STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2018B019**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DIANE RICCI,
Complainant,

v.

DEPARTMENT OF MILITARY AND VETERAN'S AFFAIRS, DIVISION OF VETERAN AFFAIRS,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on February 16, 2018, and the evidentiary hearing on May 22-25, 2018, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. Complainant appeared through her attorneys, Brooke Meyer and Kaitlin Spittell. Respondent appeared through its attorney, Eric Freund, Senior Assistant Attorney General. Respondent's advisory witness was Ben Mestas.

The record was closed on June 6, 2018, after the exhibits were reviewed and redacted for inclusion in the record. The following exhibits were admitted into evidence: Complainant's Exhibits A, B, D, E, G, H, I, J, S, U, V, X, CC, DD, FF, GG, HH, II, KK, PP, QQ, TT, UU, WW, DDD, FFF, GGG, III, JJJ, KKK, and Respondent's Exhibits 4, 5, 7, 9, 13, 14, 15, 16, 17, 23, 24, 26, 29.

MATTER APPEALED

Complainant, a certified employee, filed an appeal with the State Personnel Board (Board) on October 26, 2017. Complainant seeks review of a Performance Discussion and Documentation form and Corrective Action / Performance Improvement Plan she received on October 20, 2017, removing her supervisory responsibilities and reassigning her to a new work location with different duties. Complainant argues that these actions constitute a disciplinary demotion that was arbitrary, capricious and contrary to rule or law. Complainant further argues that Respondent's action was motivated by discrimination on the basis of gender and military status,[1] as well as retaliation directed against her as a whistleblower in violation of the State Employee Protection Act, § 24-50.5-101, *et seq.*, C.R.S. (Whistleblower Act). Complainant seeks reassignment to her former position.

Respondent argues that its October 20, 2017 actions do not constitute discipline. If these action are determined to be disciplinary, Respondent argues that they were justified by Complainant's performance problems. Respondent denies that it discriminated or retaliated against Complainant. Respondent seeks denial and dismissal of Complainant's appeal, discrimination claims and whistleblower complaint.

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[1] On her appeal form, Complainant also claimed discrimination on the basis of religion/creed. Complainant subsequently withdrew that claim and it was dismissed by the ALJ.

For the reasons discussed below, Respondent's actions do not meet the Board's definition of discipline, and were not motivated by discrimination or retaliation. Therefore, Respondent's actions are **affirmed.**

ISSUES

1. Did Respondent impose discipline on Complainant on October 20, 2017? If so, (a) did Complainant commit the acts for which she was disciplined? (b) was Respondent's actions arbitrary, capricious, or contrary to rule or law?

2. Did Respondent discriminate against Complainant on the basis of gender or military status?

3. Did Respondent retaliate against Complainant in violation of the Whistleblower Act?

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

FINDINGS OF FACT

Complainant's Employment History

1. Since May 11, 2005, Complainant has served as a military chaplain and currently serves in the Army Reserve. She has earned the rank of Lieutenant Colonel. Complainant also holds four degrees, including Master of Divinity, Doctor of Ministry and Master of Business Administration.

2. On April 16, 2012, Respondent Department of Military and Veterans Affairs (DMVA) hired Complainant as a General Professional (GP) III. (Stipulated fact.[2])

3. Complainant worked in Respondent's Division of Veterans Affairs (DVA) as a Veterans Service Officer (VSO). VSOs inform, counsel and advocate for veterans and other eligible persons concerning claims arising from military service. VSOs also assist claimants in obtaining federal and state benefits.

4. DVA's main office is located at 1355 Colorado Boulevard in Denver. DVA also has an office at the U.S. Department of Veterans Affairs' regional office in Lakewood. The Lakewood office is used by VSOs representing claimants in benefits appeals. Prior to October 20, 2017, VSOs took turns reporting to the Lakewood office to handle benefits appeals.

5. Respondent certified Complainant into the GP class effective May 1, 2013.

6. In 2014, Reuben Mestas promoted from Deputy Director to Director of DVA. Mr. Mestas' Deputy Director position became available, and Mr. Mestas invited Complainant to apply.

7. Complainant applied, and was selected, for the DVA Deputy Director position vacated by Mr. Mestas. As a result, Complainant promoted from GP III to GP IV. On October 31, 2014, Complainant signed a form acknowledging that she received a copy of the position description

[2] The parties stipulated to certain facts, which are indicated with this parenthetical note.

(PDQ) for her new position. Complainant's working title for this promotional move was "Deputy Director/Veterans Program Manager."

8. On May 1, 2015, Tamy Calahan, Respondent's Director of Human Resources (HR), notified Complainant that she "satisfactorily completed [her] trial period" and was "certified as a Deputy Director VA."

9. In Complainant's position as Deputy Director, she reported to Mr. Mestas. (Stipulated fact.)

10. At all relevant times herein, Complainant's Appointing Authority was Michael Hunt, Deputy Executive Director of DMVA. Mr. Mestas reports to Mr. Hunt.

11. Mr. Hunt retains the authority to make decisions concerning potential discipline of DVA employees. Mr. Mestas has the authority to provide non-disciplinary counselings, warnings or corrective actions to DVA employees.

12. As Deputy Director, Complainant supervised four administrative staff, who were Administrative Assistant IIs. She also performed VSO duties, served as a work lead for the other VSOs, and was responsible for filling in for Mr. Mestas when he was unavailable.

13. Complainant has received consistently satisfactory overall performance evaluations throughout her employment at DVA.

14. In her performance evaluation for April 1, 2014 – March 31, 2015, Complainant earned "high marks" for her handling of appeals and an overall satisfactory performance rating. Mr. Mestas gave Complainant only one "Needs Improvement" rating under the Core Competency of Interpersonal Skills, concerning her ability to "treat others with respect." Mr. Mestas noted that he counseled Complainant "on improving her interpersonal skills to improve and maintain smooth working relations with her co-workers and to promote office harmony."

15. In her performance evaluation for April 1, 2015 – March 31, 2016, Complainant again earned an overall satisfactory performance rating. Mr. Mestas noted that she needed improvement in maintaining confidentiality, explaining:

> Diane needs to work to keep personnel issues of those of her administrative staff between herself and myself. In the past 6 months she has discussed the status of members of staff that fall under her direction within ear shot of other members of the administrative staff and has fostered a situation of undue stress in the office. In another situation she shares with the staff the status of an individual undergoing an administrative review with information she was only privy to. This causes the staff to question if they are in the same situation, would their information be shared with the other members of the staff.

16. In Complainant's 2015-2016 evaluation, Mr. Mestas also found that Complainant needed improvement in her ability to "promote cooperation and teamwork" and "build trust and work with integrity." Mr. Mestas explained:

> Over the course of the last year Diane was verbally counseled on creating a hostile work environment for another member of the staff. She has been told that she does not directly supervise this member and she should stop. She was also told that if another member of the staff approached her that she was to direct that member to me.

17. In 2016, Respondent deconsolidated the GP class series and reassigned all employees in the class to new classes. Complainant's position was moved into the Social Services Specialist (SSS) series. Respondent changed Complainant's position classification from GP IV to SSS IV. However, a new PDQ was not created, and Complainant's duties as Deputy Director remained the same.

18. Following this deconsolidation, DVA operated with six SSS IIIs who worked as VSOs and Complainant, who was the only SSS IV. DVA also employed four administrative assistants.

19. In her performance evaluation for April 1, 2016 – March 31, 2017, Complainant earned an overall satisfactory performance rating. Mr. Mestas did not identify any areas as needing improvement and noted: "Diane has demonstrated an improvement in her interpersonal skills to improve and maintain smooth working relations with her co-workers and to promote office harmony. She has made it her personal commitment to ask, listen and care about the personal lives of her co-workers and those employees she has direct supervision over."

20. In June 2017, Complainant's monthly base pay was $5,005.00. (Stipulated fact.)

21. Respondent raised Complainant's base pay to $5,131.00, effective for pay earned in July 2017. (Stipulated fact.)

22. Complainant received base pay of $5,131.00 on 7/31/2017, 8/31/2017, 9/29/2017, 10/31/2017, 11/30/2017, 12/29/2017, 1/31/2018, 2/28/2018, 3/30/2018, and 4/30/2018. (Stipulated fact.)

Complainant's Concerns About F1's[3] Time Reporting

23. F1 was an SSS III working as a VSO in the DVA. Since at least 2015, F1 had recurring issues with tardiness and time reporting.

24. Respondent's policy concerning time sheets requires that time records be maintained for both exempt and non-exempt employees, per the Fair Labor Standards Act (FLSA). All employees are required to submit accurate time sheets to Respondent's Human Resources office, and those time sheets must be approved by their supervisors. Respondent's policy provides, in pertinent part:

> Time sheets must be certified by both the employee and the supervisor as to the accuracy of time worked and the reason for time away from work. Supervisors should not sign timesheets that do not accurately reflect the time an employee was present and working, nor should they approve timesheets that do not accurately depict the reason for leave … Supervisors should also refrain from certifying time sheets that are not consistent with DMVA or State Personnel Rules… (Paragraph D.2).

25. Respondent's time sheet policy also provides:

> Time sheets should record time worked in 15-minute units (rounded to the nearest quarter hour). An employee shall not be required to start early or leave late by less than 7 ½ minutes in order to avoid paying for the 15-minute unit. (Paragraph D.5.a).

[3] To protect the privacy of non-parties, two female VSOs are identified as F1 and F2.

26. When Mr. Mestas was unavailable, Complainant, as Deputy Director, was responsible for reviewing and certifying employees' time sheets.

27. Beginning in November 2014 and continuing through April 2017, Complainant communicated her concerns to Mr. Mestas that F1 was chronically late to work and did not seem to be working all of her scheduled hours. Complainant was also concerned that F1 took a lot of time off.

28. Mr. Hunt had an informal policy or "unwritten rule" that, if employees arrived at work 5-10 minutes late, they simply needed to stay later to ensure that they were working the proper amount of hours. If an employee was unable to work their full scheduled hours, they would have to take leave. Mr. Hunt informed Mr. Mestas of this policy, and left it up to Mr. Mestas to determine an employee's schedule and how an employee could make up missed time. Complainant was not aware of this policy.

29. On May 3, 2017, Complainant informed Mr. Mestas that she could not approve F1's April 2017 time card because she had concerns about the hours F1 reported versus the hours she actually worked. HR Director Calahan confirmed that Complainant should not sign a time card if she could not verify the hours reported on that card.

30. Mr. Mestas counseled F1 a number of times about chronic tardiness and time card discrepancies.

Reassignment of Complainant's Duties and Work Location

31. In September 2017, four of the six SSS IIIs working as VSOs, including F1, resigned. These resignations left DVA short staffed, with only Complainant and two other SSS IIIs (James Poteet and a female VSO identified as F2) available to assist veterans and their families with claims.

32. Josh Gates was one of the SSS IIIs who resigned in September 2017. During the year and a half he worked for DVA, Mr. Gates observed that Mr. Mestas and Complainant had a tense, "fractured" relationship.

33. Before Mr. Gates left the DVA, he recommended to Mr. Mestas that someone take over the appeals at the Lakewood office. Mr. Gates told Mr. Mestas that Complainant "was best suited" to take over those hearings, as "she has a lot of knowledge and can make an argument." In contrast, Mr. Gates believed that the two remaining SSS IIIs, Mr. Poteet and F2, would not be able to handle the hearings as well as Complainant.

34. Ms. Calahan conducted formal exit interviews of the four departing SSS IIIs. During those interviews, several of the SSS IIIs alleged that Complainant and F2 engaged in bullying and harassing behavior. They also alleged that Mr. Mestas was often not present or actively engaged in the VSA office environment. Ms. Calahan shared these concerns with Mr. Hunt, without identifying specific details about the allegations or who made them.

35. On October 17, 2017, Mr. Hunt issued a Corrective Action to Mr. Mestas "for willful failure to perform competently based on [his] inability to engage in effective leadership." Mr. Hunt noted that the majority of the DVA's VSOs resigned their employment in September, citing "issues with [Mr. Mestas'] management of the operation ... as the primary factor in their departure." Mr. Hunt directed Mr. Mestas to develop a written plan for the short-staffed DVA to move

forward, and to issue written reprimands to Complainant and F2 for their harassment of co-workers.

36. Mr. Mestas decided to follow Mr. Gates' suggestion to assign appeals at the Lakewood office to Complainant. Mr. Mestas considered Complainant to be a "rock star" who had the most experience of the three remaining VSOs. Because of the harassment allegations, Mr. Mestas also wanted to separate Complainant from F2.

37. On October 20, 2017, Mr. Mestas issued two documents to Complainant titled "Performance Discussion & Documentation Form" (Performance Discussion) and "Corrective Action / Performance Improvement Plan" (CA/PIP). (Stipulated fact.)

38. The Performance Discussion identified the situation to be discussed as: "Office bullying ongoing while serving as Deputy Director and failure to correct herself when verbally counseled by Director. Undermine authority of Director to fellow employees." The following "Actions/Solutions" were listed:

> Removed as a work leader and placed as a staff authority in the appeals section of Division with the title of Appeals Specialist. Will be monitored on a monthly basis with followup counseling as well as impact on core interpersonal skills during evaluation.

The Performance Discussion identifies the following "consequences to employee if situation continues": "Failure to correct your actions will result in further corrective and or disciplinary action."

39. The CA/PIP described the following "corrective action":

> Relocate to ... Regional Office Immediately and serve as a Social Services Specialist IV with focus on Appeals as a staff authority. You will no longer be classified as a work leader or have control over the continual work product of others. I will meet with you on a monthly basis to review your progress...

40. The October 20, 2017 CA/PIP required Complainant to meet with a member of the Colorado State Employee Assistance Program (C-SEAP) to seek classes to relieve stress and workplace conflicts. Mr. Mestas and Complainant agreed that Complainant could see a private counselor. (Stipulated fact.)

41. The SSS IV classification requires that an incumbent be either a work leader or a staff authority. Designating Complainant as a staff authority and removing her work leader duties did not affect Complainant's SSS IV classification.

42. Mr. Mestas asked Complainant what she wanted her new working title to be. She suggested "Appeals Management Specialist," and Mr. Mestas agreed. Complainant was provided with new business cards, which identified her work location in Lakewood and her title as "Appeals Management Specialist."

43. Mr. Mestas ordered Complainant to clear out her office at the Colorado Boulevard location by October 31, 2017.

44. The CA/PIP advised Complainant: "If you wish to protest this action, you may initiate the grievance process."

45. Complainant did not grieve the Performance Discussion or the CA/PIP. Instead, she timely filed an appeal directly with the Board.

46. Mr. Mestas also issued a CA/PIP to F2 on October 20, 2017, instructing her to "cease office bullying" and to meet with C-SEAP "to seek classes to relieve stress and workplace conflicts." Mr. Mestas instructed F2 that she would no longer handle any appeals at the Lakewood regional office, and should focus on work assignments at the Colorado Boulevard office.

47. Complainant started her new duties at the regional office in Lakewood on October 23, 2017. (Stipulated fact.)

48. On October 30, 2017, Mr. Mestas sent an email to DVA employees with the subject line "staff changes," stating: "Mickey Hunt has approved my action plan that I proposed for the future of the Division, so effective November 1, the following actions will occur." Mr. Mestas explained that Respondent "will announce for three positions for [VSOs] who will be processing claims" and one VSO "to focus on Outreach and Training." Mr. Mestas stated that Complainant "will be working exclusively on appeals, so do not send her any claims work." He also stated that Mr. Poteet "will service [sic] as acting Deputy Director."

49. Mr. Mestas did not have the authority to appoint Mr. Poteet as the acting Deputy Director. When Mr. Hunt learned of Mr. Mestas' appointment of Mr. Poteet as acting Deputy Director, he "put a stop to it." Mr. Poteet was acting Deputy Director for approximately one week.

50. On or about November 9, 2017, Mr. Hunt instructed Mr. Mestas that, while everyone's duties should be temporarily altered to cover the necessary work as long as DVA was short staffed, no one should be placed in an acting Deputy Director position.

51. In the current staff contact list, Complainant is identified as an "Appeals Specialist" working at the Lakewood office as of December 2017. Five "Service Officers" are listed as working at the Colorado Boulevard office as of April 2018, including Mr. Poteet, who is not identified as a Deputy Director.

52. Mr. Hunt was not initially aware that any of Complainant's duties were removed. However, Mr. Hunt wanted to eliminate the Deputy Director position ever since 2015, because it caused employees confusion about who their supervisor was. Mr. Hunt wanted to split the Division Director's duties in half, and create two Director positions – one for the eastern, and one for the western, parts of the state.

53. On April 1, 2018, Mr. Hunt temporarily appointed his strategic planner, David Callahan, as the acting western Division Director, based in Grand Junction. Mr. Hunt selected Mr. Callahan for this temporary position because he knew that Mr. Callahan would not want to apply for this permanent position when it was posted. Mr. Mestas currently serves as the eastern Division Director.

54. In her performance evaluation for April 1, 2017 – March 31, 2018, Complainant earned an overall satisfactory performance rating. Mr. Mestas noted that she was counseled "in October 2017 on interoffice relations and impacts on the workplace. The past 6 months since residing at the RO[4] she has been exemplary. Clearly the RO assignment allows Diane to perform at

[4] "RO" refers to the Lakewood Regional Office, where Complainant was transferred on October 20, 2017.

her best." Mr. Mestas also noted that Complainant "has served the division well as an appeals specialist. She is knowledgeable and I have heard nothing but praise for her endeavors."

55. Complainant is still working as a certified employee under the October 31, 2014 PDQ that identifies her classification as a GP IV and her working title as "Deputy Director/Veterans Program Manager."

56. Respondent has not limited Complainant's ability to transfer or promote. Her pay, seniority and accrued years of service with Respondent have not been affected.

ANALYSIS

I. COMPLAINANT'S DECISION NOT TO GRIEVE THE PERFORMANCE DISCUSSION AND CA/PIP DOES NOT DEPRIVE THE BOARD OF JURISDICTION TO REVIEW COMPLAINANT'S APPEAL.

Pursuant to § 24-50-123(1), C.R.S., the Board has promulgated rules concerning grievance procedures. Board Rule 8-5 provides: "A permanent employee may grieve matters that are not subject to appeal or review by the Board or Director." Board Rule 8-6 provides that employees may petition the Board for discretionary review of final grievance decisions.

Respondent argues that Complainant's failure to grieve the October 20, 2017 Performance Discussion and CA/PIP deprives the Board of jurisdiction to consider her appeal. Complainant alleges that these actions constituted a disciplinary demotion. Section 24-50-125(3), C.R.S., provides that a certified employee who has been disciplined is entitled to an evidentiary hearing. The statute does not require that a certified employee pursue a grievance prior to appealing a disciplinary action to the Board. In fact, § 24-50-123(2), C.R.S., provides: "Matters arising under [section] 24-50-125 ... shall not be subject to a grievance procedure under this section." Therefore, the Board has jurisdiction to determine whether the Performance Discussion and CA/PIP constituted a disciplinary action, and if they did, whether such discipline was arbitrary, capricious or contrary to rule or law.

The Board also has jurisdiction to review Complainant's claims of discrimination under § 24-50-125.3, C.R.S. This statute does not require an employee to pursue a grievance prior to requesting a hearing before the Board to review discrimination claims. Similarly, Board Rule 8-25 provides that an employee may file a petition for hearing directly with the Board within ten days of an alleged discriminatory action.

Finally, the Board has jurisdiction to review Complainant's whistleblower complaint under § 24-50.5-104, C.R.S. Again, this statute does not require an employee to pursue a grievance prior to filing a whistleblower complaint with the Board. In fact, an employee is required to file a whistleblower complaint "with the Board within 10 days after the employee knew or should have known of a disciplinary action that allegedly violates the Whistleblower Act." Board Rule 8-20.

Under these statutes and Rules, Respondent's position does not have merit. The Board has jurisdiction to review Complainant's appeal in the absence of a grievance.

II. RESPONDENT'S ASSIGNMENT OF COMPLAINANT TO THE LAKEWOOD OFFICE TO MANAGE APPEALS DID NOT CONSTITUTE DISCIPLINARY ACTION.

Complainant argues that Mr. Mestas' removal of Complainant's supervisory and work lead duties, and reassignment to the Lakewood office to handle appeals, constituted a disciplinary demotion. Board Rule 6-12 defines disciplinary action in the state classified system:

> Disciplinary actions may include, but are not limited to: an adjustment of base pay to a lower rate in the pay grade; base pay below the grade minimum for a specific period not to exceed 12 months; prohibitions of promotions or transfers for a specified period of time; demotion; dismissal; and suspension without pay, subject to FLSA provisions.

Board Rule 6-11 defines corrective, as distinguished from disciplinary, action:

> Corrective action is intended to correct and improve performance or behavior and does not affect current base pay, status, or tenure. It shall be a written statement that includes the areas for improvement; the actions to take; a reasonable amount of time, if appropriate, to make corrections; consequences for failure to correct; and a statement advising the employee of the right to grieve and the right to attach a written explanation.

The term "demotion" is not specifically defined in either the Board Rules or the Personnel Director's Administrative Procedures. However, Board Rule 1-55.1 defines a "*Non-disciplinary* Demotion" as "[a]n appointment which is a *voluntary* change to a class with a lower pay range maximum" (emphasis added). From this definition, it logically follows that a *disciplinary* demotion involves an *involuntary* change to a class with a lower pay range maximum. Because Complainant was not appointed to a class with a lower pay range maximum, Mr. Mestas' actions did not constitute a disciplinary demotion.

Mr. Mestas' reassignment of Complainant's duties and work location does not otherwise meet Board Rule 6-12's definition of "disciplinary action." Complainant's base pay has not been affected. No evidence was offered establishing that Complainant has been deprived of the ability to transfer or promote. To the contrary, Mr. Hunt confirmed that Complainant was able to apply for the new Western Director position, once it is posted.

Complainant remains a certified employee, so her status, as defined by Board Rule 1-73, has not been affected. Similarly, there is no evidence that any of Complainant's rights, which vested by virtue of her certified status, seniority, and years of service, have been affected. *See* Board Rule 1-75. Mr. Hunt, as Complainant's appointing authority, has the power to define her job, assign her to a position, and determine her work location. *See* Administrative Procedure 1-9. Therefore, considering these Rules and Procedures as a whole, changing Complainant's work assignments and location, by itself, does not constitute disciplinary action.

Further, Mr. Mestas' inartful crafting of the CA/PIP does not convert it to a disciplinary action. The preponderance of the evidence establishes that Mr. Mestas was doing his best to comply with Mr. Hunt's directions. Mr. Hunt instructed Mr. Mestas to issue a written reprimand to Complainant. At the same time, Mr. Mestas was facing a severe staffing shortage and needed to figure out how to best handle the appeals at the Lakewood office and the VSOs' work at the Colorado office. Mr. Hunt ordered Mr. Mestas to develop a written plan to accomplish these goals.

Mr. Mestas decided that Complainant, as an SSS IV with the most knowledge and experience, was best suited to take over the appeals at the Lakewood office. Even though Mr. Mestas removed Complainant's supervisory duties, he intended to protect Complainant's classification by designating her as a staff authority. As a result, neither Complainant's status nor her tenure has been affected.

In its trial brief, Respondent argues that Complainant's current assignment constitutes a transfer from one position to another in the same job class, as defined in Board Rule 1-76.1. However, no PDQ has been issued for Complainant's new position, and she continues to work under her 2014 PDQ. Mr. Hunt characterized Complainant's reassignment as "temporary." Board Rule 1-56 defines a "non-permanent position" as "[a] position established for a nine-month period or less. It may be a full-time or part-time work schedule. Synonymous with temporary." In contrast, a "permanent position" is defined by Board Rule 1-61 as "[a] position that is carried on the staffing pattern in excess of nine months or on an annual, seasonal basis."

To date, Complainant's current assignment has not exceeded nine months. If Complainant's placement in her current position exceeds nine months, under Administrative Procedure 2-7, the appointing authority is responsible for providing an accurate job description to Respondent's human resources office and Complainant, so that the position may be allocated to the proper class. In addition, under Administrative Procedure 2-7(A)(1), Complainant may request an evaluation of her position.

The preponderance of the evidence establishes that Respondent's reassignment of Complainant to the Lakewood office to handle appeals was within Respondent's authority under Administrative Procedure 1-9. This reassignment did not constitute disciplinary action subject to review by the Board under § 24-50-125(3), C.R.S.

III. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT.

Complainant's original appeal claimed that Respondent's treatment of her constituted discrimination on the basis of her military status. However, Complainant offered no evidence or argument concerning how she was discriminated against because of her military status. Therefore, this claim is considered abandoned.

Complainant also alleged that Respondent discriminated against her on the basis of gender. The Colorado Anti-Discrimination Act (CADA) provides, in pertinent part: "It shall be a discriminatory or unfair employment practice ... [f]or an employer ... to ... demote ... or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of ... gender ..." § 24-34-402(1)(a), C.R.S. 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."

To establish a *prima facie* case of discrimination in employment on the basis of gender, Complainant must demonstrate that: (1) she belongs to the protected class, (2) she was qualified for the job at issue, (3) she suffered an adverse employment decision despite her qualifications, and (4) all the evidence in the record supports or permits an inference of unlawful discrimination. *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 297 (Colo. 2000), citing *Colorado Civil Rights Comm'n v. Big O Tires*, 940 P.2d 397, 400-01 (Colo. 1997). As a female, Complainant belongs to a protected class on the basis of her gender. Complainant's consistent satisfactory performance evaluations establish that she was qualified for the job she held. Thus, Complainant

has met the first two elements of a *prima facie* case of discrimination on the basis of gender.

Concerning the third element, federal case law provides a helpful definition of an "adverse employment action" within the context of federal anti-discrimination statutes. The Tenth Circuit has defined "adverse employment action" as an action that carries a "significant risk of humiliation, damage to reputation, **and** a concomitant harm to future employment prospects." *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (emphasis added). The Tenth Circuit emphasized that "a mere inconvenience or an alteration of job responsibilities" does not constitute an "adverse employment action." *Id.* The U.S. Supreme Court has explained that an "adverse employment action" involves "a significant change in employment status, such as ... reassignment with significantly different responsibilities..." that are "materially adverse." *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761 (1998). The Tenth Circuit has further refined this definition to exclude employment actions that have a "de minimis impact upon employees' future job opportunities." *Hillig v. Rumsfeld,* 361 F.3d 1028, 1032-33 (10th Cir. 2004).

While Mr. Mestas' abrupt removal of Complainant's supervisory and lead responsibilities, and her immediate transfer to the Lakewood office, caused Complainant to feel humiliated and to worry about her ability to eventually promote to the DVA Director position, there is no evidence that Mr. Mestas' actions have harmed Complainant's future job prospects. Mr. Mestas specifically replaced Complainant's supervisory duties with the designation of "staff authority," both of which are given equal weight in the SSS IV classification. Mr. Mestas also allowed Complainant to choose her new title, which was "Appeals Management Specialist." Managing benefit appeals is an important and impressive responsibility that could enhance Complainant's future job prospects. Mr. Hunt confirmed that Complainant was welcome to apply for the western Division Director position he was establishing in Grand Junction. The preponderance of the evidence establishes that Mr. Mestas' reassignment of Complainant did not constitute an adverse employment action. Thus, Complainant has failed to establish the third element of a *prima facie* case of discrimination.

Complainant has also failed to provide evidence that supports or permits an inference of unlawful discrimination. *Id.* Complainant alleged that she was treated differently than a male employee, Mr. Poteet. Mr. Mestas did not select Mr. Poteet for transfer to the Lakewood office and designated Mr. Poteet to be the acting Deputy Director, before Mr. Hunt informed Mr. Mestas that he could not name an acting Deputy Director. Differential treatment of an employee who belongs to a protected class and another employee who does not belong to that protected class may constitute sufficient evidence of discriminatory intent. *Big O Tires*, 940 P.2d at 401-402. However, Complainant bears the burden of establishing that the employee who was treated differently was similarly situated; i.e., "similarly situated in all respects" and "subject to the same standards concerning performance, evaluation and discipline." *St. Croix v. Univ. of Colo. Health Sciences Ctr.*, 166 P.3d 230, 237 (Colo. App. 2007). If a claimant is able to show such disparate treatment, the burden of production then shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its decision. *Id.* at 399. Once the employer meets this burden of production, the Complainant must then demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination. *Id.*

In October 2017, Mr. Mestas removed Complainant's supervisory duties and her working title of Deputy Director, and transferred her to the Lakewood office to handle appeals. He then designated a male co-worker, Mr. Poteet, to serve as "acting" Deputy Director. While these actions suggest that Complainant was treated differently than a male co-worker, these two employees were not similarly situated. Complainant held the position of SSS IV, while Mr. Poteet was classified as SSS III. Complainant's performance was evaluated as a supervisor of AA IIs

and a work lead for VSOs; Mr. Poteet had no such supervisory or work lead duties. Mr. Mestas' decision was based, in part, on reports of bullying and harassment by Complainant from a number of VSOs that resigned in September 2017. Respondent did not receive any such reports concerning Mr. Poteet from departing VSOs.

In addition, Respondent has established legitimate, nondiscriminatory reasons for its differential treatment of Complainant and Mr. Poteet. Mr. Hunt instructed Mr. Mestas to develop a plan for the short-staffed VSA department to serve its clientele. Mr. Hunt also ordered Mr. Mestas to address the complaints raised in the departing VSOs' exit interviews concerning Complainant and F2. Mr. Mestas considered Mr. Gates' suggestion that Complainant was the most competent VSO to handle appeals, and decided that he needed to separate Complainant and F2. After he reassigned Complainant to the Lakewood office, Mr. Mestas believed he had to appoint someone as Deputy Director to cover for him in case of illness or other absence. He selected Mr. Poteet because he had more experience than F2, the only other VSO left in VSA. This designation was removed after approximately one week when Mr. Hunt instructed Mr. Mestas that he could not appoint an acting Deputy Director to replace Complainant in the Colorado Boulevard office.

The explanations provided by Mr. Mestas and Mr. Hunt were substantially consistent, credible and reasonable, providing legitimate, nondiscriminatory reasons for the decision to reassign Complainant. In contrast, Complainant has failed to establish that Respondent's reasons for this reassignment were pretextual. Therefore, Complainant failed to prove, by a preponderance of the evidence, that Mr. Mestes' decision to reassign her was motivated by discrimination on the basis of gender.

IV. RESPONDENT DID NOT RETALIATE AGAINST COMPLAINANT IN VIOLATION OF THE WHISTLEBLOWER ACT.

Complainant alleges that Respondent reassigned her because of her protected disclosures, in violation of the Whistleblower Act. 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 Comm'n*, 699 P.2d 960, 966 (Colo. 1985). To establish a *prima facie* violation of the Whistleblower Act, Complainant must demonstrate that she made disclosures that are "protected" under this statute, and that they were a substantial or motivating factor in the actions taken by the agency. *Id.* at 968.

For the first prong of a whistleblower claim, Complainant must show that she made a "disclosure of information," defined as "the written provision of evidence to any person, or the testimony before any committee of the general assembly, 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. To warrant protection under the Whistleblower Act, the disclosure of information must involve a matter of public concern. Disclosures that do not involve matters in the public interest or that are not of public concern do not implicate the statute. *Ferrel v. Colorado Dep't of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007).

Complainant raised a number of concerns she had about F1's chronic tardiness, her work hours and whether she was properly reporting her time. Because this communication reflects the broader public purpose of ensuring that state employees work the hours for which they are paid, it meets the definition of protected disclosures under § 24-50.5-102(2), C.R.S.

Complainant must also demonstrate that 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. If Complainant makes a disclosure about a matter of public concern to one of these persons or entities, a single disclosure is sufficient to satisfy the requirements of the Whistleblower Act. *Gansert v. Colorado*, 348 F. Supp. 2d 1215, 1228 (D. Colo. 2004). Complainant's expressions of her concerns to her supervisor, Mr. Mestas, are sufficient to meet the reporting requirements of § 24-50.5-103(2), C.R.S. *Gansert*, 348 F. Supp. 2d at 1226-28. Thus, Complainant has established the first prong of a *prima facie* whistleblower claim.

In addition to establishing that protected disclosures occurred, Complainant must demonstrate that she suffered a disciplinary action by Respondent, as defined by the Whistleblower Act, and that her protected disclosures were a substantial or motivating factor in this action. *Ward*, 699 P.2d at 968. The Whistleblower 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. "Disciplinary action" is broadly defined by § 24-50.5-102(1), C.R.S. as:

> ... any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty.

Complainant's transfer and reassignment to the Lakewood office falls squarely within this statutory definition, establishing the second prong of a *prima facie* whistleblower claim.

To meet the third and final prong of a *prima facie* whistleblower claim, Complainant must establish a causal connection between the disciplinary action imposed by Respondent and her protected disclosures. *Maestas v. Segura*, 416 F.2d 1182, 1188-89 (10th Cir. 2005). The Whistleblower 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. Employers may violate the Act if they had both legitimate and retaliatory motives in issuing the discipline. *Taylor v. Regents of the Univ. of Colo.*, 179 P.3d 246, 249-50 (Colo. 2007). In dual motive situations, the requisite causal connection exists if the disclosure of information was a substantial or motivating factor in the imposition of discipline. *Ward*, 699 P.2d at 966.

In reviewing a retaliation claim, the Tenth Circuit has held: "Unless an adverse action is *very closely connected* in time to the protected activity, a plaintiff must rely on additional evidence beyond mere temporal proximity to establish causation." *Meiners v. Univ. of Kan.*, 414 F.3d 1222, 1231 (10th Cir. 2004) (emphasis in original). A period of three months or more between protected activity and an adverse action is insufficient to show the requisite causation for a retaliation claim. *Id.* Complainant's last query about F1 was communicated to Mr. Mestas on May 3, 2017 – more than five months before the October 20, 2017 reassignment of her duties. Rather than retaliate against Complainant, Ms. Calahan confirmed that Complainant was correct not to sign F1's time card if she could not verify the reported hours.

The preponderance of the evidence establishes that Mr. Hunt's decision to issue a written warning to Complainant in October 2017 was based upon the exit interview descriptions he received from Ms. Calahan. The departing employees' allegations of bullying and harassment by Complainant went well beyond Complainant's concerns about F1's time reporting. In following Mr. Hunt's directive to issue a written warning to Complainant, Mr. Mestas did not exhibit retaliatory animus. He admired her abilities and described her as a "rock star." Mr. Mestas had previously invited Complainant to apply for the Deputy Director position he vacated in 2014. When he reassigned Complainant to the Lakewood office, he took pains to ensure that she would not lose her SSS IV classification by replacing her supervisory duties with a staff authority designation, and allowed her to create her own working title.

The preponderance of the evidence demonstrates a lack of intent to retaliate against Complainant for raising issues about F1's time reporting. Therefore, Complainant has failed to establish that Respondent retaliated against her in violation of the Whistleblower Act.

V. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Complainant seeks an award of attorney fees and costs pursuant to Board Rule 8-33. Attorney fees and costs are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. § 24-50-125.5, C.R.S.; Board Rule 8-33. A groundless personnel action is one in which it is found that "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C). Frivolous actions, on the other hand, are actions in which it is found that "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). A personnel action made in bad faith, that is malicious, or that was a means of harassment "means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B).

As discussed above, Complainant has failed to establish, by a preponderance of the evidence, that Respondent improperly disciplined her on October 20, 2017, or that she was subjected to discrimination or whistleblower retaliation. Because Respondent's actions were not instituted frivolously, in bad faith, maliciously, or as a means of harassment, Complainant is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent's reassignment of Complainant was within Respondent's authority under Administrative Procedure 1-9, and did not constitute discipline subject to review by the Board under § 24-50-125(3), C.R.S.

2. Respondent did not discriminate against Complainant on the basis of gender.

3. Respondent did not retaliate against Complainant as a whistleblower, in violation of the Whistleblower Act, § 24-50.5-101, *et seq.*, C.R.S.

4. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's October 20, 2017 reassignment of Complainant is **affirmed.** Attorney fees and costs are not awarded. Complainant's appeal is dismissed with prejudice.

Dated this 13th day
of July, 2018.

Susan J. Tyburski, Senior Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the 13th day of July 2018, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and attached **Notice of Appeal Rights** addressed as follows:

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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.