STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2019B002**

ORDER DETERMINING QUESTION OF LAW

BALAZS L. FARAGO,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, FREMONT CORRECTIONAL FACILITY,
Respondent.

THIS MATTER is before the Administrative Law Judge ("ALJ") following Respondent's Motion for a Determination of a Question of Law Pursuant to Colorado Rule of Civil Procedure 56(h). Being sufficiently advised, the ALJ finds and orders as follows:

FACTUAL BACKGROUND

1. Complainant was a certified state employee.

2. Respondent required Complainant to take leave.[1] The ALJ is uncertain of the underlying circumstances that led to the involuntary leave, who ordered the leave, and when it started.

3. The leave was sick leave, not paid time.[2]

4. On February 7, 2018, Evan M. Axelrod (Psy.D.) of Nicoletti-Flater Associates, PLLP ("Nicoletti-Flater"), found that Complainant was unfit for duty in a psychological fitness for duty ("PFFD") evaluation. Dr. Axelrod reevaluated Complainant on April 11, 2018, and again on May 31, 2018. In these reevaluations, Dr. Axelrod continued to find Complainant unfit for duty.

5. Dr. Axelrod conducted the PFFD evaluations pursuant to an arrangement between Nicoletti-Flatter and the Colorado State Employee Assistance Program ("C-SEAP").

6. Respondent separated Complainant from his employment effective June 26, 2018.

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[1] A state employer may place certified state employees on involuntary leave in three limited circumstances. First, when an employee's illness "impacts the employee's ability to perform the job or the safety of others." Director's Administrative Procedure 5-5(A). The type of leave under Procedure 5-5(A) is "sick leave." Second, "when the appointing authority wishes to release employees from their official duties for the good of the state." Director's Administrative Procedure 5-15. The type of leave under Procedure 5-15 is "administrative leave." Leave under Procedure 5-15 is "paid time." Third, the employer may issue a suspension without pay pursuant to Board Rule 6-12. Leave under Rule 6-12 is a "disciplinary action."

[2] This is evident from the fact that Respondent charged Complainant sick time during his absence. Moreover, the other types of involuntary leave are inapplicable. Complainant's leave was not paid time. Therefore, it was not administrative leave under Director's Administrative Procedure 5-15. Complainant's leave was not a "suspension without pay." Therefore, it was not a disciplinary action under Board Rule 6-12.

7. In pertinent part, the separation letter states:

> I have decided to administratively separate you from employment with the Department of Corrections effective June 26, 2018, pursuant to State Personnel Rule 5-6. This rule allows an appointing authority to either grant leave without pay or administratively separate an employee who has exhausted all paid leave and is *unable to return to work* after Family/Medical leave and Short-Term Disability leave no longer apply. Your sick and annual leave was exhausted on May 3, 2018, and your Family and Medical Leave (FMLA) expired on May 25, 2018.

(Emphasis added.)

8. Complainant appealed his separation on July 3, 2018.

9. Respondent's Motion indicates that Complainant "intends to litigate Dr. Axelrod's determinations of his psychological unfitness for duty."

10. C-SEAP is a program of the Department of Personnel and Administration. *See* § 24-50-604(1)(k), C.R.S. C-SEAP coordinates PFFD evaluations for the state. Respondent represents that "C-SEAP carefully controls and standardizes the PFFD process to ensure neutrality and consistency throughout." Respondent also references C-SEAP as the "de facto legislators of the PFFD process."

11. C-SEAP provides state employers with a sample (or "template") PFFD referral letter to send to employees placed on involuntary leave. The sample letter indicates that an involuntary leave for behavioral health issues is paid leave.

DISCUSSION

I. ISSUE.

When separating a certified state employee for exhaustion of involuntary leave under Director's Administrative Procedure 5-6, must a Department prove that the employee is unable to work?[3]

II. APPLICABLE LEGAL AUTHORITY.

A. The property right granted to certified state employees within the State Personnel System.

Article XII, § 13(8) of the Colorado Constitution provides that "[p]ersons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law."

For more than 90 years, the Colorado Supreme Court has held that neither the executive branch nor the legislature can deny certified state employees the rights granted to them under the Colorado Constitution. *See, e.g., Bardsley v. Dep't of Public Safety*, 870 P.2d 641, 647 (Colo.

[3] Respondent puts the issue as follows: "[a]s a matter of law, can a complainant in an administrative discharge appeal litigate an independent third party's fitness for duty determination, which determination led to the complainant's exhaustion of leave?"

App. 1994) (discussing cases dating as far back as 1922). Decisions interpreting the Colorado Constitution consistently hold that state employees enjoy a protected property interest in their positions and may only be separated for just cause. *See Dep't of Human Services v. Maggard*, 248 P.3d 708, 712 (Colo. 2011) ("Certified state employees have a property interest in their positions and may only be disciplined by an appointing authority for just cause."); *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994) (discussing a certified employee's "constitutional right to continued employment absent just cause"); *Ass'n of Pub. Emp. v. Dep't of Highways*, 809 P.2d 988, 991 (Colo. 1991) (citing Colo. Const. Art. XII, § 13(8) for the proposition that a central feature of the personnel system is discharge "only for just cause"); *Salas v. State Personnel Bd.*, 775 P.2d 57, 59 (Colo. App. 1988) (stating that Colo. Const. Art. XII, § 13 confers a protected property right on state employees).

B. The right to a Board hearing prior to loss of certified state employment.

Article II, § 25 of the Colorado Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law."

Article XII, § 13(8) of the Colorado Constitution provides that:

> A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude . . . Any action of the appointing authority taken under this subsection shall be subject to appeal to the state personnel board, with *the right to be heard* thereby in person or by counsel, or both.

(Emphasis added.)

Article XII, § 14(3) provides that the Board shall adopt rules to implement the State Personnel System, including rules concerning appeals from "actions by appointing authorities."

Section 24-50-101(3)(b), C.R.S., provides that "[i]t is the duty of the state personnel board to provide fair and timely resolution of cases before it."

Section 24-50-125(3), C.R.S., provides that the Board shall grant a hearing to employees who timely appeal a disciplinary action.

Section 24-50-125(5), C.R.S., provides that "the board shall hold a hearing on an appeal for any certified employee in the state personnel system who protests any action taken that adversely affects the employee's current base pay as defined by board rules, status, or tenure."

Board Rule 8-48 provides that "[a]ny action that adversely affects a certified employee's current base pay, status, or tenure as defined by Board rule may be appealed and will be set for hearing."

C. The Director's Administrative Procedures governing leaves.

There are various forms of leave. Annual leave is for an employee's personal needs. Director's Administrative Procedure 5-4. Sick leave is for health reasons, including diagnostic

and preventative examinations, treatment, and recovery. Director's Administrative Procedure 5-5. Administrative leave is "for the good of the state." Director's Administrative Procedure 5-15. Other forms of paid leave include holiday leave (Director's Administrative Procedure 5-10), bereavement leave (Director's Administrative Procedure 5-12), military leave (Director's Administrative Procedure 5-13), jury leave (Director's Administrative Procedure 5-14), parental academic leave (Director's Administrative Procedure 5-18), family medical leave (Director's Administrative Procedure 5-19, *et seq.*), and injury leave for injuries that are compensable under the Workers' Compensation Act (Director's Administrative Procedure 5-38). In addition, an appointing authority may approve unpaid leave. Director's Administrative Procedure 5-17.

Director's Administrative Procedure 5-5(A) provides that appointing authorities may send employees home for an illness "that impacts the employee's ability to perform the job or the safety of others. Sick leave shall be charged but annual leave shall be charged if sick leave is exhausted; unpaid leave if both annual and sick leave are exhausted."

Director's Administrative Procedure 5-6 provides that if an employee has exhausted leave and is "unable to return to work," then "the employee may be administratively discharged by written notice following a good faith effort to communicate with the employee." Further, "[a]dministrative discharge applies only to exhaustion of leave." Additionally, "[t]he notice of administrative discharge must inform the employee of appeal rights."

Director's Administrative Procedure 5-15 provides that "[a]dministrative leave may be used to grant paid time when the appointing authority wishes to release employees from their official duties for the good of the state." Further, "[a]dministrative leave is not intended to be a substitute for corrective or disciplinary action."

Notably absent from the regulatory framework governing leaves are any provisions for placing (and keeping) employees on involuntary leave for behavioral health[4] issues. Also absent are any provisions for employees to appeal an involuntary leave.

D. The C-SEAP Universal Policy regarding PFFD evaluations.

C-SEAP has issued two policies regarding PFFD evaluations. The first is titled "Psychological Fitness for Duty Universal Policy" and is dated July 19, 2010. The second is titled "Universal State Personnel System Policy—Psychological Fitness for Duty (PFFD)" and is dated December 17, 2015. The policies mirror each other substantially. Both policies were issued pursuant to Executive Order D 023 09.[5] Given the later date of the 2015 C-SEAP Universal Policy, its title's reference to the "State Personnel System," and its availability on the C-SEAP website,[6] it appears that the 2015 iteration supersedes the 2010 iteration.

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[4] *See* § 2-4-401(1), C.R.S. (defining "behavioral health").

[5] Governor Bill Ritter, Jr., issued Executive Order D 023 09 on October 7, 2009. The Executive Order is titled "Establishing a Policy to Address Workplace Violence, including Domestic Violence Affecting the Workplace." In relevant part, the Executive Order provides: "The Department of Personnel and Administration ('DPA') is hereby directed to develop, in cooperation with the Department of Human Services Domestic Violence Program, the Colorado Attorney General's Office, and other state agencies, a universal policy addressing workplace violence, including domestic violence affecting the workplace ('the Universal Policy')."

[6] *See* https://www.colorado.gov/c-seap, the C-SEAP website. The homepage has a "Supervisor Tools" scroll down bar that includes a link to "Psychological Fitness For Duty (PFFD)." Upon clicking the PFFD link, the site takes users to a page describing the PFFD process (https://www.colorado.gov/pacific/c-seap/psychological-fitness-duty-pffd). In turn,

Among other provisions, the 2015 C-SEAP Universal Policy includes:

- The State of Colorado believes . . . In the use of a Psychological Fitness for Duty (PFFD) program for employees, who may pose a direct threat to themselves or others, as a proactive approach to ensure the safety and viability of the work place.

- The purpose of this policy is to establish consistent procedures for ordering and implementing PFFD evaluations of state employees.

- This policy is intended to provide a mechanism for the objective assessment of an employee's psychological capacity to perform the essential functions of his or her position when, based on the employee's conduct, behavior and circumstances, there is a reasonable belief that the employee's ability to perform essential job functions is impaired, or the employee may pose a direct threat to the safety of that employee, other employees, or the public.

- PFFD evaluations must be job-related, consistent with business necessity and managed with a balanced attention to both confidentiality and issues of safety.

- If an employee's performance or behavior problems rise to the level of unacceptable work performance or unacceptable personal conduct, management retains full authority and discretion to pursue appropriate performance management under the State Personnel Board Rules and Personnel Director's Administrative Procedures, regardless of utilization of the PFFD process.

- C-SEAP will provide consultation to the referring department to assist the employer to understand fully the results of the evaluation and to make decisions regarding the employee's ability to return to work and as applicable, the process of the employee's return to work.

- C-SEAP is responsible for the overall coordination of the PFFD evaluation process and for providing consultation to appointing authorities/designees and human resource professionals.

The 2015 C-SEAP Universal Policy does not include the criteria for placing employees on involuntary leave (or for employees to challenge involuntary leaves). The 2015 C-SEAP Universal Policy does not specify what medical documentation (if any) that employees must provide to return to work.

In addition, C-SEAP provides Colorado state employers a sample PFFD referral letter to send to employees. In pertinent part, the template provides: "I am placing you on *paid* Administrative Leave until further notice, for the best interests of all involved and for your own well being." (Emphasis added.) Further, "since you will remain on *paid status* and are on *paid leave* at the Department's expense, you are expected to be available for us to contact you as necessary." (Emphasis added.)

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the description page has a link to the "Universal Policy for PFFD" that takes users to the 2015 C-SEAP Universal Policy (https://drive.google.com/file/d/0BwUD9Bt4G-21clo0WmVCMHZodms/view). Website visited by the ALJ on 11/5/18.

III. ANALYSIS.

Respondent separated Complainant because C-SEAP's vendor determined that Complainant was unfit to return to work. Respondent argues that the vendor's determination should not be subject to dispute before the Board. For the reasons that will be discussed below, the ALJ disagrees.

A. Separations under Director's Administrative Procedure 5-6 are predicated upon an employee's inability to return to work.

More than one Board decision has upheld a separation under Director's Administrative Procedure 5-6 upon a showing of the following: (1) the employee has "exhausted all credited paid leave;" (2) the employee "is unable to return to work;" (3) the employee is not entitled to take family medical leave; (4) the employee is not entitled to take short-term disability leave; (5) the employee is not a qualified individual with a disability who can reasonably be accommodated; (6) the employer made a "good faith effort to communicate with the employee;" and (7) the discharge was accomplished by written notice that includes appeal rights and the need for the employee to contact the employee's retirement plan. These requirements derive from Director's Administrative Procedure 5-6. As a result, *a state employer may not separate an employee under Director's Administrative Procedure 5-6 unless the employee is "unable to return to work."*

B. If employees on sick leave provide the medical documentation specified in the Director's Administrative Procedures, they may return to work.

Employees on sick leave may return to work as follows: (A) for absences of three or fewer days, employees generally return to work without providing any documentation; (B) for non-family medical leave absences of more than three consecutive working days, employees return upon providing an authorized medical form from a health care provider pursuant to Director's Administrative Procedure 5-5(B); and (C) for family medical leave of more than 30 days, employees return upon providing a fitness-to-return certificate pursuant to Director's Administrative Procedure 5-32. With respect to non-family medical leave absences of more than three days, the Director's Administrative Procedures require employees to provide an authorized medical form from a heath care provider but do not give appointing authorities power to dispute the form. With respect to family medical leave absences, upon receipt of the fitness-to-return certification, the state employer may "contact the health care provider for purposes *only* of clarification and authentication of the fitness-to-return certification." Director's Administrative Procedure 5-32(B) (emphasis added). Other than the limited contact with the employee's health care provider, the state employer should return an employee to work upon receipt of a fitness-to-return certification that shows the employee can perform the essential functions of the job. *See, e.g.,* Director's Administrative Procedure 5-34 and 5-34(A). Therefore, *if an employee provides the medical documentation specified in the Board Rules or the Director's Administrative Procedures, the employee cannot be administratively separated on grounds of "unable to return to work."*

Several aspects of the Director's Administrative Procedures support this conclusion. First, Procedure 5-31 provides that state employers may challenge the validity of the employee's medical certification when an employee *initiates* a family medical leave request.[7] This contrasts with the absence of any provisions for the employer to request a second opinion when the

[7] Director's Administrative Procedure 5-31 provides: "[w]hen medical certification is submitted to demonstrate that the leave is FML-qualifying, the department has the right to request a second opinion."

employee *returns* from sick leave. Given that the Director's Administrative Procedures include a provision for employers to challenge medical documentation at the inception of sick leave, but omits such a provision when the employee returns, the omission evidences an intent to restrict an employer's challenge to the medical documentation submitted by returning employees. *See Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) ("Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others").

Second, Procedure 5-32(A) (relating to fitness-to-return certificates) references administrative discharges under Procedure 5-6. Specifically, an employee's failure to provide a fitness-to-return certificate may result in an "administrative discharge as defined in Rule 5-6." This indicates that the determination as to whether an employee is "unable to work" for purposes of a Director's Administrative Procedure 5-6 separation is based on the fitness-to-return certificate issued by the employee's health provider (or the lack thereof). *See Williams v. Dep't of Corrections*, 926 P.2d 110, 112 (Colo. App. 1996) ("the provisions of an administrative regulation should be read in connection with each other, so that the regulation itself may be interpreted as a whole").

Third, Procedure 5-32(B) requires state employers to obtain the employee's written permission prior to contacting the employee's health care provider in regards to the fitness-to-return certificate. Procedure 5-32(B) also provides that the employer's contact with the employee's health provider is limited to "only" clarification and authentication of the fitness-to-return certification. As a result, Procedure 5-32(B) evidences an intent to limit employer disputes of a returning employee's medical documentation.

Finally, there are no Board Rules or Director's Administrative Procedures for state employers to condition an employee's return upon a particular health care provider (such as Nicoletti-Flater) issuing the fitness-to-return certificate. Even if there were, such a provision would likely conflict with Director's Administrative Procedures 5-31 and 5-32.

C. When a certified state employee's leave and exhaustion is involuntary, Respondent must demonstrate just cause for a separation under Director's Administrative Procedure 5-6.

Certified state employees enjoy a property right in their positions. Such a property right may not be taken by forcing an employee to take leave and then terminating the employee because such leave is exhausted. At a minimum, there must be just cause for compelling the employee to take involuntary leave and for refusing to return the employee to work. *See Kinchen*, 886 P.2d at 707 (certified employees enjoy a "constitutional right to continued employment absent just cause"). Certified state employees also have a right to a Board hearing prior to losing their employment. To be meaningful, this hearing must encompass not simply whether the employee has burned through his leave bank, but also the underlying reasons for forcing the employee to exhaust such leave. *See, e.g., Sussman v. Univ. of Colo. Health Sciences*, 706 P.2d 443, 445 (Colo. App. 1985) ("One of the purposes of state personnel system legislation is to protect state employees from arbitrary discharges").

Respondent seeks to evade its responsibility for the separation by transferring decision making to C-SEAP (or to C-SEAP's vendors).[8] Executive Order D 023 09 allows no such evasion.

[8] *See* Respondent's Motion at pp. 8-9 ("Complainant should not be permitted to litigate his psychological fitness for duty at the time of his separation from employment because the third party who made the determination—Dr. Axelrod—is not the employer defending the administrative discharge").

Instead, the Executive Order requires "each state department" to formulate protocols and procedures for implementing the Universal Policy. While departments "*may* contact the Colorado State Employee Assistance Program at DPA *for assistance*" (emphasis added), they are not required to do so. There is absolutely nothing in Executive Order D 023 09 (or elsewhere) that obligates departments to accept determinations by C-SEAP, let alone that requires departments to "rely conclusively" on determinations by C-SEAP vendors.

The language in the Universal Policy also supports the conclusion that Respondent's abrogation of responsibility is not appropriate. The 2015 C-SEAP Universal Policy states that "C-SEAP will provide *consultation* to the referring department to assist *the employer* to understand fully the results of the evaluation and to make decisions" (emphasis added). Thus even pursuant to the Universal Policy, the department, not C-SEAP, makes the decisions. Further, the 2015 C-SEAP Universal Policy provides that C-SEAP is responsible for "providing *consultation* to appointing authorities/designees" (emphasis added). By definition, consultations involve discussion and advice, not conclusive determinations.

Most important, there is nothing in Executive Order D 023 09, the 2015 C-SEAP Universal Policy, the Director's Administrative Procedures, or the Board Rules that relieves departments from establishing just cause prior to terminating a certified state employee. And even if there were such a provision, it would run afoul of the rights that state employees enjoy under the Colorado Constitution and the Colorado Revised Statutes.

Respondent appears to argue that separations under Director's Administrative Procedure 5-6 should be upheld because they result from a "neutral" and "independent" process. With all due respect to C-SEAP and its vendors, the Colorado Constitution has designated the Board as the neutral and independent body to implement the State Personnel System and to hear appeals from actions by appointing authorities. *See* Colo. Const. Art. XII, § 14(3). The Colorado Supreme Court has repeatedly held that no department may deny certified state employees the rights granted them under the constitution. The General Assembly has also made it clear that "the board shall hold a hearing on an appeal for any certified employee in the state personnel system who protests any action taken that adversely affects the employee's current base pay as defined by board rules, status, or tenure." § 24-50-125(5), C.R.S. Similarly, Board Rule 8-48 provides that "[a]ny action that adversely affects a certified employee's current base pay, status, or tenure as defined by Board rule may be appealed and will be set for hearing." Even the 2015 C-SEAP Universal Policy recognizes the Board Rules as one of the "governing orders and policies." The forum in which the appointing authority must establish just cause for separating a certified state employee is the State Personnel Board.[9]

In short, prohibiting an employee from challenging a PFFD that results in the employee's termination is irreconcilable with the rights granted to certified state employees within the State Personnel System. *Complainants in administrative discharge appeals may litigate the basis for being forced to take and exhaust leave, including disputing the PFFD determination that led to the separation.*

D. Respondent bears the burden of proof.

An issue arises as to which side bears the burden of proving the validity (or invalidity) of a separation under Director's Administrative Procedure 5-6 when the employer forces the

[9] This is not to say that the Board is somehow wiser than C-SEAP or its vendors. But unlike actions by C-SEAP or its vendors, Board actions are subject to review by the Colorado Court of Appeals. *See* § 13-4-102(2)(p), C.R.S.

employee on leave. The controlling statute requires that "[e]xcept as otherwise provided by statute, the proponent of an order shall have the burden of proof." § 24-4-105(7), C.R.S.

In disciplinary actions, "[t]he employer must bear the burden of establishing just cause for discharge by a preponderance of the evidence at the hearing before the Personnel Board." *Kinchen*, 886 P.2d at 708. In administrative actions, the employee bears the burden of proof. *See Renteria v. Dep't of Personnel*, 811 P.2d 797, 803 (Colo. 1991) (employee bears the burden when employer takes away duties in a position reallocation); *Velasquez v. Dep't of Higher Ed.*, 93 P.3d 540, 542-44 (Colo. App. 2003) (employee bears the burden when discharged for job abolishment). Regardless of whether a separation is disciplinary or administrative, the impact on the certified employee is the same: job loss. Nonetheless, the circumstances underlying the two types of separations are different: disciplinary separations result from issues involving the *employee's conduct* while administrative separations result from changes to the *employer's organizational structure*.

The separation here involves circumstances comparable to a disciplinary matter. Like the disciplinary matter in *Kinchen*, the genesis for Complainant's forced leave and separation must have been some workplace manifestation (i.e. conduct). In contrast, the reallocation and abolishment in *Renteria* and *Velasquez* stemmed from business judgments irrespective of the employee's conduct. Like in *Kinchen*, appeals of separations under Director's Administrative Procedure 5-6 will likely require difficult credibility assessments. In contrast, appeals of employment actions caused by a department's organizational changes do not typically involve difficult judgments about credibility. Like in *Kinchen*, the appointing authority here must overcome the constitutional presumption of an employee's satisfactory service. In contrast, appointing authorities are empowered to administratively separate employees due to "lack of work, lack of funds, or reorganization" pursuant to § 24-50-124, C.R.S. The similarities between disciplinary separations and Director's Administrative Procedure 5-6 separations support the conclusion that the state employer should bear the burden here regardless of characterizing the separation as an "administrative discharge." The Procedure's nomenclature does not change the essence of the separation.

As discussed above, a separation resulting from an employee's forced leave and exhaustion thereof implicates the constitutional protections attached to the employee's property interest in continued employment. To give meaningful effect to the principle of separations only for just cause as established by the Colorado Constitution, the ALJ holds that the state employer must bear the burden of establishing by a preponderance of the evidence that its decision to send the employee on sick leave for behavioral health was not arbitrary, capricious, or contrary to rule or law. In the same vein, the state employer bears the burden of establishing by a preponderance of the evidence that its refusal to return the employee to work was not arbitrary, capricious, or contrary to rule or law.

In sum, the circumstances underlying the separation determine which side bears the burden of proof. In separations resulting from the employee's conduct or performance, the state employer bears the burden. In separations resulting from changes to the employer's organizational structure, the employee bears the burden.

E. State employers are not without mechanisms to address behavioral health issues that manifest in the workplace.

The ALJ's determination under C.R.Civ.P. 56(h) may well impact the way state employers proceed with employees whose behavioral health issues manifest in the workplace. State

employers, however, are not without recourse. First, an employer may issue a corrective action to improve workplace conduct pursuant to Board Rule 6-11. Second, an employer may administer a disciplinary action for workplace misconduct or performance issues pursuant to Board Rule 6-12. Such disciplinary action may include termination of employment.[10] Third, a state employer may place an employee on paid administrative leave "for the good of the state" pursuant to Director's Administrative Procedure 5-15. Fourth, state employers may lobby for changes to the Board Rules or to the Director's Administrative Procedures.

Of import, the ALJ's determination does not undermine Director's Administrative Procedure 5-6. To the contrary, the ALJ's interpretation of Procedure 5-6 simply reinforces the Procedure's requirement that state employers cannot separate a certified state employee for leave exhaustion if the employee is able to return to work. Similarly, the ALJ's determination should not be construed to inhibit Executive Order D 023 09. That Executive Order can be fully implemented without abridging the rights of certified state employees.

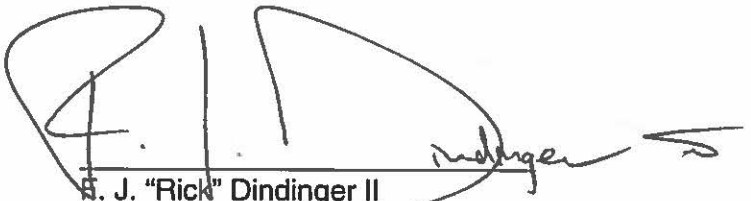
IV. DETERMINATION OF QUESTION OF LAW.

When separating a certified state employee for exhaustion of involuntary leave under Director's Administrative Procedure 5-6, a Department must prove by a preponderance of the evidence that the employee is unable to work.

ORDER

This matter shall proceed to hearing in accordance with the ALJ's determination on the question of law.

Dated this 8th day
Of November, 2018,
Denver, Colorado.



R. J. "Rick" Dindinger II
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State Personnel Board
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[10] These first two mechanisms are specifically contemplated in Executive Order D 023 09 and the 2015 C-SEAP Universal Policy. The Executive Order provides that violent behavior and threats of violence "may result in corrective and/or disciplinary action." Similarly, the Universal Policy provides that: "[i]f an employee's performance or behavior problems rise to the level of unacceptable work performance or unacceptable personal conduct, management retains full authority and discretion to pursue appropriate performance management under the State Personnel Board Rules and Personnel Director's Administrative Procedures, regardless of utilization of the PFFD process."

CERTIFICATE OF SERVICE

This is to certify that on the 9th day of November, 2018, I electronically served true copies of the foregoing **ORDER DETERMINING QUESTION OF LAW**, addressed as follows:

Balasz L. Farago
[redacted]

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