

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHELLE MULLER,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, STATE BOARD OF PAROLE,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow held the hearing in this matter on November 5, 6, and 7, 2018, at the State Personnel Board (Board), 1525 Sherman Street, Courtroom 6, Denver, Colorado. The case was commenced on the record on January 30, 2018. The record was closed on November 15, 2018 upon receipt of Respondent's Notice Regarding Trial Brief and Response. Complainant Michelle Muller was represented by Mark S. Bove, Esq. Respondent, the Colorado Department of Corrections, State Board of Parole, was represented by Stacy L. Worthington and Jack Patten, III, Senior Assistant Attorneys General. Respondent's advisory witness, and Complainant's appointing authority, was Joe Morales, formerly the Chair of the State Board of Parole. A list of exhibits offered and admitted or not admitted into evidence is attached hereto as Appendix A.

MATTERS APPEALED

Complainant Michelle Muller (Complainant) appeals her disciplinary termination, alleging that Respondent's decision to terminate her employment was arbitrary, capricious, and contrary to rule or law. Complainant also alleges that Respondent violated the Colorado State Employee Protection Act, and retaliated against her in violation of the Colorado Anti-Discrimination Act.¹

For the reasons set forth below, Respondent's action is **affirmed**.

Procedural History of Complainant's Prior Grievances and Petitions for Hearing

The current matter addresses Complainant's appeal of her appointing authority's decision to terminate her employment in September 2017 because Complainant removed herself from the Google Parole Board group email, denied having done so, accused others of the removal, and claimed the removal was another in a long list of actions taken against her constituting discrimination and retaliation. Prior to Complainant's termination, she was the subject of various confirming memoranda, reprimands, corrective actions and critical performance evaluations. Complainant commonly responded to these criticisms by filing grievances, and several petitions for hearing with the State Personnel Board. Complainant's performance issues, her grievances, and her petitions for hearing, are all relevant to the current matter, and were the subject of evidence and testimony at the hearing. The facts relating to these prior matters are voluminous,

¹ Complainant also asserted claims of age discrimination and a hostile work environment. Prior to the evidentiary hearing, Respondent filed a motion for summary judgment, which was granted in part and pursuant to which these two claims were dismissed.

but are necessarily included in the following Finding of Facts as relevant background evidence. The procedural history of Complainant's petitions for hearing filed with the State Personnel Board is summarized in Appendix B, attached hereto.

Procedural History of Complainant's Current Appeal

Complainant filed this appeal of the termination of her employment on September 15, 2017, alleging that the appointing authority's decision to terminate her employment was arbitrary, capricious and contrary to rule or law. Complainant also asserted claims of age discrimination, hostile work environment, Whistleblower Act retaliation, and retaliation for opposing age discrimination.

In the month prior to the start of the evidentiary hearing that was then set for May 15, 2018, the parties entered into settlement negotiations with the assistance of ALJ Tyburski acting as settlement facilitator. The parties appeared to reach a settlement on April 27, 2018. On April 27, 2018, Respondent filed an Unopposed Motion to Stay the Case Because of a Tentative Settlement and Request to Vacate Hearing Dates and Remaining Pretrial Deadlines. This Motion was granted on April 30, 2018. The ALJ's order directed Respondent to file an unopposed motion to dismiss or a status report on or before May 29, 2018.

On May 29, 2018, Respondent filed a Status Report and Notice of Intent of Seek Attorney Fees and Costs, advising the State Personnel Board that although the parties agreed on terms of settlement in principle, Complainant changed her mind after Respondent drafted a settlement agreement and indicated that she wished to proceed to hearing instead. Consequently, Respondent requested that this matter be set for hearing. On May 30, 2018, the ALJ issued a Procedural Order Lifting Stay and Setting New Hearing Dates and Prehearing Deadlines.

On September 28, 2018, Respondent filed a Motion for Partial Summary Judgment, seeking dismissal of Complainant's claims of age discrimination, retaliation in violation of the Colorado Anti-Discrimination Act, and hostile work environment. Respondent included in that Motion a request for costs, including attorney fees, caused by what Respondent characterized as Complainant's undue delay of the hearing. Respondent alleged that the parties had reached a settlement, which was the basis for vacating the May 2018 hearing, but that Complainant subsequently changed her mind and decided to go to hearing. This resulted in an almost sixmonth delay of the evidentiary hearing. Complainant filed a response to Respondent's Motion for Partial Summary Judgment, and the ALJ held a conference to discuss the Motion.

The ALJ granted Respondent's Motion for Partial Summary Judgment in part and denied it in part, dismissing Complainant's age discrimination and hostile work environment claims. He deferred consideration of Respondent's request for costs arising from Complainant's purported undue delay of the hearing of this matter. At hearing, evidence was presented on this issue, and the ALJ's determination is the subject of a separate Order issued contemporaneously with this Initial Decision.

ISSUES

1. Whether Complainant committed the act 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 violated the State Employee Protection Act.
5. Whether Respondent retaliated against Complainant in violation of the Colorado Anti-Discrimination Act.

FINDINGS OF FACT²

General Background Facts

1. Prior to the termination of her employment, Complainant was an Administrative Assistant III for the State Board of Parole (Parole Board) and a certified state employee.
2. Complainant began her employment in this position on January 5, 2015, after serving for several years as a state employee, primarily with the Department of Corrections (DOC).
3. The Parole Board is a Type 1 transfer agency within the DOC, comprised of seven individuals appointed by the Governor. A Type 1 transfer agency is one that is independent from the Department to which it is assigned. The Parole Board's support staff are employees of the DOC.
4. The Parole Board's functions include, but are not limited to, considering applications for parole and conducting parole revocation hearings, pursuant to § 17-2-201(4), C.R.S.
5. As of April 2015, there were six Administrative Assistant IIIs who worked out of the Parole Board's Pueblo office and two, Complainant and Carol Kromer, in the Parole Board's Denver office.
6. Complainant's supervisor from January 5, 2015 through June 20, 2015 was Jennifer Wagoner, who was then the Parole Board Office Administrator.
7. Complainant's supervisor from June 21, 2015 to February 26, 2016 was Tammy Murphy, who was hired as the Parole Board's Office Manager in April 2015 and began her duties as Office Manager on or about June 21, 2015, after being trained.
8. Ms. Wagoner became Complainant's supervisor once again commencing on February 26, 2016. Effective October 20, 2016, Joe Morales, who was then the Parole Board Chair, became Complainant's supervisor. He was also Complainant's appointing authority.
9. Complainant's overall performance evaluation for the period January 5, 2015 through March 31, 2015, i.e., her start date through the end of the annual evaluation period, was satisfactory (Level II), with ratings in different core competencies of Level IIs and Level IIIs (denoting consistently exceptional performance).

² Some of the following facts are taken from the files of Complainant's previous Board filings, of which the ALJ takes judicial notice pursuant to Colorado Rule of Evidence 201.

Confirming Memoranda Issued to Complainant in April and May 2015

10. On April 7, 2015, Complainant's co-worker, Carol Kromer, who was then 59 years old and also reported to Ms. Wagoner, told Parole Board Vice Chair Rebecca Oakes that she, Ms. Kromer, was interviewing for another job because she wanted to promote and there were no promotion opportunities at the Parole Board. Shortly thereafter, Ms. Oakes related the details of that discussion to Ms. Wagoner.

11. Ms. Wagoner called a meeting of the Parole Board support staff for April 8, 2015 via video conferencing between the Pueblo and Denver offices. During the meeting, Ms. Wagoner criticized Ms. Kromer for what she said to Ms. Oakes. Both Ms. Kromer and Complainant told Ms. Wagoner that her comments were not appropriate and should be confined to a personal conversation between Ms. Wagoner and Ms. Kromer.

12. On April 9, 2015, Complainant sent an email to Brandon Shaffer, who was then the Parole Board Chair and Complainant's appointing authority, criticizing Ms. Wagoner's handling of the April 8, 2015 meeting. The email stated, in its entirety:

I feel the need to tell you just how appalled I was yesterday at the "Emergency Ops Staff Meeting" that Jenn [Wagoner] held. To say it was unprofessional and demeaning is putting it lightly. In my almost nine years as a state employee, I can honestly tell you that I have never encountered anything that was so poorly handled by a person who is suppose [sic] to be in a "position of power!" What should have been a one on one conversation between Jenn and Carol, turned into a display of poor judgement [sic]. It is never an acceptable practice to humiliate, disrespect, and down right [sic] degrading [sic] another human being, but to do so in front of others is just unacceptable. As Chair of the Colorado Parole Board, is this really the direction you see us going?

The Parole Board is suppose [sic] to be an ELITE group of people that is mainly appointed by the Governor. Professionalism is what I signed up for when I joined this team/family. Yesterday was anything but professional and I am mortified that I was part of it. Treating staff respectfully should be an expectation practiced by everyone.

Trust and respect is the reason I come to work everyday [sic], and the reason I work as hard as I do. Yesterday was an embarrassment, are we not better than that?

13. On April 23, 2015, Ms. Wagoner issued Complainant a Confirming Memorandum addressing Complainant's purported insubordination, disrespect and disparaging remarks regarding aspects of Ms. Wagoner's skills arising from the April 8, 2015 meeting. The Confirming Memorandum directed Complainant to: convey a professional image at all times; communicate professionally with others; utilize the established chain of command for all communication; refrain from furthering any negative behavior or activity; and demonstrate through her work performance and interpersonal actions a desire to put the Parole Board and other team members in the best light.

14. On May 5, 2015, a parole hearing conducted by Case Manager James Olson, scheduled to commence at 8:00 a.m., was delayed. At 8:14 a.m., Complainant sent an email to Mr. Olson, stating, "PB REQUEST THAT YOU START IMMEDIATELY." At 8:26 a.m., Mr. Olson

responded, writing, "We will... thank you." At 8:28 a.m., Complainant responded with an email stating, "It started at approx 8:16, so that would be approx 16 minutes late." At 8:33 a.m., Mr. Olson responded, "Since we are normally the ones having to wait, I take offense to your comment ... and we don't complain about waiting."

15. On May 26, 2015, Ms. Wagoner emailed Complainant a second Confirming Memorandum. The Memorandum accused Complainant of communicating "in an inappropriate and unprofessional manner," of acting "outside the scope of your authority," and of using an "aggressive" tone in her emails to Mr. Olson on May 5, 2015.

Complainant's May 28, 2015 Grievance Concerning Her Two Confirming Memoranda

16. On May 28, 2015, Complainant waived a Step One grievance and submitted a Step Two grievance to her appointing authority, Mr. Shaffer, claiming she was being retaliated against by Ms. Wagoner, causing a hostile work environment. Complainant cited the two confirming memoranda she received, and requested that "Jennifer Wagoner receive a corrective action for her retaliation against me, which is against the Administrative Regulations. I would also like to see her get some much needed training in supervising others."

17. On June 19, 2015, Mr. Shaffer issued a final grievance decision denying Complainant's requested relief. In his decision letter, Mr. Shaffer stated that Ms. Wagoner viewed Complainant's conduct as disrespectful, hostile and unprofessional, and that Ms. Wagoner, as Complainant's supervisor, had a right to document her view of Complainant's conduct in her Confirming Memoranda. Mr. Shaffer also noted that a Confirming Memorandum is not a disciplinary action and did not constitute retaliation.

Complainant's First Petition for Hearing Filed with the State Personnel Board

18. On July 1, 2015, Complainant filed a petition for a hearing with the Board (July 1, 2015 petition), alleging what she characterized as "discriminatory harassment," and that the final grievance decision constituted discrimination. See Appendix B.

Complainant Given a Corrective Action on July 31, 2015

19. On July 31, 2015, Parole Board Chair Shaffer notified Complainant that he was giving her a corrective action for allegedly responding in a hostile, aggressive, insulting and insubordinate manner toward Ms. Murphy during telephone calls several days earlier.

Complainant's August 7, 2015 and August 10, 2015 Grievances Concerning Her July 31, 2015 Corrective Action

20. On August 7, 2015, Complainant submitted a Step One grievance to Mr. Shaffer, regarding the July 31, 2015 corrective action (the August 7th grievance), alleging that Ms. Murphy's version of the phone calls resulting in her July 31st corrective action was untruthful.

21. On August 10, 2015, Complainant submitted another Step One grievance to Mr. Shaffer, disputing Ms. Murphy's supervision of her (the August 10th grievance), and alleged that Ms. Murphy falsified the facts of the phone calls that resulted in the July 31st corrective action. This grievance stated that Ms. Murphy "has proven herself to be untrustworthy and a liar." Complainant also claimed a hostile work environment and retaliation, but did not allege age discrimination or retaliation for opposing age discrimination.

22. On August 17, 2015, Complainant sent Mr. Shaffer a memorandum in which she waived her Step One grievance for the August 7th grievance and requested a panel hearing at Step Two. She also expressed her intention to follow the standard procedures for the August 10th grievance.

23. On August 19, 2015, Mr. Shaffer issued a delegation of appointing authority to Angel Medina, Warden at DOC's Canon Minimum Centers, to review Complainant's August 7th grievance.

24. On August 28, 2015, Mr. Shaffer issued Complainant his Step One grievance decision regarding the August 10th grievance. Mr. Shaffer concluded that there was no evidence that Ms. Murphy had been dishonest, untruthful or lied, and there was no evidence that Complainant was being subjected to a hostile work environment. He denied Complainant's requested relief.

25. On August 31, 2015, Warden Medina notified Complainant that he was referring the August 7th grievance to an independent panel for a recommendation. Complainant was directed to submit her Step Two grievance against Mr. Shaffer to Warden Medina because he was handling the August 7th grievance concerning the same set of operative facts. Later that day, Complainant filed her Step Two grievance with Warden Medina against Mr. Shaffer.

Change of Parole Board Chair

26. August 31, 2015 was the last day that Mr. Shaffer served as Parole Board Chair. He was replaced by Joe Morales.

27. Shortly after Mr. Morales became Parole Board Chair, Complainant told him that if he got rid of Ms. Wagoner and Ms. Murphy, Complainant and Mr. Morales would get along fine. Mr. Morales was taken aback by this comment.

Complainant Given a Letter of Reprimand on September 29, 2015

28. On September 29, 2015, Ms. Murphy gave Complainant a letter addressing what Ms. Murphy characterized as Complainant's inappropriate use of work time and violation of administrative regulations and Board rules. Specifically, Ms. Murphy wrote, "It has come to my attention that you have been utilizing work time and state resources inappropriately for personal matters and/or personal gain, namely, grievances, appeals, etc."

Decisions on Complainant's August 7 and 10, 2015 Grievances

29. On October 20, 2015, the grievance panel issued its recommendations regarding the August 7th grievance, which were sent to Warden Medina for his consideration. The panel found, in pertinent part, that Complainant communicated in an unproductive and unprofessional manner, withdrew from interactions with her co-workers, and that Mr. Shaffer was unresponsive to Complainant's concerns. The panel recommended removal of the July 31, 2015 corrective action with the stipulation that Complainant complete classes in Maximizing Potential and Emotional Intelligence; and that supervisor training be provided to Ms. Murphy, among other things.

30. On October 28, 2015, Warden Medina issued his Step Two grievance decision concerning the August 7th grievance. He removed the July 31st corrective action, and directed

Complainant to complete the Maximizing Potential class and the Emotional Intelligence class. He denied Complainant's request for a witness to be present during interactions with Ms. Murphy, noting that all staff are expected to interact in a cordial, respectful and professional manner under DOC's Administrative Regulation (AR) 1450-01. Warden Medina also denied Complainant's request for a different supervisor and directed her to participate in a positive and constructive manner when her supervisor offered job performance feedback.

31. On October 30, 2015, Warden Medina issued his Step Two grievance decision concerning Complainant's August 10th grievance. Warden Medina found Ms. Murphy to be truthful and professional, while Complainant was occasionally dismissive, condescending, volatile, and unreasonable during her interactions with Ms. Murphy. Accordingly, he denied Complainant's request for Ms. Murphy's termination, Complainant's request for a different supervisor, her request for a witness to be present during interactions with Ms. Murphy, and her request for a monetary settlement. He also concluded that there was no evidence of a hostile work environment.

Complainant's October 30, 2015 Interim Performance Review

32. On October 30, 2015, Complainant received an interim performance review drafted by Ms. Murphy and signed by her on October 27, 2015. In her review, Ms. Murphy rated Complainant at Level I overall (Needs Improvement) and as a Level I in three out of five core competencies. Under the core competency of Accountability/Organizational Commitment, Ms. Murphy wrote,

Ms. Muller is always dressed professionally and conveys herself in a professional manner with the Parole Board Members. She does not; [sic] however, convey this same professional image with her supervisor and peers. She does take pride in making each Board Members [sic] day runs smoothly. She seems to be lacking in her organizational commitment, when asked by her supervisor what we could do to build the team she stated, "It is too late, it can't be fixed". Ms. Muller has a difficult time seeing her conduct as rude, sarcastic, and demeaning. Several concerns from staff have been shared with her to assist in her development. Ms. Muller has consistently not followed the chain of command. On several occasions, she has addressed matters directly with the Appointing Authority and has not included her immediate supervisor. These types of work behaviors dilute the chain of command, discount the value of her immediate supervisor, confuse communication of the work unit, and interfere with the healthiness of the work environment. I look forward to assisting Ms. Muller in reaching her full potential in this area. Ms. Muller wavered in compliance with policies, procedures, and rules by misusing state property for personal gain. It would be beneficial for Ms. Muller to take responsibility for conduct and use a team approach in order to create a strong team.

Concerning Communication, Ms. Murphy wrote,

Ms. Muller has the ability to communicate in a professional manner and does so with Board Members. However; [sic] she does not show the same professionalism with her supervisor or peers. She feels that the customer service industry she came from gave her skills in this competency. Too often she is rude and argumentative in her interaction with staff, Management Team

and Stakeholders. I have received complaints from both internal and external Stakeholders about their interactions with Ms. Muller. She communicates well both on phone and in person with Board Members. It is; [sic] however, difficult for others, including her management team, to speak with her on the telephone and in person as she is often evasive and will not listen to questions or give consistent understandable answers. She is very dismissive in her communication. She is slow to answer emails concerning questions from the Management Team, and when she does they are often abrupt and unclear. Ms. Muller must realize that consistently communicating and problem solving in a professional manner with her supervisor and co-workers is to her benefit and that of the team. Ms. Muller is not currently meeting expectations. Expectations to raise this competency to a level II will be addressed in a performance improvement plan.

Complainant's Second Petition for Hearing Filed with the State Personnel Board

33. On November 9, 2015, Complainant filed another petition for hearing with the Board (November 9, 2015 petition), appealing Warden Medina's Step Two grievance decisions to the extent they denied Complainant complete relief, as well as appealing her October 27, 2015 interim performance review and alleging an "abusive retaliatory environment." See Appendix B.

Complainant's November 13, 2015 Performance Improvement Plan

34. On November 13, 2015, Complainant received a signed a Performance Improvement Plan (PIP) drafted by Ms. Murphy. The PIP characterized the Complainant's performance issues as follows:

Ms. Muller's performance has demonstrated the following. It appears that she is unwilling to share information, is inconsistent in completion of assigned tasks, and lacks follow through. Ms. Muller has specifically stated that she has no interest in receiving any additional training to raise her skills to an acceptable level. She has also stated that she is unable to complete her back up duties as defined in her PDQ. Her demeanor can be dismissive, rude, disrespectful, abrupt and argumentative in all forms of communication. She is quick to over react and she seems to prefer arguing rather than working as a team.

The PIP identified the following competencies in need of improvement: Communication, Job Knowledge, Interpersonal Skills, Overall Performance. The PIP described the expectations for Complainant under each of the competencies needing improvement. Under Interpersonal Skills, the expectations were:

- * At all times treat individuals with respect and professionalism and consistently communicate and problem solve in a professional manner.
- * At all times actively contribute to a positive and productive team environment by separating minor workplace issues from legitimate concerns, and communicate those appropriately focusing on being part of the solution for the benefit of the team as a whole.
- * At all times demonstrate through actions a desire to put the Office of the Parole Board and other team members in the best light.

* Contribute to maintain an acceptable level of employee morale or teamwork by following applicable policies and procedures.

* At all times assume the good intentions of others and refrain from furthering any negativity.

Complainant Given Another Confirming Memorandum

35. On November 12, 2015, Complainant received another confirming memorandum from Ms. Murphy, which addressed Complainant's failure to attend a team building meeting on October 23, 2015, and Complainant's failure to assist with a video conference on October 26, 2015.

Complainant Meets with Parole Board Chair Joe Morales to Discuss Claims of Discrimination, Harassment and Retaliation

36. On November 20, 2015, Complainant met with Parole Board Chair Morales, and discussed her claims of discrimination, harassment and retaliation. Complainant complained that these claims, which she raised with Mr. Shaffer in the past, had not been investigated. Mr. Morales stated his intention to refer Complainant's concerns to DOC's Office of Investigator General (OIG) for investigation. Mr. Morales did so, but the OIG decided not to investigate. However, the OIG failed to inform Mr. Morales or Complainant of its decision not to investigate.

Complainant's Supervisor Submits a Workplace Violence Claim Against Complainant

37. On or about December 8, 2015, Ms. Murphy submitted a claim of workplace violence against Complainant arising from a meeting they held on November 19, 2015, when Ms. Murphy gave Complainant her PIP. In her workplace violence complaint, Ms. Murphy alleged that during the meeting, Complainant struck her desk, causing Ms. Murphy to be concerned for her safety. Complainant did not find out about Ms. Murphy's workplace violence claim until early February 2016. There was no finding that Complainant violated the DOC's workplace violence policy.

Parole Board's December 2015 Holiday Potluck in Pueblo

38. On December 18, 2015, Ms. Kromer, while at the Parole Board's Pueblo office for a holiday potluck that Complainant did not attend, observed a white board with the words "Out Today," at the top, and under that, the words "my mind," and under that, "Michelle." When she learned of this from Mrs. Kromer, Complainant viewed it as evidence of a work environment that was hostile to her.

A Draft Performance Review Indicates Complainant Needs Improvement in Four of Five Core Competencies

39. In a draft Performance Review dated January 28, 2016, Ms. Murphy rated Complainant at Level I overall and at Level I in four out of five core competencies.

Complainant's February 10, 2016 and February 17, 2016 Grievances

40. On or about February 3, 2016, pursuant to a Colorado Open Records Act request, Complainant learned that Ms. Murphy had submitted a workplace violence complaint against her in early December 2015.

41. On February 10, 2016, Complainant filed a Step One grievance against Ms. Murphy (February 10, 2016 grievance), alleging unlawful discrimination, retaliation, harassment, and the filing of a false report of workplace violence, hostile work environment and age discrimination, arising from Ms. Murphy's workplace violence complaint against Complainant and Complainant's allegations of continued retaliation, hostile work environment and age discrimination.

42. On February 17, 2016, Complainant filed a Step One grievance against her appointing authority, Mr. Morales (February 17, 2016 grievance), by emailing the grievance to Rick Thompkins, DOC's Chief Human Resources (HR) Officer, alleging retaliation, age discrimination, harassment, unlawful discrimination, a hostile work environment, falsifying facts and "bait and switch" by Mr. Morales. Complainant's allegations against Mr. Morales focused on Complainant's assertion that Mr. Morales failed to request an investigation by the OIG of her complaints on November 20, 2015, and that Mr. Morales failed to investigate the posting on the white board in the Parole Board's Pueblo office observed by Ms. Kromer that Complainant viewed as hostile to her, Complainant.

43. Both the February 10, 2016 grievance and the February 17, 2016 grievance were eventually assigned to Associate Warden Siobhan Burtlow to consider and decide. Associate Warden Burtlow decided to utilize an independent investigator, Beverly Fulton, to assist in establishing the underlying facts giving rise to Complainant's grievances.

44. On March 1, 2016, Complainant sent Mr. Morales a Step II grievance against Ms. Murphy arising from the latter's workplace violence claim and Complainant's assertion of continued harassment and discrimination.

Complainant's Third Petition for Hearing Filed with the State Personnel Board

45. On March 3, 2016, Complainant filed her third petition for hearing with the Board, accusing Ms. Murphy, Mr. Morales and Ms. Wagoner of continued "unlawful discrimination, retaliation, harassment, filing a false report for work place violence ... a hostile work environment, age discrimination, falsifying facts, and bait and switch." See Appendix B.

Complainant's March 3, 2016 Grievance

46. On March 3, 2016, Complainant filed a Step One grievance (March 3, 2016 grievance) against Ms. Wagoner regarding recently-imposed requirements to clock in and out on a daily basis, and to stagger her lunch with Ms. Kromer in the Parole Board's Denver office. Complainant also alleged continued retaliation, hostile work environment, unlawful discrimination, age discrimination and harassment. As relief, Complainant requested that all staff members be required to follow the same rules.

47. On March 16, 2016, Ms. Wagoner issued her Step One grievance response to Complainant's March 3, 2016 grievance, denying Complainant's requested relief.

48. On March 21, 2016, Complainant escalated her March 3, 2016 grievance by proceeding to Step Two with Mr. Morales as her appointing authority.

Complainant's March 22, 2016 Discretionary Job Performance Review

49. On March 22, 2016, Ms. Wagoner signed a discretionary review of Complainant's job performance that rated Complainant at Level I (Needs Improvement) in four of her five Core Competencies of Accountability/Organizational Commitment, Job Knowledge, Communication, and Interpersonal Skills. Her overall rating was Level I. Complainant refused to sign, alleging that the review was retaliatory. In her comments on the review, Complainant referred to an Employee Engagement Survey, the results of which she reported as being highly unfavorable towards the Parole Board leadership.

Beverly Fulton's Investigative Report Concerning Complainant's February 2016 Grievances

50. On April 18, 2016, Ms. Fulton submitted her investigative report to Associate Warden Burtlow regarding the allegations contained in Complainant's grievances. Ms. Fulton concluded that there was no factual basis for Complainant's allegations that Mr. Morales deliberately lied about his intent to investigate, or intentionally declined to investigate, Complainant's allegations of retaliation and a hostile work environment. Ms. Fulton concluded that Complainant's allegations of retaliation and hostile work environment had been referred to the OIG, which decided not to investigate, but failed to so inform HR, Mr. Morales, or Complainant. Ms. Fulton indicated that Complainant has a right to have her allegations investigated and that she, Ms. Fulton, would be conducting that investigation. Regarding the Pueblo office white board incident, Ms. Fulton concluded that the message on the white board was not directed at Complainant.

Decision on Complainant's March 3, 2016 Grievance

51. On April 20, 2016, Mr. Morales issued his Step Two grievance decision addressing Complainant's March 3, 2016 grievance, and set procedures to address Complainant's concerns about signing in and out of the office, and staggered lunch hours. He denied Complainant's requests for attorney fees and a change in supervisor. Mr. Morales pointed out that he did refer Complainant's claims of discrimination, retaliation and harassment to the OIG office.

Complainant's 2015-2016 Annual Performance Review

52. In late April 2016, Ms. Wagoner completed Complainant's annual performance review for the 2015-2016 review period. Overall, Complainant was rated at Level II (meeting expectations), with ratings of Level II in all core competencies with the exception of Communication, for which Complainant was rated at Level I (Needs Improvement), citing disrespectful and insubordinate communications with her supervisors and rude communications with others. Complainant refused to sign this evaluation.

Decisions on Complainant's February 2016 Grievances

53. On April 29, 2016, Associate Warden Burtlow issued two Step Two grievance decisions. The first response addressed Complainant's February 10, 2016 grievance against Ms. Murphy and Complainant's requested relief at both Step One and Step Two. With respect to Complainant's requested relief at Step One, Associate Warden Burtlow granted Complainant's

request for her allegations of unlawful discrimination, harassment, retaliation, and age discrimination to be investigated by having Ms. Fulton investigate Complainant's complaints; denied Complainant's request for attorney fees; denied Complainant's request to remove Ms. Murphy from state employment; and denied Complainant's request to remove all negative paperwork from her personnel file. With respect to Complainant's requested relief at Step Two, Associate Warden Burtlow denied Complainant's request to remove all negative documents from her personnel file; denied Complainant's request to update her performance review and evaluation; denied Complainant's request to disregard both the PIP and the discretionary performance review; denied Complainant's request to have Mr. Morales tell the Parole Board's Pueblo staff that Complainant was not a threat to Ms. Murphy; denied Complainant's request for a written apology from Ms. Murphy, Ms. Wagoner and Mr. Morales; denied Complainant's request for attorney's fees; denied her request for removal of supervision from Ms. Wagoner to a Parole Board member at the Denver Office; denied Complainant's request to remove Ms. Murphy from State employment; and addressed Complainant's request to switch positions to a different department in the State by noting that Complainant was always free to request a voluntary transfer.

54. Associate Warden Burtlow's second response addressed Complainant's February 17, 2016 grievance against Mr. Morales and concluded that Mr. Morales did nothing improper with respect to Complainant's allegations of a hostile work environment, and that he passed on Complainant's claims after the November 20, 2015 meeting but the ball was dropped between the OIG and Respondent's HR office. With respect to Complainant's requested relief, Associate Warden Burtlow directed Ms. Fulton to investigate Complainant's complaints of unlawful discrimination, harassment, retaliation and age discrimination. Associate Warden Burtlow addressed Complainant's request to be removed from the alleged hostile work environment by noting that Complainant had a right to seek a transfer. Associate Warden Burtlow denied Complainant's requests for attorney fees, and to have all negative documentation purged from her personnel file.

Beverly Fulton's Report Concerning Complainant's Allegations of Age Discrimination

55. On May 12, 2016, Ms. Fulton issued a report regarding Complainant's allegations of age discrimination made to DOC between the summer of 2015 and concluding in March 2016.

56. In her report, Ms. Fulton acknowledged that Complainant was asserting claims of age discrimination and a hostile work environment based on age. Ms. Fulton concluded there was no evidence that age was a factor in any adverse employment action. In making this determination, Ms. Fulton found that the actions taken by Mr. Morales, Ms. Wagoner, Ms. Murphy and Ms. Oakes to address Complainant's workplace behavior were justified by Complainant's conduct and were not the result of the filing of grievance or other workplace or agency complaints. Ms. Fulton found no indication Complainant's age was the reason for the confirming memoranda, corrective actions and performance evaluations that prompted Complainant's grievances.

57. Concerning the workplace violence report filed by Ms. Murphy against Complainant, Ms. Fulton determined there was an error made by OIG and Respondent's HR office about which office was investigating the complaints under AR 1450-05, and that the decision by the OIG to investigate Ms. Murphy's allegations was not because of Complainant's age or in retaliation for any previous action. Finally, with respect to the white board incident that Ms. Fulton addressed in her previous report, Ms. Fulton concluded the placement of Complainant's name under the text "my mind" was not made because of Complainant's age or in retaliation for any previous action or in an effort to embarrass her.

Complainant's Fourth Petition for Hearing Filed with the State Personnel Board

58. On May 12, 2016, Complainant filed a fourth petition for hearing with the Board, alleging age discrimination, unlawful discrimination, retaliation, targeting, falsifying facts for self gain, bait and switch, harassment, hostile work environment, discrimination in a final agency grievance decision, and "Forced Resignation (upcoming R 6-10)" (May 12, 2016 petition). See Appendix B.

Events Leading To Complainant's Rule 6-10 Meetings with Warden Johnson

59. On or about March 7, 2016, Alfredo Peña, a Parole Board member, told Complainant to telephone two victims to find out whether they were expecting a hearing. One of the persons he told Complainant to call was J.L., whom Mr. Peña incorrectly identified as a victim of offender M.T. Mr. Peña wrote down and handed to Complainant the incorrect Department of Corrections number for that offender. The correct number is for offender S.R.

60. J.L. did not answer the phone when Complainant called her. Complainant left a voice-mail message for J.L., in which she did not identify the offender in question.

61. On March 22, 2016, J.L. called Complainant and Complainant told her that S.R.'s mandatory release date was approaching.

62. On March 22, 2016, J.L. telephoned Tracy Willmer, an Administrative Assistant III at the Victim Service Unit (VSU). During the call J.L. told Ms. Willmer that she was confused because Complainant said that the offender who victimized J.L. was scheduled to be released later that year.

63. Later that day, Ms. Willmer emailed Complainant and asked for an explanation.

64. That same day, March 22, 2016, Complainant emailed Ms. Willmer and wrote: "Hi already spoke to her. She was the one scheduled to attend full boards and when she didn't show up, we called to see if she was still interested. We could not get a hold of her, but left a message which generated the call today. She did tell me thou [sic], that she received a letter from VSU stating that he waived. I said I had no knowledge and would have to speak to VSU."

65. Shortly thereafter, Ms. Willmer forwarded Complainant's email to Monica Chambers, the VSU coordinator, who contacted Ms. Wagoner. In her email, Ms. Chambers wrote, in part: "The victim, [J.L.] called VSU upset – I have no idea why Michelle would have called her. She was never scheduled for a full board review – because the offender never even had a full board review. Why would Michelle call to ask how she was going to attend, if she wasn't on a list to attend or get a phone call on 3/2/16 – actually, why would she call a victim at all? I can't even figure out how she got the number. She doesn't make notifications or coordinate with victims directly. She also told the victim that that the offender is getting out later this year. . .that he has an MRD [Mandatory Release Date]. He doesn't – he has a LIFE sentence . . .that's why [J.L.] is so upset. I can't figure this out and Michelle's response isn't helpful at all – it doesn't even make sense." Wagoner responded via email and wrote, in part: "I am so sorry. I have no idea why she would call the victim. She completely operated outside of her authority."

66. On March 25, 2016, Ms. Wagoner contacted Complainant and requested a responsive statement explaining her contact with J.L. to be submitted no later than March 28, 2016.

67. On March 27, 2016, J.L. sent an email to VSU.

I J.L. had a voicemail that was left on my phone on 03/07/2016. I work on call for a dental company I was going through my voicemail box on 03/22/2016 to prepare for my on call days and make sure my voicemail box had sufficient space. I came across a message from Michelle Muller stating that she needed me to contact her at my earliest convenience [sic] regarding a personal matter and she stated she was with the state [sic] of Colorado [sic] she asked me to contact her at 303-763-2475. I then proceeded to call her back and she said that she was trying to contact me to see if I was going to go to the upcoming parole hearing for Mr. R. I told Michelle that I had received [sic] a letter from the victim services stating that he waived [sic] his right to a parole hearing. She then said, well the hearing is waived until September [sic] but this will be his last hearing before his MRD. I did not know what MRD meant so I asked her to explain [sic] to me what that meant. She then proceeded to tell me that MRD is a mandatory release date. I then got very nervous I told her that I was never aware that he had a mandatory release date and I began to get flustered and I was just really confused. This information sent me into a bit of a panic, although I know that someday soon he will be released its [sic] just not easy hearing it. I have thought about the day that happens for a really long time. I then contacted Victim [sic] services who I shared my experience [sic] with.

68. On March 28, 2016, Complainant sent an email to Ms. Wagoner with her explanation of her contact with "somebody."

As I stated, I did receive a call from "somebody", who stated that she received a call from someone on the Parole Board approx two weeks ago. She (?) stated that someone left a voice message, so I asked her what the message said. She stated that she doesn't remember because she deleted it. I stated that if I had called it would have been related to a full board w/victim.

My statement to you was this: Approx two weeks ago, the only thing I can remember is Parole Board Chair, Joe Morales left a voice message for one of our full boards with victim(s). He called to get a statement and no one answered, requiring him to leave a message. I also stated that I would never "just" call a victim nor would I "just" offer an [sic] my opinion to a question a victim would have when they come for a hearing. I did however, go back an [sic] pulled up my full board list and no where [sic] was R. on it. I also asked you where would I have gotten the number from, in which you stated you did not know.

69. In a memorandum misdated December 16, 2013, and titled "Recommendation of Corrective and/or Disciplinary Action," Ms. Wagoner recommended to Mr. Morales, Complainant's appointing authority, that he issue a disciplinary and/or corrective action against Complainant for having called J.L. in connection with the wrong offender: "...I am recommending a Corrective and/or Disciplinary action due to the egregious nature of Michelle's attempts to circumvent responsibility. Michelle has violated AR 1450-01, Code of Conduct, which states, 'DOC employees ... shall [not] ... willfully depart from the truth...'"

70. On April 19, 2016, Board Chair Morales delegated appointing authority to Warden David Johnson of the Denver Complex to conduct a Rule 6-10 meeting with Complainant.

The May 18, 2016 and June 24, 2016 Rule 6-10 Meetings

71. Warden Johnson conducted a Rule 6-10 meeting with Complainant on May 18, 2016.

72. On June 21, 2016, Warden Johnson issued another Notice of Rule 6-10 meeting, scheduling the continuation of the Rule 6-10 meeting for June 24, 2016.

73. The second Rule 6-10 meeting was held on June 24, 2016.

Warden Johnson's Rule 6-10 Decision

74. On July 11, 2016, Warden Johnson issued his Rule 6-10 decision. In his written decision, he informed Complainant that he had decided not to impose a disciplinary or corrective action against Complainant because "there was no willful misconduct or purposeful violation of agency rules." However, he also informed her that, "Department of Correction's employees serve the citizens of Colorado and it is an expectation that we provide excellent service to our stakeholders which includes providing accurate information. When [J.L.] returned your phone call after you left a message, you did not adequately research and verify which offender she was returning your call for. This resulted in inaccurate information being provided to her by you which cause her to experience unnecessary anxiety and panic. When presented with this information, you consistently diverted questions, provided deflective answers, and showed a reluctance to accept any accountability for your performance despite the impact statement that was provided by [J.L.]." He also concluded that Complainant had "made an unprofessional comment relating to me be [sic] the chosen one being hand picked as Appointing Authority to handle the Rule 6-10 meeting. Although you stated that your comment was just a statement and not meant to be an insult, I believe that you were being disingenuous and once again avoiding responsibility for your inappropriate comment. Providing inaccurate information, being unprofessional with your co-workers, and avoiding responsibility for your conduct have been documented areas of improvement of your in past performance evaluations. Therefore, I am recommending your supervisor consider this information within your next performance review."

75. On July 17, 2016, Complainant filed a Step I grievance against Mr. Morales, and Ms. Wagoner for "retaliation, hostile work environment, unlawful discrimination, and harassment." Complainant objected to being responsible for Carol Kromer's duties after Ms. Kromer was transferred as well as her own. Complainant complained that she was now required to competently perform two full-time jobs and was being set up to fail. Subsequently, Complainant met with Mr. Morales, Ms. Murphy and Ms. Wagoner and her job duties were modified.

76. On July 27, 2016, Complainant submitted a Step I grievance "against; [sic] GPII, Jennifer Wagoner, Parole Board Chair, Joe Morales, and Warden, David M. Johnson for; [sic] unlawful discrimination, harassment, hostile work environment, and retaliation." In her grievance, Complainant complained that Warden Johnson's feelings were hurt when she asked him during the Rule 6-10 meeting why he had been chosen to conduct the Rule 6-10 meeting. Alleging that Warden Johnson found her not guilty of any wrongdoing with respect to the initial reason the Rule 6-10 meeting was convened, Complainant went on to list all the allegedly adverse actions she was subjected to since she began working at the Parole Board that illustrated the hostile work environment, retaliation, unlawful discrimination and harassment she felt she has been subjected to. As relief, she requested "that every piece of information/paperwork/recordings referencing this R6-10 be destroyed"; all attorney's fees; removal of all negative paperwork from her personnel file while she worked for the Parole Board; her duties, which she characterized as two full time

jobs, be distributed; removal from "this hostile work environment, harassment, retaliation, and unlawful discrimination immediately"; "Immediately STOP the 'TARGETING' against me by the Parole Board leadership;" and "Place my supervision with a board member in the Denver office."

77. On August 1, 2016, Mr. Morales informed Complainant and Warden Johnson that the latter should respond to Complainant's Step I grievance.

78. Warden Johnson issued his Step I grievance response on August 5, 2016, denying Complainant's request for relief and finding that Complainant presented no information indicating that she has been the subject of discrimination, harassment, a hostile work environment or retaliation. Complainant's concerns that Warden Johnson's comments about unprofessional conduct would be included in Complainant's annual performance evaluation were premature because that performance evaluation had yet to be drafted. Warden Johnson denied Complainant's request that all information relating to the Rule 6-10 meeting be destroyed. He stated that he did not have the authority to approve reimbursement of attorney's fees. "All other requested relief is associated with complaints that are being reviewed as part of a separate grievance submitted by you or have been addressed previously and will not be addressed within this response."

79. On or about August 8, 2016, Complainant submitted a Step II grievance, in which she wrote:

This Step II Grievance is being filed because the Step I Grievance was not met and has raised more questions and concerns.

At the Step I Grievance meeting held on August 3, 2016, Warden Johnson stated that my many bullet points that I grieved, have been, or, are being addressed. To my knowledge this is incorrect. The only "Relief" I have received is filing my many grievances with [the State Personnel Board]. I have not received any "Relief" from the hostile work environment I am currently working in, or the retaliation, unlawful discrimination and harassment I am still experiencing, although, it has been promised by Parole Board Chair, Joe Morales. This includes my signature, and Parole Board Chair, Mr. Morales' signature on a 1450-05, Acknowledgement of Receipt of AR 1450-05, for Unlawful Discrimination/Discriminatory Harassment form sign on November 20, 2015, the Employee Engagement Survey results from February 2016, in which the Parole Board leadership did not receive one vote for trust and confidence, and the dysfunctional outside investigation report done by Beverly Fulton on the Parole Board in May 2016.

In addition, another concern, or disappointment, was having Warden Johnson answer the Step I Grievance, considering he was named in the Step I Grievance. In my opinion, and with his answer to the Step I Grievance, he could not be unbiased? How could anyone think that his answer to the Step I Grievance would be any different than the R6-10 response he gave as the Appointing Authority? The simple fact that he stated that a performance review has not transpired per his R6-10 response, reiterates my concern that he did not read the bullet points, or take them seriously, or has any other knowledge of the environment within the Parole Board, as one would have hoped. How could he think that with him being the Appointing Authority to the R6-10, and the Step I Grievance, that his recommendation would not be taken seriously, and down the road, and when it does appear on a review, corrective action, confirming memorandum, or

discretionary review, it would be too late to grieve? Considering everything I have experienced in the last 15 months that I have been employed with the Parole Board, after I reported an offensive environment, and everything I have outlined in the many grievances to include this one, how can anyone think this will have a different outcome? Thus the reason I am filing this Step II Grievance.

Relief Requested:

I am requesting that every single piece of information/paperwork/recordings referencing this R6-10 be destroyed. (This R6-10 was not about Warden Johnson's emotions, or his feelings. I walked into this R6-10 meeting being candid and honest. When Warden Johnson brought his emotions to my attention, I apologized immensely, he accepted my apology, and thanked me for my apology).

All Lawyer(s) fees reimbursed.

Removal of all negative paperwork from my file that occurred while I have been employed with the Parole Board.

The two full time job duties that were assigned to me be distributed among the staff to include the new employee Karen, who replaced Carol Kromer in position 9011, and Office Manager, Tammy Murphy whose PD states that she is the scheduler for the State of Colorado and the Parole Board.

Removal from this hostile work environment, harassment, retaliation, and unlawful discrimination immediately.

Immediately STOP the "TARGETING" against me by the Parole Board leadership.

Place my supervision with a board member in the Denver office.

80. On September 1, 2016, Mr. Morales met with Complainant to discuss her Step II grievance.

81. On September 7, 2016, Mr. Morales issued his Step II grievance decision. Mr. Morales concluded, in pertinent part:

You were provided an incorrect DOC number by Mr. Pena when directed by him to contact a victim, resulting in the wrong victim being contacted. I concur with the R-6-10 findings and with Warden Johnson's Step I response that You did not willfully intend to violate agency rules or engage in misconduct. I also concur with Warden Johnson's decision that your actions did not rise to the level of a corrective or disciplinary action in regards to this incident.

I also find that you presented no information in writing or in person during our meeting that indicates that you were intentionally discriminated against, harassed or that you work in a hostile environment. Nor do I find any evidence of retaliation against you. The nature of the victim's complaint and impact on the victim justified the Rule 6-10 Fact-finding process. There was no adverse action taken against

you because the results of the Rule 6-10 process and Step I Response found that your actions did not warrant corrective and or disciplinary action. Due to information provided and findings of the Rule 6-10 fact finding process, the findings in Warden Johnson's letter and the events involving your contact with the victim will not be used in your future performance evaluations.

Relief Requested and Decision:

All information/paperwork/recordings referring this R6-10 be destroyed is Denied. This meeting, process and outcomes are personnel records and will be maintained as required by the State Personnel Rules.

All Lawyer(s) fees reimbursed; Denied

The two full time job duties that were assigned to you be distributed among the staff to include the new employee Karen, who replaced Carol Kromer in position 9011 and office manager Tammy Murphy whose PD states that she is the scheduler for the State of Colorado and the Parole Board is Denied. These issue are not relevant to this R6-10 process and is being addressed in a separate Grievance.

Removal from this hostile work environment, harassment, and unlawful discrimination immediately is Denied. There was no indication that the R6-10 process was predicated on hostility, to harass or to unlawfully discriminate, but based on a victim's valid concerns and complaint. I also find that there is no indication that the events underlying this grievance are part of a patter of hostile work environment, harassment or discrimination. This relief has also been addressed in other grievances and as stated before you have the right to transfer to and or compete for other positions in CDOC or state government with the support of your supervisor and appointing authority.

Immediately stop targeting against me by the Parole Board leadership is Denied. This impartial R6-10 process was justified due to the nature of the victim's complaint and due to lack of information you provided to your supervisor, this R6-10 was also based on concerns involving the (VRA) Victims Rights Act, the rights of a crime victim and was not a result of "Targeting" by Parole Board leadership.

Place my supervision with a board member in the Denver is Denied. This relief is not relevant in this R6-10 process and has been previously addressed in other grievances.

Complainant's Meetings with Rick Thompkins in September and October 2016 and His Intervention

82. On September 13, 2016, Complainant, accompanied by Pam Cress of Colorado WINS, met with Rick Thompkins, Chief Human Resources Officer for the DOC, the first of several meetings by which Mr. Thompkins sought to mediate the issues Complainant was experiencing with Ms. Murphy, Ms. Wagoner and Mr. Morales. During this meeting, in which Complainant complained that she was being retaliated against and victimized, and in which she severely criticized the performance and abilities of her supervisors, Complainant characterized the issues she had with Ms. Wagoner and Ms. Murphy as a "personality conflict." Mr. Thompkins was

sympathetic to Complainant's concerns, acknowledging that there were problems with the structure and management of the Parole Board. In response to Mr. Thompson's question, "How can we resolve this situation," Complainant replied that she could not get over the hurt she felt from all that was done to her as a new Parole Board employee. During a discussion of work assignments, Mr. Thompson remarked that only two positions were assigned to the Denver Parole Board office, Complainant's and Ms. Wagoner's. Mr. Thompson also expressed some concerns about the legitimacy of some of the discretionary reviews given Complainant.

83. Complainant, accompanied by Ms. Cress, met again with Mr. Thompson on October 13, 2016. Mr. Thompson indicated he was working on transferring Complainant out of the Parole Board at Complainant's request. During this meeting, Mr. Thompson indicated that Ms. Wagoner's job position did not allow her to supervise anyone and that she should not be supervising Complainant. Mr. Thompson told Complainant that Mr. Morales would supervise her going forward. He also indicated that he would review all Complainant's discretionary reviews because they included many rookie mistakes and that he would probably have some of them removed.

84. On October 20, 2016, Mr. Thompson sent an email to Complainant and Ms. Cress, informing them that, "I have discussed this matter with Joe Morales and effective today, Michelle you will report to the Parole Board Chair while we work to secure a transfer for you. Mr. Morales will complete your mid-year evaluation along with assigning your work. As we work through this process if you have any questions please contact me."

85. On Monday October 24, 2016 at 9:26 a.m., Complainant sent an email to Ms. Cress, copying Mr. Thompson, that stated in pertinent part:

Thank you for providing me this information on October 20, 2016. Although, as of Friday, October 21, 2016, it is my belief that GP11, Jennifer Wagoner has either not been informed, or she is ignoring the directive given to her. Attached is an email in which I received on Friday, October 21st, where it appears that she is still allowed to supervise admin.

In addition, when it came to light 16 (sixteen) weeks ago, that the only two full-time positions allocated for the Denver office in 2015, were 9012 (mine), and 9013 (GP11, Jennifer Wagoners [sic]), as of today, October 24, 2016, the only full time position in Denver is mine, 9012. Furthermore, since it came to light 16 weeks ago that position 9013 was "transferred" to Denver full-time, removing position 9011, GP11, Wagoner continues to work 80% of the time in Pueblo and only 20% of the time in Denver. Her time in Denver consist [sic] of approx. 10:30 AM- 2:15 PM, allowing approx. 5 hours of driving time on Friday's [sic].

In addition, this brings to light an even more critical state violation. Since state employees are not entitled to "perks" and keeping with Governor Hickenloopers [sic] motto, "Transparency in State Government", and not to sound like a "Whistleblower" I must point out for these three reasons, the fact that in the Spring of 2015, GP11, Jennifer Wagoner assigned herself a state vehicle to commute from Pueblo to Denver in. She pulled this car from the Parole state fleet pool. This car has costed [sic] the taxpayers of Colorado approx. \$4,319.51, to date, and has approx. 23,000 additional miles on it, not including insurance, and maintenance.

Complainant's Fifth Petition for Hearing Filed with the State Personnel Board

86. On September 16, 2016, Complainant filed her petition for hearing with the Board (September 16, 2016 Petition for Hearing), alleging age discrimination, hostile work environment, harassment, retaliation, unlawful discrimination after reporting an offensive environment, and objecting to the final grievance decision. See Appendix B.

Complainant's Whistleblower Complaint

87. On October 25, 2016 at 4:27 p.m., Complainant sent a whistleblower complaint to Jay Kirby, the DOC's Inspector General via email, with copies to Mr. Thompson and Mr. Morales, writing "Please see attached information that I would like to submit as a 'Whistleblower', under C.R.S. 24-50.5-101 and C.R.S. 24-50.5-102 and am asking for protection under C.R.S. 24-50.5-103, and AR 1450.05. I would also like to state that this information is **confidential** and is not to be shared with staff or subordinates. I do fear for my safety within the Parole Board, since there is a pattern of retaliation." (Emphasis in original.)

88. In her Whistleblower complaint, Complainant wrote:

Position number 9013, is a full-time position located at, 940 Broadway, Denver, Colorado 80203. The person who occupies position 9013, GP II, Jennifer Wagoner, lives in Pueblo, Colorado. In spring 2015, GP II, Jennifer Wagoner assigned herself a state car taking a car from the Colorado Parole Division's State Fleet pool. I was also told in June 2015, by GP II, Jennifer Wagoner to track her state car as a Colorado Board of Parole State Vehicle. This car's sole purpose was for GP II, Jennifer Wagoner to commute from her living location in Pueblo, Colorado to her work location in Denver Colorado, making this state car a "perk", and state employees are not entitled to "perks".

I did not become aware that her full-time work location was assigned to Denver until recently. Therefore, I am submitting this information under C.R.S. 24-50.5-101, and C.R.S. 24-50.5-102, and asking for protection under C.R.S. 24-50.5-103, and AR 1450-05.

89. Romaine Pacheco, the Director of the Governor's Office of Boards and Commissions, who had oversight of the Parole Board, was provided a copy of this email string. She emailed Mr. Morales on October 27, 2016 at 11:08 a.m., writing, "[Complainant's] response to you was equally unprofessional. Please draft a document that clearly spells out her relationship to not only Jennifer [Wagoner] but all co workers regarding professional conduct."

90. At 8:24 a.m. on October 27, 2016, Complainant sent an email to Mr. Kirby, writing:

Can you please acknowledge that this information was received by you or someone in your department? If you are not the correct person or department to investigate this, would you be kind enough to point me in the right direction?

Since filing this "Whistleblowers" information against the Colorado Board of Parole, my biggest fear is coming true. I am being 'targeted' by the Parole Board Chair. I was called rude to the person named in this claim, even though she was the one who targeted me. I was told that she is not classified to supervise, and still believe this to be true since no one has updated me

differently, although, she is still allowed to do so. I should mention that he email in question didn't even pertain to her position.

Thank you in advance for any assistance you can offer.

(Emphasis in original.)

91. Mr. Kirby responded via email at 4:40 p.m. on October 27, acknowledging receipt of Complainant's whistleblower complaint.

92. At 8:14 a.m. the next morning, October 28, 2016, Complainant responded to Mr. Kirby via email: "A sincere thank you for acknowledging my email. My concern was that you were not the correct person &/or department, and my concern would be ignored. I do hope that this puts me in a protective class in which I will not be retaliated against as stated in the Colorado Revised Statute, and the AR, and that this information is confidential and will only be shared with those who are in a need to know basis. I have grave concerns on how I have been, or will be treated if this is spread [sic] among staff and subordinates. Please understand, in the past year I have been mercilessly retaliated against after reporting an offensive environment in April 2015. I hope this explains why I am overly concerned fro begin mistreated by this leadership, since it has been allowed in the past. Although, I am working with Mr. Thompkins to fix some of the wrongs that I have experienced."

93. The OIG investigation was assigned to investigator Adam Cummings. He reviewed Complainant's whistleblower complaint and attached documentation. He interviewed Complainant, Mr. Morales, Ms. Wagoner, and three employees of the Pueblo Parole Board office: Ms. Murphy, Elizabeth Fey and Kelli Segura. He also interviewed HR Employee Relations Supervisor Jana Maher about Ms. Wagoner's assigned position location.

94. Mr. Cummings' investigative report summary, completed on or about November 17, 2016, follows:

The investigation revealed that Wagoner's position is located in Pueblo, not Denver and the Parole Board Chair, Joe Morales, is aware of Wagoner's State Vehicle use and approves of the usage. The investigation also revealed that the vehicle is intended to be used as a pool car vehicle for the employees assigned to the Pueblo Parole Board Office, and is not assigned specifically to Wagoner. Three employees were interviewed and all three employees stated that have also used the vehicle when there was a need to use it. Based on the Odometer History Reports provided by Muller, the mileage accumulation appears to be reasonable and appropriate.

This investigation failed to reveal any misuse by any State Resources by Jennifer Wagoner. It was determined that the use of the State Fleet Vehicle in question has been used appropriately, within policy, and only for legitimate business needs. There was not enough information or evidence produced to support Muller's allegations. In addition, Muller failed to provide enough information to support her allegation that she is a victim of retaliation after admitting she was not negatively affected in her pay, status, or tenure.

Email Exchanges on October 26 and 27, 2016

95. On October 26, 2016, Complainant sent an email regarding a Parole Board hearing and Ms. Murphy was not included among the recipients. Ms. Wagoner forwarded the email to Ms. Murphy in an email and included Complainant among the recipients. The email read, "It looks like Michelle inadvertently missed including you in on this email." In response, Complainant replied by email and stated, "Nope, just replied to 'all' and apparently she was never on the one from Amanda....just wanting to make sure you get your facts straight...." Approximately an hour later, Mr. Morales wrote in an email to Complainant, "Michelle, I was tracking this email string and found your email communication with Jennifer Wagoner to be rude and really uncalled-for, in the future could you please communicate with team members in a professional and courteous manor [sic] according to our code of conduct in all matters of business. I would greatly appreciate it, thank you." Complainant responded via email the next day, October 27, 2018, at 7:31 a.m., writing to Mr. Morales, "Please keep in mind that I was informed that Ms. Wagoner does not supervise or micro manage anyone anymore, and in my mind her email targeting me was uncalled for and unnecessary...Please update me if she is still supervising and micro managing admin and that might alleviate my confusion. If not, I only know what I am told..... Thank you for your words and I will keep that in mind."

Complainant's Communications with Mr. Thompkins After the Whistleblower Complaint

96. On November 17, 2016, Ms. Cress sent an email to Mr. Thompkins, with a copy to Complainant, in which she wrote:

Michelle and I talked this morning. In retrospect, she agreed way back when we met at Fort Logan to try to move forward positively and be open to solutions. At that time, and at our last meeting in Springs, she was promised:

1. That she would report directly to Joe;
2. That you would look at what negative things could be removed from her personnel file;
3. That you would ultimately look for another position for her;
4. That her PDQ would be updated to reflect what job responsibilities are realistic and accurate.

Michelle is telling me that as of today, none of these things have happened. Jennifer continues to try to supervise Michelle. Joe will rarely speak to her. She is not allowed to speak to anyone directly in Pueblo and her access to files that she needs to do her job is restricted. At this point, we are at a crossroads about what to do going forward. Should the three of us sit down again and talk (I think you had mentioned to her a date in December)? If we do that, we would have to have some viable action items and timeframes by which they will occur and the mechanism by which they will occur, wouldn't you agree?

Please let us know what you're thinking at this point.

97. During this time, Mr. Thompkins searched for another job placement for Complainant at her request. He found her a position with DOC's Correctional Industries (CI), but Complainant refused the transfer because she did not want to work around offenders. She also indicated to Mr. Thompkins that she did not want to work at any DOC facility housing offenders.

98. On November 21, 2016, Complainant sent an email to Mr. Thompkins, with a copy to Ms. Cress, ostensibly to update Mr. Thompkins on what occurred since their October 13, 2016 meeting. After complaining about the slow transition of supervision from Ms. Wagoner to Mr. Morales, the failure to finalize Complainant's PDQ, the failure to timely provide Complainant with her mid-year review, and complain9ng about too much work and then too little, Complainant added:

PB Chair, Morales does speak to me sporadically to discuss general topics like his daughter's Halloween costume, Alana, or his uncle who is extremely ill, going to rehab. He has no desire to have a work discussion with me, or to hear anything I have to say since my PD has not been addressed and my mid-year is still not signed...Although, when I tried to talk to him about work, I believe his exact statement to me was "it doesn't concern you". So I had no choice but to file a complaint against the Parole Board's misuse of state funds.

Mr. Thompkins, I am not interested in moving to CI. My expectations when I was hired with the Colorado Department of Corrections, and now with the Colorado Board of Parole, remains [sic] the same: I expect to be treated with dignity, respect, fairness and not to be unlawfully retaliated against, or discriminated against for any reason. On December 1, 2016, I will have worked for CDOC for 10 years. It is still my expatiation [sic] that is division be fixed so that I can work in it without fear of retaliation, discrimination, etc... as it stated in the Administrative Regulations. It is my request that you move GPII Liasion [sic], Jennifer Wagoner out of her position since she is the reason the Parole Board is in such a MUDDLED MESS! Misrepresenting her position for personal gain should not be rewarded by allowing her to keep her position, and it should be required that when you cash you paycheck, it holds you responsible and accountable for all aspects of your job.

99. In an email to Mr. Thompkins on January 10, 2017, Complainant alleged that "DPA³ classified the Parole Board Leadership's action against me as UNLAWFUL Retaliation. To me, that means this leadership is no better then [sic] an offender..." (emphasis and capitalization in original).⁴

Complainant Removes Herself from the Parole Board Group Email

100. On March 22, 2017 at 4:14 p.m., Complainant's name was removed from the DOC_PB_EVERYONE@state.co.us Google group email list serve (group email).

³ Complainant refers to the DPA, but this reference is to the State Personnel Board, which is a Type 1 transfer agency within the Department of Personnel and Administration.

⁴ Complainant was referring to the ALJ's Preliminary Recommendation addressing Complainant's petition for hearing in consolidated case no. 2016G001(C). What the ALJ actually did was recommend that the Board grant a hearing on Complainant's retaliation claim, finding that as of her October 13, 2015 Rebuttal to Respondent's Information Sheet, Complainant was on record as opposing age discrimination, and that there were several adverse actions taken against her that were temporally proximate to that Rebuttal that could support a finding of a causal connection between her protected activity and the adverse actions. The ALJ made no finding that Parole Board unlawfully retaliated against Complainant and upon review of the ALJ's Preliminary Recommendation, the State Personnel Board did not grant Complainant a hearing on her retaliation claim.

101. On March 23, 2017, at 10:13 a.m., Ms. Murphy emailed weekly calendars/agendas to Parole Board employees included on the group email, as was done every Thursday.

102. Complainant met with Mr. Thompkins on March 23, 2017 at 10:30 a.m., a meeting that had been scheduled weeks before.

103. On March 23, 2017 at 2:21 p.m., Complainant sent an email to Ms. Murphy and Mr. Morales inquiring about the weekly calendars and agendas.

104. On March 23, 2017, Ms. Murphy sent an email to Complainant that the calendars/agendas were sent out at 10:13 a.m. that morning.

105. Ms. Murphy investigated and confirmed that Complainant's name was no longer on the group email.

106. Later on March 23, 2017, Ms. Murphy contacted the Governor's Office of Information and Technology (OIT) about the issue. OIT sent Ms. Murphy a link to access the Google audit report, which provided historical information about Complainant's email account within the list serve. The audit report indicated that Complainant, or someone using her login credentials, removed her name from the list serve at 4:14 p.m. on March 22, 2017.

107. The only way someone other than Complainant could have removed her from the group email was if that person was sitting at Complainant's computer and Complainant had already logged on.

108. DOC had implemented a two-step verification process in 2015 whereby if an attempt were made to log in to Complainant's email account from a computer other than Complainant's, a verification code would be sent to Complainant's cell phone or email and that code would need to be entered to complete the log in procedure. This means, essentially, that only Complainant could have logged in to her computer on March 22, 2017.

109. As the OIT employee responsible for the Parole Board, Matt Moynahan concluded, it was Complainant who removed herself from the Parole Board group email.

110. After Ms. Murphy was informed that Complainant was no longer included in the group email, she sent copies of all group emails separately to Complainant. It is not clear why Complainant was not added back on the group email.

111. In an email to Mr. Thompkins on March 27, 2017, Complainant complained to Rick Thompkins, DOC's Chief Human Resource Officer, about being removed from the group email. She wrote, in pertinent part, "Please advise... what do I need to do? I just filed the R6-10 with DPA, and you have the Job Duties in your hand, add the numerous grievances in the State Appeals Court and how is this not RETALIATION!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!"

Complainant's Conflict with Amanda Hollander-Ballew

112. On March 28, 2017, Amanda Hollander-Ballew, of DOC's Victims Services Unit, sent a memorandum to Chair Morales and Vice Chair Rebecca Oakes, relating Ms. Hollander's interactions with Complainant the day before. Ms. Hollander-Ballew wrote:

On March 27, 2017, Michelle Muller came into my ... office, clearly upset, asking why she was not included on an e-mail that I had sent on Friday March 24, 2017 to the DOC_PB_EVERYONE@state.co.us group email requesting a full board date. I told her that I requested it the way I have always requested the date and was unsure why she did not receive it. Ms. Muller demanded that I double check who I sent it o, incase [sic] it went to the Parole Board Members only group e-mail, so I showed her on my computer screen that I indeed, sent it to the DOC_PB_EVERYONE group e-mail. In Ms. Muller's hand she had a printed copy of the original e-mail I sent to DOC_PB_EVERYONE group that had been forwarded to her, myself, and Joe Morales from Tammy Murphy. She had then asked if I could print it out for her records just as another example of things she isn't included on. I said, sure (even though she had the e-mail in her hand) and started to print it. However, before I even got a chance to finish Ms. Muller then became even more irate saying, "Clearly this is just too much to ask for, too much work for you to do!" and stormed out of my office slamming the door.

Later on in the afternoon, I went to Ms. Muller's cubicle area and asked her if Brandon Mathews was still there and that I wanted to ask him a question regarding a victim hearing. She refused to even look up at me and just said "No he isn't here." in a pretty aggressive tone. At that point, not wanting to converse with her any more due to her lack of common courtesy, I walked out of the Parole Board office.

Complainant's March 31, 2017 Unlawful Discrimination/Discriminatory Harassment Complaint

113. On March 31, 2017, Complainant filed an Unlawful Discrimination/Discriminatory Harassment Complaint Form with the Board, alleging discrimination and discriminatory harassment based on age, retaliation and harassment, being targeted, hostile work environment. On the form, Complainant identified the perpetrators as Joe Morales, Jennifer Wagoner and Tammy Murphy. Complainant wrote:

This grievance is being presented as a continued pattern of; unlawful retaliation, hostile work environment, age discrimination, unlawful discrimination and harassment that has been placed upon me, by the leadership within the Parole Board; Parole Board Chair, Joe Morales, Liaison I, Jennifer Wagoner, although she misrepresents herself as an Administrator II) [sic], and Office Manager, Tammy Murphy. First, I would like to state that I am a ten year state employee, and the issues that I have encountered have only been directed towards me within the last two years while employed with the Parole Board.

...

I am filing this grievance specifically because most of my job duties have been taken away from me and the day that I met with HR Chief, Rick Thompkins, 11/23/17, on my Step II Grievance solution, my name was removed from the DOC PB Everyone@state.co.us, eliminating me from all communications, and eliminating me from critical emails needed pertaining to the only part of my job that still exist, being the VSU Liaison.

...

When I met with HR Chief, Mr. Thompkins on 3/23/17, he agreed that the leadership within the Parole Board has been anything BUT honest and trustworthy. HR Chief, Mr. Thompkins agreed to remove all negative documents given to me by this Leadership, over the past two years. I believe that I have proven beyond a reasonable doubt that I am being targeted for unlawful retaliation, age discrimination, hostile work environment, unlawful discrimination and harassment.

Complainant sought the removal of Chair Morales, Ms. Wagoner and Ms. Murphy, "Bring in a competent Administrator to put the Parole Board back to the elite status it needs to be. Remembering that everything that is done here is a direct reflection on the Governor since 7 of these positions are appointed by the Governor" and "Stop the targeting against me."

114. On April 20, 2017, the OIG opened an investigation into Complainant's discrimination/harassment complaint, which included the issue of Complainant's removal from the group email. Criminal Investigator Joe Spangler was in charge of the investigation and he concluded, after reviewing the IT audit report, and talking with Mr. Moynahan and others, that Complainant removed herself from the group email and Ms. Wagoner and Ms. Murphy had no involvement in the removal. He completed the report in late May or early June 2017. He summarized his report as follows:

On April 20, 2017, an investigation was opened by the Office of Inspector General concerning Administrative Assistant Michelle Muller, after Mrs. Muller alleged she was being harassed, retaliated against, forced to work in a hostile work environment, and age discrimination, by the Colorado Parole Board and its members. Mrs. Muller based her most recent allegation of having her duties removed and her name being taken off an Email Group (which prevented her from completing her assigned duties) as a direct result of her previous grievances and complaints that she has filed against the Colorado Parole Board and it's [sic] members.

Since Mrs. Muller currently has several active grievances filed and accepted with the Colorado State Appeals Court and an active complaint file [sic] with the Colorado Department of Personnel and Administration, only the current allegations concerning the removal of her duties and her name being removed from the Email Group has been addressed in this investigation.

Mr. Muller has been informed since August of 2016 her duties were either being reassigned or removed from her job description. In August 2016, Mrs. Muller had a meeting to discuss her job duties and the minutes from this meeting was documented and provided as part of this investigation. In October 2016, Mrs. Muller received her Position Description document (PDQ) which she stated she looked at but did not read. In November of 2016, Mrs. Muller received an email from her immediate supervisor, Joe Morales, which again described the removal of some of her duties. According to Rick Thompkins, Joe Morales is Mrs. Muller's Appointing Authority and as such, has the authority to change Ms. Muller's job duties.

As far as the removal of Mrs. Muller's name from the Email Group, according to an audit that was done by OIT, Mrs. Muller or someone using Mrs. Muller's login credentials was the one who removed Mrs. Muller from the

Email Group on March 22, 2017 at 4:14 p.m. Neither Mrs. Jennifer Wagoner nor Tammy Murphy were working out of the Denver Office on the day Mrs. Muller's name was removed from the Email Group. Mrs. Muller's other allegation concerning her name being removed from the Email Group was that she was not able to complete her assigned duties since she was not receiving the emails. On March 23, 2017, Mrs. Muller informed Mrs. Murphy she did not receive the calendars for the week and that she believed her name had been taken off the Email Group. Within a matter of minutes, Mrs. Murphy responded and emailed Mrs. Muller the calendars. Since Mrs. Muller's name had been removed from the Email Group, Mrs. Murphy has included Mrs. Muller [sic] name in any emails that pertained to her job duties.

Complainant's Conduct on April 17, 2017

115. On April 17, 2017, Parole Board Member Alexandra Walker was conducting a parole application hearing at the Denver office. Ms. Hollander and two victims were present but remained out of sight of the offender, who appeared via teleconferencing. During the hearing, Complainant opened the hearing office door and announced to Ms. Hollander, "John is ready, your victims are here," in her normal voice. The victims who were present in the hearing room were confused and concerned that the offender was thus made aware of their presence.

116. On Monday, April 24, 2017 at 7:31 a.m., Complainant sent an email to Mr. Thompkins, and copied Ms. Oakes, Ms. Cress and Barry Roseman, her attorney. She wrote:

After sole [sic] searching this past weekend, I must request that VSU Liaison Amanda Ballew-Hollander be reassigned immediately, or terminated. I am in fear for my safety. The severity of the false accusations that she placed against me proves that she is the worst kind of liar there is. She "**consciously**" used her position with the Parole Board Leadership, her status as a GPII, and the Parole Boards [sic] hatred for me to make false accusations against me. Her action can not [sic], nor should not be ignored. Knowing that Amanda came to VSU from a facility where she worked as a Correctional Officer, in my mind makes her even more dangerous.

Again, I am her today in fear for my safety- please advise immediately what steps are being taken to ensure that I am safe at my state job.

Complainant Given Another Corrective Action

117. On April 24, 2017, Romaine Pacheco and Vice Chair Oakes met with Complainant, Ms. Pacheco told Complainant that, because there have been a few incidents in the past several weeks with regard to issues with the VSU and other things, Respondent was taking corrective action and placing Complainant on administrative leave with pay pending an OIG investigation. The notice of corrective action, signed by Ms. Oakes for Mr. Morales, stated, in pertinent part, "The fact that you made the statement 'victims are here', in a tone and volume that could have been easily heard by the offender, during an active prole hearing with victims present, is an extremely serious violation and was disrespectful to the parole board member and disruptive to the hearing being conducted. To unnecessarily re-traumatize or confuse a crime victim during a parole hearing violates Administration [sic] Regulation 1450-01, *Code of Conduct*, the Victim Right's [sic] Act, as well as our high standard of protecting the victims who share their trauma with us in pursuit of justice by advocating for themselves or their loved ones."

118. In the April 24, 2017 notice of corrective action, Mr. Morales also wrote as follows:

On April 14, 2017, Vice Chair Rebecca Oakes met with you to discuss the previous incident with Ms. Hollander-Ballew, in which you were reported to have been rude to Ms. Hollander-Ballew. Since that meeting, I have observed that you have treated Ms. Oakes and Ms. Hollander-Ballew disrespectfully. On April 21, 2017, you sent an email to Ms. Oakes in which you accused her of acting out of "hatred" and accused Ms. Hollander-Ballew of lying and bullying you. Again, on April 24, 2017, you made serious allegations against Ms. Hollander-Ballew, alleging that she is a liar and dangerous, and accused Ms. Oakes again of hating you. Making unfounded, inflammatory, and outrageous allegations such as this against your colleagues is a violation of the Code of Conduct and basic human courtesy.

119. The notice of corrective action required Complainant to:

1. Review and adhere to Administrative Regulation 1450-01 Code of Conduct, and comply with all aspects of the Victims Rights Act.
2. Conduct yourself in a professional and businesslike manner at all times while you are working. This includes treating Parole Board members, Department of Corrections (DOC) staff, victims, and anyone else with whom you come in contact during your work day [sic] with respect and courtesy.
3. Your behavior relating to the sensitivity of crime victims, your relationship with the Parole Board and VSU staff and respect of active parole hearing with victims present must be corrected by strict adherence to the Code of Conduct, the Victim Rights Act, and to your performance plan.
4. To correct victim sensitivity and awareness you must attend remedial Victim Rights Training and Awareness.
5. The behavioral correction relating to your relationship with Parole Board members, VSU staff, and VSU operations must be made immediately and the VRA training will be scheduled when made available by VSU and coordinated with the parole board for your mandatory attendance and successful completion.

The notice of corrective action warned Complainant, "Any violation of this corrective action will result in further corrective and/or disciplinary action, up to and including termination."

Complainant Placed on Administrative Leave With Pay

120. Also on April 24, 2017, Complainant was handed a notice that she was being placed on administrative leave with pay effective immediately.

Notice of and Preparation For a Rule 6-10 Meeting Scheduled for August 7, 2017

121. On July 26, 2017, Mr. Morales sent Complainant a notice of a Rule 6-10 meeting scheduled for August 7, 2018 to discuss information that caused Mr. Morales to believe that a

disciplinary or correct action may be appropriate. Mr. Morales wrote, "This information includes, but is not limited to the following: You alleged that your name had been removed from a group email list, with the result that you did not receive emails that were essential to your job duties. The Inspector General investigated this allegation and concluded that (1) you or someone using your login credentials were the one who removed you from the Email Group, during a time that you were the only one in the office."

The August 7, 2017 Rule 6-10 Meeting and Its Aftermath

122. Mr. Morales held a Rule 6-10 meeting with Complainant on August 7, 2017. Mr. Morales' representative was Brenda Valerio of DOC's HR group. Complainant's representative was Pam Cress of Colorado WINS. At the beginning of the meeting, Mr. Morales gave Complainant a summary of the OIG's investigative report and a copy of AR 1450-01. Complainant had not seen a copy of the investigative report before, and was provided time to review it at the meeting. Mr. Morales pointed to the investigative report's conclusion that Complainant, or someone using her login credentials, removed Complainant from the email group on March 22, 2018 at 4:14 p.m. Mr. Morales stated that this Rule 6-10 meeting was specifically about the group email incident. At the meeting, Complainant stated that there would be no reason for her to take herself off the group email. Furthermore, she represented that she was informed that only the owner or administrator of the group email could add or delete names from the group email, and even if she could delete herself from the group email, she would not know how. She noted that she had already expressed concerns about not being kept in the loop about Parole Board matters, and taking herself off the group email would only exacerbate her concerns. "There would have been no reason why I would have done it. My complaint all along had been the disconnect between the parole board members in the [Denver] office and the Pueblo office."

123. Later on August 7, 2017, Complainant sent an email to Mr. Morales, informing him that Maria Pacheco told her on or about March 13, 2018 that only the owner could add or delete names from a group email and that the owner of the subject email group was Jennifer Wagoner.

124. On August 8, 2017, at 8:25 a.m., Complainant sent Mr. Morales another email:

Joe,

I just want to clarify my conversation from yesterday so there is no misunderstanding, or thoughts that I would intentionally be misleading:

I stated, when looking at one of the reports, I said it was "manipulated", when in fact, I should have said "modified."

Joe, in addition to the information I provided to you yesterday, for the record, I would like to reiterate that I filed a C.R.S. 24-50.5-101, Misuse of State Funds in October 2016, as a Whistleblower, with an outcome presented to me in February 2017. Then, in April 2017, approximately 10 (ten) weeks later, I am then placed on Admin leave going on 15 (fifteen) weeks, for my name being removed from a group email router. As I sit here, I can't help but feel this is retaliation, something the ARs and Statute are written to protect me from.

I have outlined more than once being "bullied" by this leadership with an open appeal, and an open Step II Grievance from 2016. With that being said, I am asking that an outcome to the meeting yesterday be given sooner, rather than

later. Please let me do the job I was hired to do. I would like to be a productive working adult again.

125. On August 9, 2017 at 3:55 p.m., Complainant sent Mr. Morales another email, ostensibly reiterating or providing additional information "as to why I would not have 'removed my name from a group email router.'" Complainant reiterated that she had been concerned about the disconnect between the parole board's Denver and Pueblo offices for some time. In addition, Complainant alleged that in her March 23, 2017 meeting with Rick Thompkins, Mr. Thompkins agreed to virtually all the relief Complainant was requesting. Complainant concluded her email to Mr. Morales as follows:

If for no other reason Joe, I am a 59 year old white female, with 10 years of state experience with the Colorado Department of Corrections. I have paid thousands, and thousands of dollars in lawyers fees, and countless hours provided to me by my CO-WINS, Union Rep, Pam Cress, just to fight all the accusations placed against me by this leadership. I consider myself to be a very honest, meticulous, professional person, who has a very strong work ethic. I do not believe in the misuse of taxpayers dollars just because you can, or the position you hold. I strongly believe the ARS, and Statutes are written for a reason, and they should apply to EVERYONE.

Unfortunately for me, this has been a battle I have found myself in, and had to fight almost everyday with the Parole Board... there would be no reason why I would make matters WORSE for myself, remove my name from a group email router, be suspended for going on 15 weeks, and once again have to spend time and money defending myself to this leadership. I just would not do that... that is not who I am!

I look forward to putting this behind me/us, and to get back to work as soon as possible. Please let me do the job I was hired to do, successfully!!

126. On August 18, 2017, Maria Pacheco responded to inquiries from Mr. Morales via email. She informed Mr. Morales that during the week of March 19 through March 25, 2018, she left the office around 4:00 p.m. every day. She also informed Mr. Morales that she never asked Complainant for her computer passwords, never sat at Complainant's desk nor worked on her computer. She also wrote, "My memory isn't very good, and I do not recall specifically Michelle asking me to remove her from a specific e-mail group, but I do remember been [sic] asked that question in this office before, and my response for that would be that if they no longer want to receive e-mail from a specific group, that they can remove themselves from it. I remember showing that specific person step by step on how to do that as it is very simple step, and that would be something that I would not document, or write a ticket as no follow up, nor action was needed for me besides knowledge sharing."

127. Mr. Morales also spoke with Mr. Moynahan, who told Mr. Morales that, in his expert opinion, Complainant was the person who removed herself from the group email.

September 7, 2017 Notice of Disciplinary Action

128. On September 7, 2017, Mr. Morales sent Complainant a disciplinary letter via certified and regular U.S. mail, as well as email, informing her that her employment with Respondent was terminated, effective September 7, 2017.

129. In his disciplinary letter, based on all information he received, Mr. Morales concluded that Complainant had removed her name from the group list serve, falsely accused others of doing so, and so was guilty of willful deception that maligned others' integrity, caused unnecessary stress and needless additional cost, and created a hostile work environment. He also concluded that Complainant violated a raft of DOC administrative regulations, the DOC Code of Conduct, the DOC Code of Ethics and failure to perform in accordance with her current performance plan.

130. Mr. Morales determined that Complainant violated DOC Administrative Regulation 1450-01 Code of Conduct, section IV, subsections A.3, A.8, B.1, B.2, E.1, E.2, and M.1.

131. AR 1450-01, effective January 1, 2017, DOC Code of Conduct, Section IV(A)(3) provides, "DOC employees, contract workers, and volunteers shall comply with and adhere to all DOC ARs, procedures, operational memorandums, rules, duties, legal orders, procedures, and administrative instructions."

132. AR 1450-01, section IV(A)(8) provides, "Any act or conduct on or off duty which affects job performance and/or tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action."

133. AR 1450-01, section IV(B)(1) provides, "Any action on or off duty on the part of DOC employees, contract workers, and volunteers that jeopardizes the integrity or security of the Department, calls into question one's ability to perform effectively and efficiently in his/her position, adversely affects public safety, causes doubt upon the person's integrity or which reflects discredit upon the individual as a DOC employee, contract worker, or volunteer is expressly prohibited as conduct unbecoming."

134. AR 1450-01, section IV(B)(2) provides, "While on or off duty, DOC employees, contract workers, and volunteers are required to maintain considerate, cooperative, cordial, and professional relationships toward each other. Professional relationships will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies."

135. AR 1450-01, section IV(E)(1) provides, "DOC employees, contract workers, and volunteers shall neither falsify any documents nor willingly depart from the truth, either in giving testimony or in connection with any official duties or official investigation."

136. AR 1450-01, section IV(E)(2) provides, "DOC employees, contract workers, and volunteers shall not bear false witness against each other or offenders."

137. AR 1450-01, section IV(M)(1) provides, "There is an obligation to be accountable and efficient in the use of all state resources. DOC employees, contract workers, and volunteers will not use or allow the use of state time, supplies, or state-owned or leased property and equipment for their personal gain or private interests."

138. Mr. Morales also determined that Complainant violated AR 1150-20 Brady Reporting and Disclosures, Section IV, subsections A, B, D.4, D.5, D.7, and D.9. Neither party introduced this AR into evidence.

139. Mr. Morales also determined that Complainant violated the DOC Code of Ethics, Section II, subsections A.2, A.5, Section III, subsections B and M. Section II (A)(2) provides that government employees “shall carry out their duties for the benefit of the people of the state....”

140. Section II(A)(5) of the Code of Ethics provides that government employees “must have the benefit of specific standards to guide their conduct, and of a penalty mechanism to enforce those standards” in order to “ensure propriety and to preserve public confidence.”

141. Section III (B) of the Code of Ethics provides that all employees of the DOC “[s]hall demonstrate the highest standards of personal integrity, truthfulness, and honesty and shall, through personal conduct, inspire public confidence and trust in government....” There is no Section III (M).

142. Complainant filed an appeal of her employment termination with the Board on September 15, 2017, alleging age discrimination, egregious abuse, open appeal with the Court of Appeals, targeted, unlawful discrimination, hostile work environment, retaliation, harassment and a whistleblower claim.

Assessment of Witnesses' Credibility

143. The evasiveness and deception that her supervisors and grievance reviewers noted about Complainant were also in evidence at the hearing. Although seemingly earnest and forthright, Complainant was evasive and often chose to not understand questions she clearly understood. There were several instances where her testimony at hearing conflicted with her deposition testimony. Her testimony also revealed a tendency to misrepresent what she knew or was told to her own benefit. For example, she contended that Mr. Thompkins agreed to remove all negative documents from her personnel file. However, as Mr. Thompkins testified, all he promised was to review Complainant's personnel file, clean it up, and perhaps remove a few discretionary reviews that he believed were unnecessary. Accordingly, Complainant's credibility was questionable.

144. On the other hand, all of Respondent's key witnesses, such as Mr. Morales, Ms. Wagoner, Mr. Moynahan, Mr. Cummings and Mr. Spangler were forthright and entirely credible in their testimony. They were straightforward, consistent, persuasive, and their testimony was in accord with available documentation.

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. XII, §§ 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.

For Complainant's claims of retaliation in violation of the Colorado State Employee Protection Act and retaliation in violation of the Colorado Anti-Discrimination Act, Complainant bears the initial burden of establishing a *prima facie* showing that Respondent violated these statutes and the ultimate burden of persuasion. § 24-4-105(7), C.R.S. (Whistleblower Act); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009) (CADA).

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 Act for Which She was Disciplined

Complainant's appointing authority, Parole Board Chair Joe Morales, decided to terminate Complainant's employment because he believed that Complainant removed herself from the Parole Board's Google email group and then accused others of having done it. Mr. Morales based his understanding of Complainant's role in the removal of her name from the group email on the OIT's audit report and his conversation with OIT employee Matthew Moynahan.

At hearing, Respondent established, by a preponderance of the evidence, that it was more likely than not that Complainant committed the act for which she was disciplined. Mr. Moynahan testified that the audit report establishes that Complainant was the person who removed herself from the group email and that no one else could have done so.

Although Complainant did establish at hearing that an OIT owner, an administrator, and perhaps a manager could add and delete from the group email, the audit report would indicate the identity of the person adding or deleting. In other words, if someone at OIT, or Ms. Wagoner, or Ms. Murphy, had deleted Complainant from the group email, the audit report would have so indicated, e.g., the audit report would have read:

Tammy Murphy–DOC removed michelle.muller@state.co.us from group
DOC_PB_Everyone@state.co.us.

At hearing, Complainant argued that someone with her log-in credentials could have accessed her email account and deleted her from the group email. Mr. Moynahan persuasively testified that could not happen. Even if someone possessed Complainant's log-in credentials, unless they were physically at Complainant's computer, they would have had to successfully overcome the obstacle of the two-step verification procedure that was implemented in 2015, which only Complainant could have done through her cell phone or email. Accordingly, the weight of

the available evidence indicates that it was Complainant who removed herself from the group email on March 22, 2017 at 4:14 p.m. Even Mr. Thompkins, who up to that time had been supportive of Complainant's perception that her supervisors were targeting her, was persuaded that Complainant caused her own removal from the group email.

At hearing, Complainant also contended that she had no reason to remove herself from the group email. In addition, she argued, she lacked the knowledge to remove herself even if she wanted to do so. Complainant pointed out that she was already upset and concerned that she was disconnected from the Parole Board support staff, all of whom were located in Pueblo, so why would she make her situation even worse by deleting herself from the group email? This argument is ultimately unpersuasive. At the time Complainant removed herself from the group email, she was complaining that her duties had been taken away from her, and that she was being intentionally disconnected from the rest of the Parole Board support staff. Her removal from the group email would have reinforced her contention that her supervisors were following an intentional and continual strategy to separate her from the Parole Board staff. That evidence would likely assist her in persuading Mr. Thompkins, with whom she had a scheduled meeting the next day to once again discuss again her victimization and potential remedies, that Ms. Wagoner, Ms. Murphy, and maybe even Mr. Morales, were conspiring to isolate and shun her. At hearing, Mr. Thompkins testified that when he first learned that Complainant had been removed from the group email, he sent Ms. Murphy and Ms. Wagoner an angry email, and felt sympathy for Complainant.

Complainant also argued that if she had deleted herself from the group email so she could claim she was being sabotaged by others and could not do her work, why did she notify Ms. Murphy on March 23, 2017 that she did not receive the weekly schedule and agendas rather than wait a few days to maximize the damage she could claim? This argument ignores the obvious: the Parole Board schedule and agendas were distributed every Thursday morning. If Complainant did not receive the schedule and agendas by Thursday afternoon, she would need to make inquiries. That is precisely what she did, and what she had to do.

Complainant also argued that her removal from the group email may have been caused by a computer glitch, and occurred through no fault of anyone. Mr. Moynahan, the OIT expert, gave little credence to that idea, stating that Google email groups are rock solid and such computer glitch was highly unlikely.

The weight of the evidence, and an assessment of the credibility of Complainant and her co-workers, establishes that Complainant removed herself from the group email on March 22, 2017 – the act for which she was disciplined.

Accordingly, Respondent has proven by a preponderance of the evidence that Complainant committed the act for which she was terminated.

II. The Appointing Authority's Action was Neither Arbitrary nor Capricious, Nor Contrary to Rule or Law

A. The Appointing Authority's Action was Not Arbitrary or Capricious

In determining whether an agency's decision is arbitrary or capricious, a court 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. Dep't. of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

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 or 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 range of reasonable alternatives.

Mr. Morales' decision to terminate Complainant's employment was neither arbitrary nor capricious.

Prior to making the decision to terminate Complainant's employment, Mr. Morales spoke with Mr. Moynahan of OIT about the group email issue and the audit report. Mr. Moynahan told Mr. Morales that it was his expert opinion that Complainant removed herself from the Parole Board's group email. He spoke with Maria Pacheco, upon whom Complainant cast suspicion by stating that she saw Ms. Pacheco at her computer one day. Ms. Pacheco told Mr. Morales that she had never logged onto Complainant's computer; she also testified to that fact, credibly, at the hearing. The only reasonable conclusion Mr. Morales could come to based on the evidence available to him was that Complainant removed herself from the Parole Board group email.

Mr. Morales also reviewed Complainant's personnel file and noted Complainant's chronic failure to communicate in a professional manner with her co-workers, supervisors, and others, and Complainant's antagonistic interpersonal work relationships. It may have been helpful for Mr. Morales to also confer with Mr. Thompkins, who up to that time had a more sympathetic and understanding view of Complainant and her issues with the Parole Board, and could have provided some relevant mitigating information. However, given the nature and scope of Complainant's act of self-removal from the group email, and her history of inappropriate communication and interpersonal relationships, it is highly unlikely that Mr. Thompkins' input would have, or should have, led Mr. Morales to a different disciplinary decision.

Board Rule 6-9 enumerates the factors that an appointing authority should consider when deciding whether to take corrective or disciplinary action. These factors are applicable not only to the decision to take corrective or disciplinary action, but also to the specific corrective or disciplinary action taken once it has been decided that a corrective or disciplinary action is warranted. In deciding on the need to discipline Complainant, and the level of discipline the situation required, Mr. Morales properly considered each of these factors, and also testified to them at the hearing.

1. Nature, Extent, and Seriousness of the Act, Error or Omission

Complainant intentionally removed herself from the group email and sought to cast suspicion on other, innocent employees as part of her campaign to establish that she was being victimized by Ms. Wagoner, Ms. Murphy and Mr. Morales, and to rid the Parole Board of these employees. She was not truthful in her conversations with Mr. Morales, Mr. Thompkins and the OIG investigator, Mr. Spangler. Complainant's deception, her dishonesty, her breach of the public trust, and her intent to harm others, were properly viewed by Mr. Morales as serious transgressions that justified significant discipline.

2. Effect of the Act, Error or Omission

Complainant's actions resulted in a not inconsiderable waste of DOC resources and time, and added to the toxic environment of the Parole Board and its support staff. For someone who repeatedly complained about the toxic environment of the Parole Board, Complainant's actions were akin to putting out fire with gasoline. Her attempt to sow suspicion against her co-workers while shoring up her own allegations of victimization exacerbated an already adversarial work environment.

3. Type and Frequency of Previous Unsatisfactory Behavior or Acts

Viewed in its broadest terms, Complainant conduct concerning her removal from the Parole Board group email was deceptive, hostile and aggressive. Complainant was frequently guilty of similar acts since she began working at the Parole Board.

As Mr. Morales was aware, Complainant had been fighting against Ms. Wagoner since April 2015, just three months after Complainant began working at the Parole Board. Complainant resisted Ms. Murphy's supervision almost as soon as Ms. Murphy was hired as office manager. In grievance after grievance, Complainant sought the termination of both Ms. Wagoner and Ms. Murphy and, later, Mr. Morales. In Warden Johnson's July 11, 2016 Rule 6-10 decision concerning the J.L. incident, he wrote, "Providing inaccurate information, being unprofessional to your co-workers, and avoiding responsibility for your conduct have been documented areas of improvement of yours in past performance evaluations." In her meetings with Mr. Thompkins, she railed against all three for their alleged incompetence, lack of knowledge, lack of leadership skills, and Complainant's perception that they were all out to get her. As Mr. Morales testified at the hearing, Complainant thought others were out to get her, so she kept attempting to get others first. Rather than admit her own mistakes and mishandling of certain matters and interpersonal relationships, Complainant repeatedly blamed others. Complainant's whistleblower complaint is an example of Complainant's problematic approach to her supervisors. Based on a few scraps of purported information of questionable reliability, Complainant accused Ms. Wagoner of inappropriately appropriating to herself a state vehicle and utilizing it in violation of fiscal rules to the detriment of taxpayer funds, all while ignoring the facts that she knew or could easily have obtained that would effectively undermine any legitimate claim against Ms. Wagoner's use of a state vehicle. Like the actions she took with respect to her removal from the group email, Complainant accused others of misconduct in an effort to rid the Parole Board of their presence, while appearing as if she were the victim or the whistleblower seeking to protect taxpayers from the misuse of State resources.

4. Prior Corrective or Disciplinary Actions

Between January 2015 and April 2017, when she was placed on paid administrative leave, Complainant received multiple confirming memoranda addressing her disrespectful and insubordinate communications with supervisors, and several corrective actions addressing similar conduct. These actions were based on perceptions of Complainant's behavior as being rude, insubordinate, inappropriate, argumentative, confrontational and offensive.

5. Period of Time Since a Prior Offense

Less than five months prior to removing herself from the Parole Board's group email, Complainant filed a whistleblower complaint of questionable foundation directed at Ms. Wagoner designed to negatively affect Ms. Wagoner's job security. In email exchanges on October 25 and

26, 2016, Complainant communicated in a disrespectful manner with both Ms. Wagoner and Mr. Morales. In January 2017, in an email to Mr. Thompkins, Complainant mischaracterized an ALJ's Preliminary Recommendation and wrote that the Parole Board's leadership "is no better then [sic] an offender"

6. Previous Performance Evaluations

Complainant's previous performance evaluations rated her at Level II or Level I, but contained narratives highlighting her interpersonal communication issues that remained unresolved.

Complainant's performance evaluations reveal inveterate problems with her communication and interpersonal relations. Although it is true that Complainant's first performance review for the initial three months of her employment with the Parole Board was highly favorable, subsequent evaluations were highly critical of many aspects of her job performance. In late October 2015, Ms. Murphy rated her at Level I (Needs improvement) and at Level I in three out of five core competencies. The PIP she received in November 2015 characterized her issues as follows: "Ms. Muller's performance has demonstrated the following. It appears that she is unwilling to share information, is inconsistent in completion of assigned tasks, and lacks follow through. Ms. Muller has specifically stated that she has no interest in receiving any additional training to raise her skills to an acceptable level. She has also stated that she is unable to complete her back up duties as defined in her PDQ. Her demeanor can be dismissive, rude, disrespectful, abrupt and argumentative in all forms of communication. She is quick to over react and she seems to prefer arguing rather than working as a team." In a draft Performance Review dated January 28, 2016, Complainant was rated at Level I overall and at Level I in four out of five core competencies. On March 22, 2016, Ms. Wagoner signed a discretionary review of Complainant's job performance that rated Complainant at Level I (Needs Improvement) in four of her five Core Competencies. Complainant's annual performance review for the 2015-2016 rated her at Level II (meeting expectations), with ratings of Level II in all core competencies with the exception of Communication, for which Complainant was rated at Level I (Needs Improvement), citing disrespectful and insubordinate communications with her supervisors and rude communications with others.

7. Mitigating Circumstances

At hearing, when asked if he considered mitigating circumstances in his decision to terminate Complainant's employment, Mr. Morales stated that he knew of no mitigating circumstances, and very little material mitigating information was provided by Complainant herself. However, mitigating circumstances did exist, although they were insufficient to establish that Mr. Morales' disciplinary decision was arbitrary or capricious.

At the time of her termination, Complainant was a ten-year state employee, who was capable of satisfactory performance and a positive attitude when not being reprimanded or criticized. The Parole Board's management and leadership structure was problematic and there was little effective and experienced supervision that could have guided Complainant towards activities more productive than her persistent grievances, discontent and oppositional behavior. Mr. Thompkins could have provided some perspective on the issues of Parole Board supervision as affecting Complainant's performance issues. All that being said, even if Mr. Morales considered these mitigating circumstances, they were not significant enough to overcome all the factors weighing in favor of the disciplinary action upon which Mr. Morales decided.

In short, Mr. Morales used reasonable diligence and care in procuring the appropriate evidence in the exercise of his discretion, he gave candid and honest consideration of the pertinent evidence and he reached reasonable conclusions. Accordingly, Mr. Morales' decision to terminate Complainant's employment was not arbitrary or capricious under the *Lawley* standard.

B. The Appointing Authority's Decision Was Not Contrary to Rule or Law

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

Mr. Morales 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 actions, the period of time that had elapsed since a prior offense, and previous performance evaluations. His failure to fully investigate mitigating circumstances was a harmless error.

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. Complainant has made no claim that Mr. Morales did not comply with the requirements of Rule 6-10.

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, which was the case here.

As discussed below, Mr. Morales decision to terminate Complainant's employment did not violate the Colorado State Employee Protection Act nor did it violate the Colorado Anti-Discrimination Act.

Accordingly, Mr. Morales' decision was not contrary to rule or law.

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

The next issue is whether the discipline imposed was within the range of reasonable alternatives available to Respondent.

Mr. Morales considered the seriousness of Complainant's conduct and Complainant's failure to improve her performance over time, despite repeated corrective and disciplinary actions. Complainant's conduct was overtly hostile to her supervisors and some Parole Board members. She was a major contributing factor to the toxic environment among the Parole Board support staff. Complainant had been seeking the termination of Ms. Wagoner and Ms. Murphy since 2015, and her multitudinous grievances were disruptive, distracting and wasteful of agency resources. Instead of virtually declaring war on Ms. Wagoner and Ms. Murphy and, later, Mr. Morales because of her perception that they did not know what they were doing and were intent on targeting her, Complainant would have done well to use that time and energy to work with Ms. Wagoner and Ms. Murphy and Mr. Morales to improve the work environment and establish positive working relationships. As Complainant told Mr. Thompkins, she did not believe the situation could be fixed, and yet she refused any transfer that Mr. Thompkins offered her. In making his decision to terminate Complainant's employment, Mr. Morales considered alternative

forms of discipline, but decided that termination was appropriate due to Complainant's failure to correct her deficient performance in such areas as integrity, honesty, trustworthiness, and appropriate interpersonal communications.

Reviewing the totality of the relevant circumstances, the termination of Complainant's employment was, therefore, within the range of reasonable alternatives available to Respondent.

IV. Respondent Did Not Retaliate Against Complainant in Violation of the Colorado State Employee Protection Act

Complainant also alleges that Respondent retaliated against her in violation of the Colorado State Employee Protection Act, §§ 24-50.5-101, *et seq.*, C.R.S. (Whistleblower Act or Act). More specifically, Complainant contends that Respondent retaliated against her because of her October 25, 2016 whistleblower complaint concerning Ms. Wagoner's use of a state vehicle. At hearing, Complainant alleged that it was her whistleblower complaint that ultimately led to the termination of her employment.

The purpose of the Whistleblower Act, set forth in the legislative declaration, is to encourage "state employees . . . to disclose information on actions of state agencies that are not in the public interest." § 24- 50.5-101, C.R.S.; *Lanes v. O'Brien*, 746 P.2d 1366, 1371 (Colo. App. 1987). The Whistleblower Act "protects state employees from retaliation by their appointing authorities or supervisors because of disclosures of information about state agencies' actions which are not in the public interest." *Ward v. Industrial Commission*, 699 P.2d 960, 966 (Colo. 1985). The Act prohibits the initiation or administration of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S.

As the proponent of her Whistleblower Act claim, Complainant bears the initial burden of proof. § 24-4-105(7), C.R.S. *See also Ward*, 699 P.2d at 968 (holding that the burden of proof in Whistleblower Act claims follows the burden of proof in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)). In determining whether there has been a violation of the Whistleblower Act, "[i]t must be initially determined whether the claimant's disclosures fell within the protection of the 'whistleblower' statute and that they were a substantial or motivating factor in the [action taken by the agency]. If the claimant's evidence establishes that [her] expression was protected by the 'whistleblower' statute, then the [reviewing adjudicator] must determine whether [the agency's] evidence established, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968.

A. Complainant Failed to State A *Prima Facie* Case of Violation of the Whistleblower Act

The first question, therefore, is whether Complainant has proven by a preponderance of the evidence that her disclosures "fell within the protection of the whistle-blower statute" and that her disclosures "were a substantial or motivating factor" in the decision to terminate her employment. *Ward*, 699 P.2d at 968.

1. Complainant's showing of protected disclosures

In order to show that her disclosures fall within the protection of the Whistleblower Act, Complainant must be able to prove that: 1) she made a disclosure of information, as that term is defined in § 24-50-102(2), C.R.S., and applicable case law; and 2) she made a "good faith effort

to provide to her supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure.” § 24-50.5-103(2), C.R.S. Additionally, in order for Complainant’s disclosures to be protected under the Act, the disclosures must not be exempted from the Act’s protections, pursuant to § 24-50.5-103(1)(a)-(1)(c), C.R.S. These exemptions include, but are not limited to, information that the employee “knows to be false or who discloses information with disregard for the truth or falsity of the information” § 24-50.5-103(1)(a), C.R.S. The Act requires “both a good faith belief in the accuracy of the information disclosed and a reasonable foundation of fact for such belief.” *Lanes*, 746 P.2d at 1373.

a) Complainant made one or more disclosures of information

(1) Defining the parameters of a “disclosure”

The Whistleblower Act defines “disclosure of information” as “the written provision of evidence to any person . . . regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.” § 24-50.5-102(2), C.R.S. Disclosures may be presented in writing or offered orally. *Ward*, 699 P.2d at 967. “[D]isclosures that do not concern matters in the public interest, or are not of ‘public concern’, do not invoke this statute.” *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007).

First Amendment protections also depend, in part, upon the analysis as to whether statements were of “public concern.” First Amendment precedent, therefore, is helpful in understanding the contours of such a requirement. See *Ward*, 699 P.2d at 968 (adopting the First Amendment allocations of burden of proof in *Mt. Healthy* as the template for a whistleblower analysis).

The Supreme Court has characterized a matter of “public concern” as one “fairly considered as relating to any matter of political, social, or other concern of the community.” *Connick v. Myers*, 461 U.S. 138, 146 (1983). “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record.” *Id.* at 147-48.

Statements which have “the ring of internal office politics” do not present matters of public concern. *Handy-Clay v. City of Memphis, TN*, 695 F.3d 531, 543 (6th Cir. 2012). “While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests.” *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996)(internal citations and quotation marks omitted).

(2) Application to Complainant’s statements

Here, Complainant submitted her whistleblower complaint to Jay Kirby of the OIG, with copies to Mr. Thompkins and Mr. Morales, on October 25, 2016. In her complaint, Complainant alleged that Ms. Wagoner assigned herself a state vehicle and that she wrongfully used it to commute from her home in Pueblo to her assigned work location in Denver, costing the taxpayers of Colorado \$4,601.52. She characterized her complaint as misuse of state funds by the Parole Board.

As characterized by Complainant, the misuse of state funds constitutes a matter of public concern. Accordingly, Complainant established that the concerns she expressed constituted disclosures under the Whistleblower Act.

b) Complainant made her disclosure to an appropriate person

The Whistleblower Act requires that an employee who wishes to disclose information must "make a good faith effort to provide to [her] supervisor or appointing authority, or member of the general assembly the information to be disclosed prior to the time of its disclosure." § 24-50.5-103(2), C.R.S. This requirement is met when an employee makes a protected disclosure to her supervisor, and does not necessarily require two separate disclosures of information. *Gansert v. Colorado*, 348 F. Supp.2d 1215, 1226-28 (D. Colo. 2004).

Complainant raised the issue of the alleged misuse of a state vehicle by Ms. Wagoner with Mr. Thompkins in an email on October 24, 2016. The next day, she submitted her whistleblower complaint to Mr. Kirby of the OIG, and copied Mr. Morales, her supervisor and appointing authority, and Mr. Thompkins. Accordingly, Complainant provided the information to her supervisor/appointing authority and met this requirement.

c) Complainant lacked a reasonable foundation of fact for a good faith belief in the accuracy of the disclosed information

The Act requires "both a good faith belief in the accuracy of the information disclosed and a reasonable foundation of fact for such belief." *Lanes*, 746 P.2d at 1373.

Complainant alleges that sometime in 2016, Mr. Thompkins informed her that the job position filled by Ms. Wagoner was assigned to the Denver office. The evidence establishes that Mr. Thompkins, during his September 13, 2016 meeting with Complainant, offhandedly remarked that the position occupied by Ms. Wagoner was assigned to the Denver office. That remark, along with emails that referred to the state vehicle used by Ms. Wagoner when she traveled to the Denver office once or twice a week as "Ms. Wagoner's vehicle," formed the factual basis for Complainant's whistleblower complaint. To these "facts," Complainant added allegations that Ms. Wagoner assigned the vehicle to herself and that she regularly drove it home to her residence in Pueblo in violation of fiscal rules.

Even if Complainant possessed a good faith belief in the accuracy of her whistleblower allegations, those allegations lacked a reasonable foundation of fact for that belief. Complainant knew from her own first-hand experience that Ms. Wagoner lived in Pueblo, her office was in Pueblo, she had no assigned office in Denver, and she did not commute to the Denver office on a daily basis but visited it as part of her job duties no more than once or twice per week. The most cursory of investigations would have revealed to Complainant that Ms. Wagoner's position was always assigned to the Parole Board's Pueblo office and that the vehicle Ms. Wagoner used was a pool vehicle and not one that was assigned exclusively to Ms. Wagoner. Complainant possessed no information that Ms. Wagoner assigned the vehicle to herself or ever used the vehicle for reasons other than legitimate business ones and offered no such evidence at the hearing.

The evidence establishes that Complainant submitted her whistleblower complaint to damage Ms. Wagoner's position and to protect herself from any imminent adverse actions. It is significant that Complainant waited over a month after Mr. Thompkins' remark about the location of Ms. Wagoner's position to submit her whistleblower complaint, and that she invoked the

protections of the Whistleblower Act when she submitted it. The timing of Complainant's whistleblower complaint appears strategic and, as Mr. Thompkins testified, the complaint was submitted after a day of an exchange of bickering emails among Complainant, Ms. Wagoner and Ms. Murphy.

Complainant failed to establish that she possessed a reasonable factual foundation for a good faith belief in the accuracy of her whistleblower disclosures. Accordingly, she failed to establish a *prima facie* case of retaliation in violation of the Whistleblower Act and therefore this claim fails.

2. Even if Complainant had stated a *prima facie* case of Whistleblower Act retaliation, she failed to establish that her disclosures were a substantial or motivating factor in the imposition of discipline

a) Complainant was the subject of discipline

The Whistleblower Act prohibits the imposition of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S. "Disciplinary action" is construed broadly in the Act, and includes "any direct or indirect form of discipline or penalty" including termination of employment, withholding of work, unsatisfactory or below standard performance evaluations or the "threat of any such discipline or penalty." C.R.S. § 24-50.5-102(1).

Complainant alleges that after she submitted her whistleblower complaint on October 25, 2016, work was taken away from her, she was removed from the group email, placed on administrative leave, and finally terminated. Although Complainant failed to establish at hearing that her job duties changed after October 25, 2016, and although she removed herself from the Parole Board group email, being placed on administrative leave and being terminated did constitute disciplinary actions under the Act.

b) Complainant failed to show that her disclosures were a substantial or motivating factor in the imposition of discipline

Once it is established that protected disclosures and adverse employment actions occurred, the employee must demonstrate that the adverse actions were taken "on account of the employee's disclosure of information." § 24-50-103(1), C.R.S. Under *Ward*, 699 P.2d 960, Complainant must demonstrate that her protected disclosures were a substantial or motivating factor for the actions taken against her. In other words, she must demonstrate a causal connection between her protected disclosures and the adverse actions. If she sustains this burden, Respondent then has an opportunity to prove, by a preponderance of the evidence, that it would have made the same decision in the absence of Complainant's disclosures. *Id.*, at 968. This allocation of the burden of proof assures that employees do not abuse the Whistleblower Act to evade appropriate consequences for poor job performance. *Taylor v. Regents of University of Colorado*, 179 P .3d 246, 249 (Colo. App. 2007).

The Colorado case law implementing the Whistleblower Act fails to define the standard by which a causal connection is established. Therefore, case law implementing the anti-retaliation provisions of CADA and Title VII (they are identical) provides useful guidance. Under this long line of cases, in anti-discrimination cases involving retaliation claims, the causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Love v. RE/MAX of America, Inc.*, 738

F.2d 383, 386 (10th Cir. 1984); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999). The inference of retaliation generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action." *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir. 1996). Generally, unless the adverse action is "very closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." *Id.* at 328 (citations omitted; emphasis in original). See also, *Piercy v. Maketa*, 480 F.3d 1192, 1198 (10th Cir. 2007) (a retaliatory motive may be inferred when an adverse action closely follows protected activity and, when the termination is very closely connected in time to the protected activity, the plaintiff may rely on evidence of temporal proximity to establish causation); *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 (10th Cir. 2006) ("We have repeatedly recognized temporal proximity between protected conduct and termination as relevant evidence of a causal connection sufficient to justify an inference of retaliatory motive").

In this case, five months elapsed between the time Complainant submitted her whistleblower complaint and when her name was removed from the group email. It was another month until Complainant was placed on administrative leave. Finally, it was nearly eleven months between the time Complainant submitted her whistleblower complaint and the time she was terminated. Even if the facts supported Complainant's contention that Ms. Wagoner or Ms. Murphy removed her from the group email, which they do not, five months between the protected activity and the purported adverse action is insufficient, by itself, to establish causation. See *Piercy*, 480 F.3d at 1198 (an adverse employment action occurring three months after the protected activity cannot, standing alone, demonstrate causation); *Hysten v. Burlington N. & Santa Fe Ry. Co.*, 296 F.3d 1177, 1183–84 (10th Cir.2002) (concluding that a period of "[a]lmost three months" between the protected activity and the alleged retaliatory act does not permit an inference of causation); *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (a period of three months between the protected activity and the adverse action, standing alone, is not sufficient to establish causation).

Complainant provided no additional evidence to establish a causal connection between her whistleblower complaint and the subsequent disciplinary actions taken against her. Therefore, she did not demonstrate the requisite causal connection to support her Whistleblower Act retaliation claim. Accordingly, Complainant failed to show that her disclosures were a substantial or motivating factor in the imposition of discipline. This is another reason why Complainant's Whistleblower Act retaliation claim fails.

B. Even If Complainant Had Stated a *Prima Facie* Case of Whistleblower Act Retaliation, Respondent Established that It Would Have Terminated Complainant's Employment Even in the Absence of Complainant's Protected Disclosures

Once a state employee has established that her disclosures were protected under the Whistleblower Act and were a substantial or motivating factor in her discipline, the employer is provided the opportunity to prove, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected activity. *Ward*, 699 P.2d at 968.

Respondent established by a preponderance of the evidence that it would have terminated Complainant's employment even if her disclosures were protected under the Act and even if she established that those disclosures were a substantial or motivating factor in the imposition of discipline.

Mr. Morales decided to terminate Complainant's employment because he was convinced that Complainant had removed herself from the Parole Board group email, lied about it, and sought to cast suspicion on Ms. Murphy and Ms. Wagoner, and others. Mr. Morales also based his decision on Complainant's well-known antagonism towards Ms. Murphy and Ms. Wagoner and her stated desire that they be terminated, as well as the job performance issues highlighted in her performance reviews, especially her conduct towards Parole Board support staff, which had been persistently characterized as rude, disrespectful, oppositional, insubordinate and hostile. In the midst of all the turmoil surrounding Complainant's employment at the Parole Board, and her plethora of grievances, it appears that her whistleblower complaint was not an extraordinary event and hardly the act that triggered Respondent to retaliate against her by terminating her employment.

When the full history of Complainant's employment with the Parole Board is taken into account, it is clear that Respondent has successfully proven that Mr. Morales' decision would have been the same even in the absence of Complainant's whistleblower complaint.

V. Respondent Did Not Retaliate Against Complainant in Violation of the Colorado Anti-Discrimination Act

Complainant alleges that she has been subjected to a continuous campaign of adverse actions that were taken in response to, and retaliation for, Complainant's activity in opposing alleged age discrimination. More specifically, Complainant contends that her objection to the manner in which Ms. Wagoner treated Ms. Kromer on April 8, 2015 constituted opposition to age discrimination and that Respondent, by the actions of Ms. Wagoner, Ms. Murphy, Mr. Shaffer, Mr. Morales, and others, retaliated against her for that alleged protected activity.

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

The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1964. Federal Title VII law serves as a guide to CADA. Board Rule 9-4 provides, "Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred." *See also, Colo. Civil Rts. Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 399 (Colo. 1997); *St. Croix v. Univ. of Colo. Health Sciences Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007).

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

If the employee establishes a *prima facie* case of retaliation in violation of CADA, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for its actions. *McDonnell Douglas v. Green*, 411 U.S. 792, 806 (1973); *Cone v. Longmont United Hosp. Ass'n*,

14 F.3d 526, 529 (10th Cir. 1994). If the employer states a legitimate, non-retaliatory reason for its actions, judgment for the employer is warranted unless the employee can show that the proffered reason was actually a pretext for retaliation. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002).

A. Complainant's Allegations of Age Discrimination Were Not Protected Opposition to Alleged Discrimination Because Complainant Did Not Have a Good Faith Belief that Respondent Violated CADA

Complainant alleges that Respondent retaliated against her because she objected to Ms. Wagoner's treatment of Carol Kromer, a member of the class protected by the age provision of CADA, on April 8, 2015. Opposition to conduct made unlawful by CADA is protected if based on a good faith belief that CADA has been violated, even if that belief is mistaken. *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984).

Complainant failed to establish that she harbored a good faith belief that Ms. Wagoner's purported objectionable treatment of Ms. Kromer constituted discrimination on the basis of age in violation of CADA. Despite many opportunities to raise the issue of age discrimination after April 8, 2015, Complainant did not allege that her objection to the treatment of Ms. Kromer constituted opposition to age discrimination until a full six months later, when Complainant's newly-retained attorney in October 2015 filed a pleading that asserted, for the first time, that Complainant's objection to Ms. Wagoner's treatment of Ms. Kromer on April 8, 2015 constituted opposition to age discrimination.

Complainant's initial objection in the form of an email to Parole Board Chair Shaffer, did not mention that Complainant believed that Ms. Wagoner's treatment of Ms. Kromer constituted age discrimination. Complainant did not mention age at all. Nor did she mention age in the subsequent grievance she submitted on May 28, 2015, claiming retaliation and a hostile work environment. Similarly, Complainant did not mention age as the basis for her allegations of retaliation arising from her objection to Ms. Wagoner's treatment of Ms. Kromer in the petition for hearing she filed with the Board on July 1, 2015.

On August 7, 2015, Complainant submitted a grievance contesting the corrective action given to her by Ms. Wagoner on July 31, 2015 for allegedly responding in a hostile, aggressive, insulting and insubordinate manner towards Ms. Murphy during telephone conferences. This August 7th grievance does not mention any form of unlawful discrimination. On August 10, 2015, Complainant filed another grievance, alleging that Ms. Murphy deliberately misrepresented the nature of the phone calls between her and Complainant, that Ms. Murphy was untrustworthy and a liar, and that Ms. Murphy's employment should be terminated. This August 10th grievance does not mention any form of discrimination made unlawful under either Title VII or CADA. Pursuant to the Board's preliminary review of Complainant's July 1, 2015 petition for hearing, Complainant filed her Information Sheet on September 14, 2015. There, she made no mention of age discrimination or retaliation for opposing age discrimination.

It was not until October 13, 2015, after Complainant retained an attorney and he filed a Rebuttal to Respondent's Information Sheet, that Complainant claimed retaliation for opposing age discrimination. In that Rebuttal, Complainant alleges, "Complainant will testify that she believed in good faith that Ms. Wagoner was discriminating against Ms. Kromer because of Mr. Kromer's age" Significantly, Complainant rarely mentions retaliation for opposing the purported age discrimination to which Ms. Kromer was subjected on April 8, 2015 in the multitudinous grievances and Board filings in the subsequent three years. At hearing,

Complainant made little to no attempt to establish her good faith belief that Ms. Wagoner discriminated against Ms. Kromer on the basis of age in violation of CADA.

Complainant failed to meet her burden to establish by a preponderance of the evidence that she held a good faith belief that her objection to Ms. Wagoner's treatment of Ms. Kromer on April 8, 2015 was opposition to age discrimination prohibited by CADA. Therefore, Complainant has failed to establish the first prong of a *prima facie* case of retaliation in violation of CADA. Accordingly, her retaliation claim pursuant to CADA fails.

B. Even If Complainant Had Established a *Prima Facie* Case of Retaliation in Violation of CADA, She Failed to Establish That Respondent's Purported Legitimate, Non-Retaliatory Reasons for Its Actions Were a Pretext for Retaliation

At hearing, Respondent provided legitimate, non-retaliatory reasons for the adverse actions taken against Complainant, including Mr. Morales' decision to terminate Complainant's employment on September 7, 2017. Complainant provided no persuasive evidence that these reasons were a pretext for retaliation arising from Complainant's alleged protected activity in purportedly opposing age discrimination violative of CADA. Accordingly, even if Complainant successfully stated a *prima facie* case of retaliation under CADA, which she was unable to do, her claim would still fail due to her inability to demonstrate that Respondent's actions were a pretext for retaliation.

CONCLUSIONS OF LAW

1. Complainant committed the act 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 retaliate against Complainant in violation of the Colorado State Employee Protection Act.
5. Respondent did not retaliate against Complainant in violation of the Colorado Anti-Discrimination Act.

ORDER

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

Dated this 31st day
of December 2018,
at Denver, Colorado



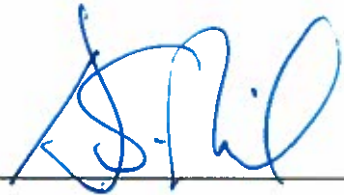
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 31st day of December 2018, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Mark S. Bove, Esq.
730 Seventeenth Street, Suite 635
Denver, CO 80202
msbove@aol.com

Stacy L. Worthington, Esq.
Jack Patten, III, Esq.
Senior Assistant Attorneys General
1300 Broadway, 10th Floor
Denver, CO 80203
Stacy.Worthington@coag.gov
Jack.Patten@coag.gov



APPENDIX A

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED:

A, B, E, G, H, I, K, L, M, N, O, P, Q, R, S, V, W, X, Y, AA, BB, GG, HH

RESPONDENT'S EXHIBITS ADMITTED:

6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 38, 39, 41, 42, 46, 47, 48, 49, 50, 51

RESPONDENT'S EXHIBITS OFFERED BUT NOT ADMITTED:

2

APPENDIX B

Complainant's Petitions for Hearing Filed with the State Personnel Board

State Personnel Board Case No. 2016G001(C), consolidating petitions filed on July 1, 2015, November 9, 2015, March 3, 2016 and May 12, 2016

July 1, 2015 Petition for Hearing

On July 1, 2015, Complainant filed a petition for a hearing with the Board (**July 1, 2015 petition**), alleging what she characterized as “discriminatory harassment,” and that the final grievance decision constituted discrimination. However, Complainant failed to specify the nature of the discrimination alleged, e.g., age discrimination, sex discrimination, etc. After Complainant waived a CCRD investigation, the parties submitted information sheets and replies. On October 13, 2015, Complainant, having retained an attorney to represent her in this matter, filed a Rebuttal to Respondent's Information Sheet. In her Rebuttal, Complainant alleged, for the first time, that the basis for her claim was age discrimination against a co-worker, to which Complainant objected. In her Rebuttal, Complainant alleged that:

In this case, Complainant clearly complained about Ms. Wagoner's abusive treatment of Ms. Kromer on April 8, 2015. She expressed her dismay, as a new employee of Respondent, that a supervisor – a person in a position of authority – berated and belittled a subordinate employee in the presence of that subordinate's peers. Complainant will testify that she believed in good faith that Ms. Wagoner was discriminating against Ms. Kromer because of Mr. Kromer's age and was retaliating against Ms. Kromer because she was looking for another job with another State agency.

The preliminary review of Complainant's July 1, 2015 petition was stayed, along with Complainant's subsequent petitions for hearing, while issues of consolidation and information sheets and replies were filed and considered.

November 9, 2015 Petition for Hearing

On November 9, 2015, Complainant filed another petition for hearing with the Board (**November 9, 2015 petition**), appealing Warden Medina's Step Two grievance decisions to the extent they denied Complainant complete relief, as well as appealing her October 27, 2015 interim performance review and alleging an “abusive retaliatory environment. I believe the retaliation is for my filing grievances and a Board appeal.” Complainant did not check the box indicating discrimination but she did check the box indicating that the final grievance decision constituted “Discrimination – Retaliation.”

The ALJ consolidated this petition with Complainant's July 1, 2015 petition on December 17, 2015.

On December 22, 2015, the Board referred Complainant's November 9, 2015 petition to the CCRD to investigate Complainant's discrimination claims. On December 31, 2015, Complainant filed a waiver of the CCRD investigation of her November 9, 2015 petition.

On February 9, 2016, Complainant filed her Information Sheet addressing her November 9, 2015 petition. In her Information Sheet, Complainant alleged retaliation based on opposition activity, specifically, that Complainant's objection to Ms. Wagoner's treatment of Ms. Kromer was opposition to perceived age discrimination, and that the confirming memoranda that were subsequently issued and the corrective action given to her were acts of retaliation arising from Complainant's opposition to the treatment of Ms. Kromer.

Respondent filed its Information Sheet on February 19, 2016, arguing that Complainant failed to state a *prima facie* case of age discrimination, failed to establish a viable claim of retaliation because either there were no adverse actions still at issue or there were legitimate, non-retaliatory reasons for those actions.

March 3, 2016 Petition for Hearing

On March 3, 2016, Complainant filed her third petition for hearing with the Board, accusing Ms. Murphy, Mr. Morales and Ms. Wagoner of continued "unlawful discrimination, retaliation, harassment, filing a false report for work place violence ... a hostile work environment, age discrimination, falsifying facts, and bait and switch." This petition was rendered moot because the grievance process had not been completed, and Complainant's subsequent petition, filed with the Board on May 12, 2016, superseded the March 3, 2016 petition.

May 12, 2016 Petition for Hearing

On May 12, 2016, Complainant filed with the Board a fourth petition for hearing, alleging age discrimination, unlawful discrimination, retaliation, targeting, falsifying facts for self gain, bait and switch, harassment, hostile work environment, discrimination in a final agency grievance decision, and "Forced Resignation (upcoming R 6-10)" (**May 12, 2016 petition**). On May 25, 2016, the ALJ issued an Order Consolidating Complainant's May 12, 2016 Petition with this Case, 2016G001(C), and granting the parties leave to file any additional information not already filed that specifically addressed the May 12, 2016 petition. On June 8, 2016, Respondent filed Additional Information and Documentation for Consideration, which included 29 exhibits comprising approximately 540 pages. Complainant did not file any additional information.

The Preliminary Recommendation in Case No. 2016G001(C) and the Board Order

On November 2, 2016, the ALJ issued his Preliminary Recommendation in Case No. 2016G001(C), recommending that the Board not grant a hearing on Complainant's age discrimination claim and her hostile work environment claim. However, the ALJ recommended that the Board grant Complainant a hearing on her retaliation in violation of the Colorado Anti-Discrimination Act claim, writing, "Although it may be difficult for Complainant to make that argument [that her objection to Ms. Wagoner's treatment of Ms. Kromer on April 8, 2015 was protected opposition to age discrimination] convincingly if this matter goes to hearing because of her failure to mention age discrimination in any grievance or Board filing prior to her rebuttal to Respondent's Information Sheet, filed six months after her alleged protected activity, the fact remains that as of October 13, 2015, Complainant was on record as having opposed what she says she viewed as age discrimination.

The Board considered the Preliminary Recommendation at its regularly scheduled meeting on November 15, 2016. With only four Board members in attendance, the Board did not obtain sufficient votes to grant the hearing solely on the issue of retaliation, and effectively denied Complainant's petition for hearing, issuing its Order on November 17, 2016.

Complainant appealed the Board's Order to the Colorado Court of Appeals. On March 22, 2018, the Court issued its order affirming the Board order.

State Personnel Board Case No. 2017G040

On September 16, 2016, Complainant filed her petition for hearing with the Board alleging age discrimination, hostile work environment, harassment, retaliation, unlawful discrimination after reporting an offensive environment, and objecting to the final grievance decision.

Pursuant to the Board's Notice of Preliminary Review, Complainant filed her Information Sheet on March 27, 2017. In her Information Sheet, Complainant addressed only one claim – her claim of retaliation for protected activity in opposing alleged unlawful discrimination.

Respondent filed its Information Sheet on April 6, 2017, arguing that Complainant did not have a viable claim of retaliation and Complainant waived all other claims because she did not address them in her Information Sheet.

The Preliminary Recommendation in Case No. 2017G040 and the Board Order

On June 9, 2017, the ALJ issued his Preliminary Recommendation that the Board deny Complainant's petition for hearing, finding that Complainant failed to establish that she was the subject of any adverse action and that she failed to demonstrate a causal connection between her purported protected activity and the actions she characterized as adverse.

On June 20, 2017, the Board considered the Preliminary Recommendation and upheld it. On June 21, 2017, the Board issued its order denying Complainant's petition for hearing.

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 Rule 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 8-67, 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 of receipt of the decision. 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.