STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2019B023(c)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DEAN PACE,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO, ADMISSIONS/RESTORATION PROGRAM,
Respondent.

Senior Administrative Law Judge ("ALJ") S. Tyburkski held a commencement hearing on March 10, 2020. ALJ K. McCabe held an evidentiary hearing on November 18, November 19, December 1, and December 3, 2020. The record closed on December 9, 2020. ALJ McCabe conducted the evidentiary hearing by web conference. Casey Leier, Esq., represented Complainant. Complainant, Dean Pace, appeared. Lucia Padilla, Esq., represented Respondent, Department of Human Services, Colorado Mental Health Institute at Pueblo, Admissions/Restoration Prgram. Christine Tafoya, Complainant's Appointing Authority and Respondent's Advisory Witness, appeared.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing are attached in an Appendix.

MATTERS APPEALED

In January 2018, Respondent requested Complainant undergo a psychological fitness for duty evaluation and placed Complainant on paid administrative leave. On February 22, 2018, Respondent removed Complainant from paid administrative leave after the psychological fitness for duty evaluator determined Complainant was not fit for duty. Respondent did not provide Complainant notice that he had a right to dispute the February 22, 2018 action. On August 28, 2018, Complainant made a demand for reasonable accommodations and provided Respondent documentation from his own medical providers that he was fit for work. On September 16, 2018, the psychological fitness for duty evaluator also found Complainant fit for work. On September 20, 2018, Respondent verbally notified Complainant he was able to return to work and would receive retroactive pay from August 28, 2018 until he returned to work. On October 1, 2018, Complainant filed an appeal with the State Personnel Board alleging Respondent's decision to place him on leave was discriminatory and retaliatory under the Colorado Anti-Discrimination Act ("CADA").[1] Complainant also initiated a grievance with Respondent. On December 27, 2018, Complainant filed a petition for hearing on Respondent's Step II grievance decision and again

[1] Complainant also alleged Family Medical Leave retaliation. This is not an issue before the State Personnel Board.

alleged discrimination and retaliation under CADA. Complainant also alleged Respondent violated his federal and state Constitutional rights and the grievance procedures. Complainant seeks back pay, return of his leave balances, and attorney fees and costs.

Respondent argues Complainant failed to timely appeal its decisions related to leave. Respondent argues that it did not discriminate or retaliate against Complainant.

ISSUES

1. Did Complainant timely appeal Respondent's determination to remove Complainant from paid administrative leave?

2. Did Respondent retaliate or discriminate against Complainant in violation of the Colorado Anti-Discrimination Act ("CADA")?

3. Was Respondent's decision arbitrary, capricious, or contrary to rule or law?

4. Did Respondent violate the grievance procedures?

5. Did Respondent's final grievance decision violate Complainant's Federal or State Constitutional Rights?

FINDINGS OF FACT

Background

1. Respondent hired Complainant in March 2010.

2. Complainant received multiple promotions during his period of employment.[2]

3. During the relevant time period, Complainant was a Mental Health Clinician I.

4. During the relevant time period, Complainant worked in Unit J1 at Respondent's Colorado Mental Health Institute at Pueblo ("CMHIP").

5. Unit J1 is a restoration unit. Patients in Unit J1 have felony criminal charges. Patients in Unit J1 are not competent to understand those charges due to mental health issues. Unit J1's purpose is to restore competency to patients.

6. Per Complainant's Position Description, the purpose of Complainant's work unit was to, in part, "Provide a safe, secure, therapeutic setting for comprehensive/holistic care of patients with both psychiatric and medical issues to include evaluation and treatment."

7. Complainant had multiple job duties. Per Complainant's Position Description, 50 percent of his job duties were to provide, "Patient Care/Nursing Care/Communication/Unit Maintenance/Safety/Security".

8. Complainant worked directly with patients.

[2] Complainant is no longer employed by Respondent.

Respondent's Employees

9. During the relevant time period, Complainant's Appointing Authority was Christine Tafoya (formerly Ochoa). During the relevant time period, Ms. Tafoya was Respondent's Program Chief Nurse for the Restoration Program.

10. During the relevant time period, Kimberly Ortiz was Respondent's Lead Nurse of Unit J1.

11. During the relevant time period, Shawna Armstrong was Respondent's Shift Charge Nurse.

12. Ms. Ortiz was Complainant's supervisor. Ms. Armstrong was Complainant's shift supervisor.

13. Ms. Armstrong reported to Ms. Ortiz. Ms. Ortiz reported to Ms. Tafoya. Ms. Tafoya reported to the Chief Nursing Officer, Ronda Katzenmeyer.

14. Ms. Tafoya first worked with Complainant in 2010 or 2013 when she was a Lead Nurse. Ms. Tafoya perceived Complainant as personable and a good employee.

15. During the relevant time period, Nancy Schmelzer was Respondent's Benefits Specialist. Ms. Schmelzer provided guidance to appointing authorities and acted as a go-between for providing information to Colorado State Employees Assistance Program ("CSEAP") during psychological fitness for duty evaluations.

16. During the relevant time period, Bridget Clawson Braaten was Respondent's ADA Coordinator.

Respondent's Policies

17. The State of Colorado has a Universal State Personnel System Policy for Psychological Fitness for Duty ("PFFD") evaluations. The policy provides, in part:

> 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.

18. Per the Universal State Personnel System Policy for PFFD evaluations:

> An appointing authority/designee may request a PFFD evaluation when an employee's behavior suggests that:
>
> - the employee's ability to perform the essential functions of his/her position is impaired;
>
> or
>
> - continued service by the employee may pose a direct threat to the safety of that employee, other employees, or the public;

And expert guidance is needed to determine if psychological or cognitive factors, which may or may not include substance use, may be causal or contributing.

19. The Universal State Personnel System Policy for PFFD evaluations allows an appointing authority to take performance management measures during the PFFD process.

Complainant's 2017 Performance Issues and Performance Management Notifications

20. In 2017, Complainant received multiple performance management notifications.

21. In April 2017, Complainant received an overall Level II (successful) rating on his 2016-2017 performance evaluation.

22. On July 25, 2017, Ms. Armstrong had a performance discussion with Complainant about exceeding the number of allotted call-offs in a rolling six-month period.

23. On October 3, 2017, Ms. Armstrong had a performance discussion with Complainant about exceeding the number of allotted call-offs in a rolling six-month period.

24. On October 12, 2017, Ms. Ortiz had a performance discussion with Complainant, because Complainant failed to complete a required random wellness check on October 11, 2017. Failing to complete a wellness check places patients at risk.

25. On October 25, 2017, Complainant received his 2017-2018 mid-year performance management appraisal. The appraisal noted Complainant had "struggled with call-offs in the past six months." The appraisal also noted Complainant had "good job knowledge" and "effective communication with his peer [sic], patients, and Lead Nurse."

26. On December 20, 2017, Deb Ealey approached Ms. Ortiz with concerns about Complainant putting his feet up and closing his eyes while on duty.

27. On December 26, 2017, Ms. Ortiz met with Complainant about the concern brought to her by Ms. Ealey. Complainant informed Ms. Ortiz he was not sleeping, and was just resting his eyes. Ms. Ortiz informed Complainant that this was not acceptable behavior. During the meeting, Complainant mentioned medication he was taking and medical issues he was having at the time. Complainant indicated to Ms. Ortiz he was going through some medication changes. Complainant said he was not able to focus. Complainant was apologetic. Ms. Ortiz informed Complainant about CSEAP.

28. On December 26, 2017, following the meeting, Ms. Ortiz sent Complainant an email informing Complainant he was not allowed to put his feet up on a desk and close his eyes while on duty. The email also stated Complainant was required to take direction from the Charge Nurse and perform assigned duties.

29. In late 2017, Ms. Ortiz received a complaint from Ms. Armstrong and another supervisor about Complainant improperly completing point sheets.

30. Point sheets are like "pay checks" for patients in Unit J1. Another employee, made Complainant a cheat sheet for completing point sheets.

2017 Schedule Change

31. In approximately August 2017, Respondent changed the schedule for employees.

32. Respondent made the decision to change employee schedules because Respondent was managing too many different schedules. Allowing employees to have many different schedules was not working for hospital needs or for providing patient care.

33. After this change, Respondent only offered employees the option of working 8.5-hour shifts (typically a 5 day per week schedule) or 12.5-hour shifts (typically four days one week and three days the next week). Respondent eliminated the option for a 10-hour shift.

34. After the schedule change, Respondent assigned Complainant a 12.5-hour shift. Complainant worked the graveyard shift from 6:30 p.m. to 7:00 a.m., three days per week. Complainant worked a fourth day every other week.

35. Prior to the schedule change, Complainant worked a 10-hour shift, four days per week.

36. Working graveyard shifts negatively impacted Complainant's health. Complainant experienced exacerbation of existing health issues following the schedule change.

37. Complainant's appearance, work performance, and demeanor at work changed following his change to 12.5-hour graveyard shifts.

38. On November 1, 2017, Respondent approved Complainant for Family Medical Leave ("FML") Designation Notice. Complainant was out of work for approximately one month on FML, from late October 2017 to late November 2017.

39. Complainant's FML was for some of the same medical issues that Complainant sought Americans with Disabilities Act ("ADA") accommodations for in December 2017/January 2018.

Complainant's Requests to Change Schedule and Behavior Changes

40. Following the August 2017 schedule change, Complainant approached Ms. Ortiz multiple times about difficulties following the schedule change.

41. Ms. Ortiz did not have the authority to change schedules. Schedule changes were required to be approved by Ms. Tafoya.

42. Ms. Tafoya was unable to provide Complainant a 10-hour shift following the August 2017 schedule change, because Respondent no longer offered any employee a 10-hour shift.

43. Complainant wanted to return to his prior schedule, working a 10-hour shift four days per week.

44. Following the August 2017 schedule change, Ms. Ortiz noted a change in Complainant's appearance. Prior to the schedule change, Ms. Ortiz observed that Complainant was always well dressed. After the schedule change, Ms. Ortiz noted Complainant was less neat.

45. Following the August 2017 schedule change, Ms. Ortiz noted Complainant was anxious and all over the place.

46. After Complainant returned from FML, Complainant made several statements to Ms. Ortiz related to his well-being. Complainant told Ms. Ortiz that he had tried to get into rehab for alcoholism and it did not work out. Complainant also told Ms. Ortiz he was a mess, and could be one of the guys on the unit.

47. A friend of Complainant's, Janice Rubidoux, approached Ms. Ortiz and expressed concern for Complainant. Ms. Rubidoux mentioned that Complainant had just purchased a Corvette, and was going to Arizona to purchase a Cadillac.

48. Ms. Ortiz and Ms. Tafoya regularly had meetings. In these meetings, Ms. Ortiz would review performance of all of her employees with Ms. Tafoya. Ms. Ortiz periodically reported concerns to Ms. Tafoya about Complainant in these meetings. Ms. Ortiz informed Ms. Tafoya of employee rumors about Complainant that included Complainant drinking too much and spending money frivolously. Ms. Ortiz also related concerns about Complainant's performance, including Complainant's failure to do a wellness check.

49. On December 12, 2017, Complainant called Ms. Tafoya at approximately 6:45 a.m. and expressed an urgent need to see her regarding his schedule. Complainant informed Ms. Tafoya he could not get in touch with Ms. Ortiz to discuss his schedule. Complainant sounded frantic to Ms. Tafoya.

50. Ms. Tafoya scheduled a meeting with Complainant for 4:00 p.m. on the same date.

51. Complainant went to see his medical provider, Doctor MSD[3], prior to the meeting. Doctor MSD is a primary care provider.

52. On December 12, 2017, Doctor MSD wrote a note for Complainant ("December 12 Note"). Doctor MSD wrote, "Due to [Complainant's medical conditions] working 12 hour nightshifts has caused worsening of his medical state. I believe it would be more detrimental for him to continue with this shift."

53. Complainant arrived for the meeting with Ms. Tafoya early.

54. Approximately 10 minutes prior to the scheduled meeting, Complainant observed Ms. Tafoya exiting another meeting and approached her.

55. Ms. Tafoya asked Complainant to wait until the scheduled meeting time.

56. Complainant had not slept between the end of his shift at approximately 6:30 a.m. and the time of the meeting at approximately 4:00 p.m. Complainant, therefore, had been awake for approximately 24 consecutive hours at the time of the meeting.

[3] Complainant's medical providers will be referred to by their initials to protect Complainant's personal health information.

57. Complainant was disheveled, had a stale smell of alcohol, and appeared to be anxious. Ms. Tafoya did not notice the smell on Complainant until he was exiting the meeting. Complainant did not appear intoxicated to Ms. Tafoya.

58. During the meeting, Complainant's speech was pressured and he was talking fast. Complainant informed Ms. Tafoya about his medical conditions.

59. During the meeting, Complainant made several concerning statements to Ms. Tafoya. These statements included: Complainant was like a patient; Complainant had not been eating right; Complaint did not have a support system; Complainant could not maintain daily functions; and Complainant's life was unraveling.

60. During the meeting, Complainant mentioned taking specific medications.

61. During the meeting, Complainant provided the December 12 Note to Ms. Tafoya.

62. During the meeting, Complainant and Ms. Tafoya discussed possible alternate schedules. Complainant requested 10-hour shifts. Respondent did not have 10-hour shifts available at that time. Ms. Tafoya offered to move Complainant to the 12.5-hour day shift. Complainant, however, informed Ms. Tafoya he had concerns about working the day shift. Complainant was concerned medication he was taking would prevent him from waking up on time for the day shift. Ms. Tafoya also informed Complainant about the possibility of an 8.5-hour shift.

63. During the meeting. Ms. Tafoya directed Complainant to turn in the December 12 Note to Benefits/Human Resources.

64. Complainant's behavior during the meeting caused Ms. Tafoya to have concern for Complainant and confirmed issues that had been previously reported by Ms. Ortiz.

Reasonable Accommodation Process

65. Ms. Tafoya forwarded the December 12 Note to Ms. Schmelzer.

66. Ms. Schmelzer forwarded the December 12 Note to Ms. Clawson.

67. On December 13, 2017, Complainant signed a REQUEST FOR REASONABLE ACCOMMODATION DUE TO MENTAL/PHYSICAL DISABILITY form. The form provided an area to mark the major life activities that Complainant's impairment limited. Complainant marked "Thinking", "Other:", and "Neurological." In the area provided to "Describe how the impairment [affected his] ability to perform activity(ies) checked above", Complainant wrote, "INABILITY TO FUNCTION NORMALLY WHILE @ WORK, BEING TO [sic] FATIGUED & PHYSICALLY ILL TO PERFORM QUALITY JOB PERFORMANCE, LACK OF MEDICATION CONSISTANCY [sic]".[4] Complainant also wrote he became unable to perform the activities on November 26, 2017.

[4] This is transcribed from a handwritten statement. The statement was written in predominantly capital letters.

68. The REQUEST FOR REASONABLE ACCOMMODATION DUE TO MENTAL/PHYSICAL DISABILITY form also asked, "What portions of your job can you no longer perform?" Complainant wrote, "BEING TO [sic] TIRED & FATIGUED TO SHOW UP FOR GRAVEYARD SHIFT, MAKING GOOD DECISIONS, UNABLE TO STAY AWAKE LACK OF INTERACTIONS WITH PATIENTS, NOT ABLE TO PAY ATTENTION".[5]

69. Complainant described his impairments and wrote, "I WOULD LIKE A SCHEDULE SUCH AS 2:30 pm TO 11:00 pm TO MAINTAIN STEADY SLEEP HABITS, MEDICATION CONSISTANCY [sic] & GET OFF OF 12 HR GRAVEYARD SHIFTS".[6]

70. Doctor MSD signed the form on December 15, 2017. Doctor MSD provided the following accommodation may help Complainant perform his job duties: "returning to swing shift 2:30 pm – 11 pm would help with [medical conditions]".

71. On December 18, 2017, Complainant met with Ms. Ortiz. Ms. Ortiz observed Complainant was not well on that day.

72. Complainant discussed a possible schedule change with Ms. Ortiz. Complainant told Ms. Ortiz he was struggling with working graveyard, that he was fatigued, and that he was having difficulty focusing.

73. Ms. Ortiz told Complainant he could talk to Ms. Tafoya about Complainant moving to day shift. Complainant declined and informed Ms. Ortiz he could not get up that early.

74. Ms. Ortiz suggested Complainant explore moving to the nurse pool and working part-time. Complainant told Ms. Ortiz he could not afford it and he was making financial mistakes.

75. The nurse pool provides coverage for nurses who are out. Moving to the nurse pool would allow Complainant to work part-time.

76. On December 19, 2017, Ms. Ortiz sent an email to Ms. Tafoya and provided a summary of the meeting. Ms. Ortiz wrote:

> On December 18, 2017, [Complainant] requested to meet with me. He wanted to discuss the change in his schedule from the 12 hour shifts to 10 hours [sic] shifts and have the same schedule he previously had. I explained to [Complainant] the 10 hour shifts would not be available as that shift is no longer available at the hospital. I explained it would need to be an eight hour shift with a 30 min lunch. I also expressed my concern to [Complainant] that the eight hour shift would mean that he would be required to work 5 days [sic] week. [Complainant] is currently stating he would only like to work three days a week. He again expressed he thought you understood he wanted the 10 hour shift. I again explained I didn't believe that would be an option. [Complainant] also asked if it was possible to

[5] This is transcribed from a handwritten statement. The statement was written in predominantly capital letters.

[6] This is transcribed from a handwritten statement. The statement was written in predominantly capital letters.

have a 12 hour shift that comes in middle of day. I again explained I don't think it would benefit the unit and would need to discuss this with you.

I asked [Complainant] how he was doing with his health at this point. He stated, "I have so much anxiety I think I could be one of these guys." "I met with my doctor and she is supporting me not working the 12 hour shifts." "I am going to have to think about the situation because now that you explained the 8.5 hour shifts I am not sure about working 5 days." I asked [Complainant] to please discuss this with his provider for the best outcome for him and he will need to make a decision with his provider. [Complainant] agreed and will think about his options. I also explained to [Complainant] my concern over his recent behaviors and encouraged him to seek professional help and offered CSEP [sic]. He stated he has his own provider and stated he is making poor choices and it is causing him more anxiety. He is concerned over the lost [sic] of his job and I explained he is covered with FMLA at this point.

[Complainant] was calmer and not as anxious has he has been recently. I encouraged him to continue to [sic] on a positive path. I offered my support and encouragement.

77. On the same date, Ms. Tafoya responded to Ms. Ortiz's email. Ms. Ortiz wrote, in part, "Thanks. I did not discuss 10 hour shifts with him. I informed him if I were to change his schedule it would be from 2:30 to 11 pm. I will look into what shifts he can/can't work. I also referred him to CSEAP and had a very similar conversation when I met with him last week."

78. On December 19, 2017, Ms. Clawson sent a reasonable accommodation packet to Complainant.

79. On December 23, 2017, Complainant signed a REASONABLE ACCOMMODATION REQUEST FORM. Complainant completed the MEDICAL INQUIRY FORM IN RESPONSE TO ACCOMMODATION REQUEST. The MEDICAL INQUIRY FORM IN RESPONSE TO ACCOMMODATION REQUEST is required to be completed by a medical professional. Complainant attached the December 12 Note.

80. On December 27, 2017, Ms. Clawson received a reasonable accommodation request from Complainant. Ms. Clawson called Complainant to tell him that she needed additional information.

81. On December 28, 2017, Ms. Clawson received information about shifts at CMHIP.

82. On January 3, 2018, Ms. Clawson called Complainant. Ms. Clawson did not reach Complainant.

83. On January 3, 2018, Complainant signed a REASONABLE ACCOMMODATION REQUEST FORM. Complainant wrote, "I AM REQUESTING TO GET OFF OF 12 HR GRAVEYARD SHIFTS & RETURN TO MY FORMER SCHEDULE, AFTERNOONS 1:30 PM TO 11:30 PM & IF POSSIBLE HAVE THURSDAY, FRIDAY, SATURDAY OFF TO ACCOMMODATE DRS APPOINTMENTS & THERAPY." Complainant also wrote, "I HAVE BEEN SUFFERING FROM [MEDICAL CONDITION] & [MEDICAL CONDITION] & 12 HR GRAVEYARD SHIFTS

ARE MAKING IT WORSE". Complainant then wrote, "12 HR GRAVEYARD SHIFTS ARE MAKING ME PHYSICALLY & MENTALLY ILL".[7]

84. The REASONABLE ACCOMMODATION REQUEST FORM asked, "What if any, job function are you having difficulty performing?" Complainant wrote, "FATIGUED, STAYING AWAKE @ WORK, GETTING UP TO GO TO WORK, TO [sic] TIRED TO INTERACT WITH PATIENTS APPROPRIATELY, MAKING GOOD DECISIONS, CONCENTRATION, BEING ABLE TO FUNCTION WITHOUT FEELING FATIGUED & SICK".[8]

85. The REASONABLE ACCOMMODATION REQUEST FORM provided an "Other" section. Complainant wrote, "I AM SUFFERING & STRUGGLING GREATLY & 12 HR GRAVEYARD SHIFTS ARE MAKING MY HEALTH & SITUATION VERY DIFFICULT TO MANAGE. I HAVE BEEN HOSPITALIZED & HAD TO GO TO EMERGENCY ROOM SEVERAL TIMES IN ORDER TO HANDLE MY [medical condition]. 12 HR GRAVEYARD SHIFTS HAVE INCREASED STRESS, [medical condition], & [medical condition]."[9]

86. On January 8, 2018, Ms. Clawson emailed Complainant to follow-up on her attempt to reach him by telephone. Ms. Clawson wrote, in part, "I called and left you a voicemail on the 3rd, but haven't heard from you. If you are still interested in pursuing an accommodation, please contact me by close of business Friday, January 12th, 2018."

87. On January 9, 2018, Complainant responded to Ms. Clawson's email. Complainant wrote, in part:

> I'm sorry to ramble on so much but I am rather frantic and have stress and anxiety over meeting the time line to get all this turned into you and achieving my goals. So please excuse me for being obsessive and lengthy in my emails I'm just very nervous and this has been weighing heavy on my mind and stressing me out since it took so long to get my initial paperwork so long after Christmas. Anyway again I will follow up with a phone call tomorrow and I hope I am allotted enough time in order to get the paperwork from my Dr. I will indicate to her on Friday that it is imperative that she send that paperwork to you via email no later than Friday January 12th. I hope this will keep me from having to start over or being out of compliance with my time frame to be in compliance with you.

88. On January 10, 2018, Ms. Clawson replied to Complainant and informed him she set aside time for call on Friday.

89. On January 10, 2018, Doctor MSD, signed a MEDICAL INQUIRY FORM IN RESPONSE TO ACCOMMODATION REQUEST. On the form, Doctor MSD marked Complainant had an impairment that substantially limited a major life activity. The form asked, "What limitation(s)

---

[7] The quotes in this paragraph are transcribed from a handwritten statement. The statements were written in predominantly capital letters.

[8] This is transcribed from a handwritten statement. The statement was written in predominantly capital letters.

[9] This is transcribed from a handwritten statement. The statement was written in predominantly capital letters.

is interfering with job performance or accessing a benefit of employment?" Doctor MSD responded, "working graveyard shift is interfering with good sleep without good sleep [medical condition] is worse – this interferes [illegible] safety". Doctor MSD suggested Complainant "change back to 2:30 – 11 pm shift" as an accommodation. The MEDICAL INQUIRY FORM was part of Complainant's January 3, 2018 REASONABLE ACCOMMODATION REQUEST FORM.

90. On January 10, 2018, Ms. Clawson received Complainant's January 3, 2018 REASONABLE ACCOMMODATION REQUEST FORM.

91. Respondent found Complainant was a qualified individual with a disability and offered him an accommodation.

92. On January 16, 2018, Respondent conducted an ADA meeting with Complainant. Ms. Tafoya, Ms. Schmelzer, Ms. Ortiz, Ms. Clawson, and Complainant were present for the meeting by telephone. Complainant was offered an accommodation. During the meeting, Respondent offered Complainant, "the accommodation of working 2:30 PM to 10:30 PM on the J1 unit with two days off a week (either Monday and Tuesday or Tuesday and Wednesday)." Complainant declined the accommodation.

93. During the meeting, Complainant expressed that he wanted to work a 10-hour shift four days per week. Someone explained during the meeting that type of shift was no longer available.

94. Following the meeting, Ms. Clawson sent Complainant an email as follows:

> The Colorado Department of Human Services ("CDHS") is committed to providing reasonable accommodations to its employees and applicants for employment to ensure that individuals with disabilities enjoy equal access to all employment opportunities.
>
> I received your request for reasonable accommodation on January 10th, 2018. Based on the information provided, it was determined that you are a qualified individual with a disability. I reviewed your request for a reasonable accommodation and your doctor specifically requested that you not work graveyard shifts and requested you return to your most previous schedule of 2:30 PM to 11:00 PM.
>
> On January 16th, 2018 you were offered the accommodation of working 2:30 PM to 10:30 PM on the J1 unit with two days off a week (either Monday and Tuesday or Tuesday and Wednesday). You verbally declined that reasonable accommodation offer.
>
> If you feel that you need a different reasonable accommodation, please provide supporting documentation as to the specific accommodation required directly from your doctor by close of business on January 23rd, 2018. As a reminder, a fitness to return may be required if your doctor is requesting that you now work graveyards.
>
> Please contact me at [phone number] if you have any questions or concerns. It is my pleasure to work with you on your request.

95. Complainant did not grieve or file a petition for hearing related to Respondent's ADA accommodation determination.

96. At some point after the ADA meeting, Ms. Armstrong requested Complainant provide a fitness to return certification.

97. On January 22, 2018, Complainant sent Ms. Clawson an email as a follow-up to the January 16, 2018 meeting. Complainant requested in the email to work three 12-hour shifts per week, rather than a schedule that included a fourth 12-hour shift every other week. Complainant requested additional time to speak with Doctor MSD. Complainant informed Ms. Clawson he had an appointment with Doctor MSD on January 29, 2018.

98. On January 26, 2018, Ms. Clawson responded to Complainant's email. Ms. Clawson agreed to provide the extra time requested.

99. On January 29, 2018, Doctor MSD wrote a letter on behalf of Complainant, "I have evaluated [Complainant] again. He has had marked improvement in his mental and physical health. I am confident [Complainant] can continue on graveyard shift and perform all duties, up to and not exceeding 40 hours per week." Complainant provided the letter to Respondent.

100. On January 30, 2018, Ms. Tafoya asked Ms. Schmelzer by email if Doctor MSD's January 29, 2018 letter would be sufficient for fitness to return to work.

101. On February 6, 2018, Ms. Clawson spoke with Complainant on the telephone. Complainant informed Ms. Clawson he no longer wished to pursue accommodations. Ms. Clawson sent Complainant a letter memorializing the conversation on the same date.

Psychological Fitness for Duty Evaluation

102. Prior to January 11, 2018, Ms. Tafoya began exploring the possibility of having Complainant undergo a PFFD evaluation.

103. On January 11, 2018, Ms. Tafoya participated in a meeting discussing having Complainant undergo a PFFD evaluation.

104. Ms. Tafoya had ongoing concerns about Complainant's ability to perform his job duties as a result of his behavior/statements during the meeting on December 12, 2017 and the concerns being reported to her by Ms. Ortiz. Ms. Tafoya wanted Complainant to be able to get healthy and return to work.

105. The goal of a PFFD evaluation is to get someone back on track and return to work. Typically, PFFD evaluations are provided to employees who have had good performance in the past and are presenting out of character behavior that appears to be impacting their performance at work.

106. Ms. Schmelzer and Ms. Tafoya had a meeting by telephone with CSEAP. Ms. Tafoya discussed some of her concerns and observations during the meeting.

107. CSEAP analyzes whether an individual should be put through a PFFD evaluation based upon information provided by Respondent, and then manages the PFFD process.

108. CSEAP agreed Complainant was a candidate for a PFFD evaluation.

109. On January 30, 2018, Ms. Tafoya and Ms. Schmelzer conducted a meeting with Complainant. During the meeting, Ms. Tafoya informed Complainant he needed to report to CSEAP and participate in a PFFD evaluation.

110. Complainant disagreed that he needed to undergo a PFFD evaluation.

111. During the meeting, Ms. Tafoya informed Complainant the PFFD evaluation was optional. Ms. Tafoya further explained the PFFD evaluation was recommended because Complainant was making poor choices that were impacting his performance. Ms. Tafoya also discussed performance concerns during the meeting and the possibility of performance management measures being taken as a result of Complainant's performance.

112. Complainant agreed to participate in the PFFD evaluation.

113. Following the meeting, also on January 30, 2018, Ms. Tafoya sent Complainant a letter summarizing the meeting, informing he would be placed on paid administrative leave until further notice, and providing other information.

114. Complainant did not initiate a grievance or file a petition for hearing within 10 days of receiving this notice.

115. Ms. Tafoya provided paperwork to Ms. Schmelzer for the PFFD evaluation that included her notes from the December 12, 2017 meeting with Complainant, performance notes from Ms. Ortiz, performance improvement plans from Ms. Armstrong, and emails from Ms. Ealey to Ms. Ortiz about Complainant's performance.

116. Ms. Schmelzer provided the information to CSEAP.

117. CSEAP provided the information to the PFFD evaluator, Doctor BG.

118. On February 8, 2018, Complainant participated in a PFFD evaluation with Doctor BG. As part of the PFFD evaluation, Complainant met with Doctor BG and took multiple tests.

119. On approximately February 13, 2018, Doctor BG faxed Respondent a report from the PFFD evaluation. Doctor BG found Complainant unfit for duty.

120. The PFFD evaluation is a five-page report. The report is divided into multiple sections: Referral Information, Consent/Releases of Information, Methods of Assessment, PFFD Rating, and Referral Questions Summary & Recommendations.

121. The Referral Information section includes information provided by Venice Gallegos, CSEAP employee, to Doctor BG about "the current behaviors, conduct and circumstances as reported to her from the Appointing Authority (AA) and the HR representative." Doctor BG wrote she had been provided the following information:

> His Appointing Authority indicated that she and others who meet with and work with [Complainant] had reported noticeable changes over the last year in his work ethic, appearance and concentration, however, in the last couple of months significant and concerning changes have been observed by a range of staff. These have included [Complainant] being observed at work, on shift, smelling of alcohol, at times referring to himself as, "no different than a patient," on more than one occasion repeatedly seeking out his AA to anxiously request a return to 10 hour shifts when he clearly did not appear to recall that he'd approached her more than once recently on the same topic. He has dropped information to staff about his DUI and psychiatric medication history, sometimes nonchalantly and sometimes with high anxiety. He has voiced concern to staff about his increased episodes of spending, leading him to be concerned for his finances, overall demonstrating a worrisome shift in his ability to meet work protocols they suspected.

122. The remainder of the report does not reference alcohol or concerns about substance abuse.

123. Per the report, Doctor BG used 11 methods of assessment.

124. In the report, Doctor BG provided the following PFFD Rating, "Given [Complainant's] background history (records and collateral interviews), current functioning (testing measures, mental status, and records reviewed) and the responsibilities as outlined in the job description, he is presently rated as *Unfit/Not Fit for Duty.*" (Italics in original).

125. In the report, Doctor BG provided responses to four referral questions. The first question was, "Do you assess there to be psychological, behavioral or cognitive factors that negatively impact the employee's capacity to perform his/her current job duties? If so, describe factors and their impact on the employee in the workplace." Doctor BG responded:

> [Complainant] appears to be struggling with maintaining attention to details, which is a requirement within many aspects of his job duties. He either purposefully does not follow policies and procedures or is making attempts to appear as if he was not instructed or aware of them, in an effort to appear desirable. The assessment measures revealed [Complainant's] attempt to represent himself in a favorable manner, regardless of the instructions he was provided from the outset of the evaluation. This certainly leads to concerns regarding the degree of cooperation he is willing to exert in his employment setting. In addition, there are notable concerns that [Complainant] may exploit his environment for self-gain. He is certainly concerned about the motivations of others, which leads him to be rather self-protective and impulsive. he [sic] is more likely to justify his negative choices or actions (rather than be accountable) given that he perceives others as unreliable or disloyal. Overall, these dynamics are of great concern given that [Complainant] works with a vulnerable population.
>
> He is currently unwilling to take responsibility for assessing his own functional capacity, as it relates to his ability to perform his duties (which is a job requirement). He expressed inability to work an ongoing 4-day work week, night-shift, (which in fact can be difficult for some individuals). He proceeded with initiating paperwork through his care provider in order to medically support his concern. However, when he was reportedly offered a 5-day work week, with daytime hours, he was

displeased with having only 2 days off. He then abruptly requested a cancellation of any work accommodations via his care provider. However, between the initiation of the request for accommodations and the initiation of the termination of the accommodations, there was no evidence of rehabilitation or improvements in functioning per his care provider. In addition, he did not make his care provider aware of the rationale for changing his work plan, but instead presented to his care provider, as if he was abruptly doing well functionally (which was not the case).

The aforementioned example of the behaviors in which [Complainant] will pursue his desires, as long as the result is such, that his needs are met, is of concern. He works with a vulnerable population. His position is to maintain details and document appropriately as he supports the staff and milieu. His current level of functioning does not appear to meet these job requirements and would give rise to concerns about his ability to function fully in his current position.

126. In the report, Doctor BG provided that, "At this time, there appears to be an elevated risk with regard to personal, coworker and resident safety as [Complainant] places his needs above others, to satisfy his own gain."

127. Ms. Schmelzer received and reviewed Doctor BG's report.

128. Ms. Tafoya received and reviewed Doctor BG's report.

Unpaid Leave

129. CSEAP scheduled a meeting with Complainant to discuss the results of the PFFD evaluation on February 22, 2018.

130. Following the meeting with CSEAP, Ms. Schmelzer met with Complainant to discuss FML and short-term disability. Ms. Schmelzer provided Complainant a letter prepared by Ms. Tafoya notifying Complainant of the end of paid administrative leave.

131. It is typical to remove an employee from paid administrative leave after a person is found not fit for duty. After the not fit for duty determination is received, Respondent considers it to be the employee's condition that is keeping that employee from work. Ms. Schmelzer handled the situation with Complainant like other employees who had gone through this process in the past.

132. On February 22, 2018, Ms. Tafoya issued Complainant a letter informing Complainant of the PFFD evaluation results. Ms. Tafoya informed Complainant that the PFFD evaluation found Complainant was "currently unable to return to work." Ms. Tafoya further informed Complainant that, "The Paid Administrative Leave will be discontinued effective close of business February 22, 2018. To continue receiving pay, you must use any Sick, Annual, of [sic] Holiday, balances that are still available to you." The letter did not notify Complainant of a right to dispute the decision.

133. In March 2018, Complainant retained counsel.

134. Complainant's attorney referred him to Doctor WM. On March 29, 2018, Complainant began outpatient treatment with Doctor WM.

135. On May 31, 2018, Respondent sent Complainant an ADA Reasonable Accommodation letter. The letter provided information on how to request an ADA accommodation.

136. During his leave, Complainant applied for and received short-term and long-term disability benefits. Disability benefits only provided Complainant a portion of his pay.

137. On June 14, 2018, Respondent sent Complainant another ADA Reasonable Accommodation letter. The letter provided information on how to request an ADA accommodation.

138. On June 27, 2018, Doctor BG conducted a PFFD re-evaluation of Complainant.

139. On August 2, 2018, Doctor BG issued a report that concluded she did not have enough information to find Complainant fit for duty. Doctor BG's report noted that Complainant failed to provide requested information to her.

Return from Leave and Grievance

140. On August 28, 2018, Complainant's Attorney, William Finger, sent Respondent a demand letter, requesting Respondent provide Complainant an ADA accommodation. In addition to multiple letters composed by Doctor MSD, the demand letter provided a report from Doctor WM. Doctor WM found Complainant fit to return to work. Doctor WM's medical report was dated August 16, 2018.

141. On August 31, 2018, Ms. Clawson sent Complainant an email acknowledging receipt of the August 28, 2018 demand letter. Ms. Clawson wrote, "I received a letter regarding your concerns. I tried to call, but it said your number was no longer in service. When can we chat?"

142. On September 12, 2018, Ms. Clawson sent Complainant and his attorney an email inquiring if Complainant would still like to pursue an accommodation.

143. On September 16, 2018, Doctor BG issued an updated report based upon additional information provided. The additional records reviewed by Doctor BG were from Doctors MSD and WHM. Doctor BG found Complainant fit for duty.

144. On September 18, 2018, Complainant filed an internal discrimination complaint with Respondent. An investigator conducted an investigation of the internal discrimination complaint. The investigator did not find that discrimination occurred.

145. On September 20, 2018, Ms. Tafoya conducted a meeting with Complainant and his attorney. Ms. Schmelzer was also present. The meeting was recorded.

146. On September 25, 2018, Ms. Tafoya sent Complainant a letter. Ms. Tafoya informed Complainant he would be placed on paid administrative leave effective August 28, 2018.

147. On September 27, 2018, Ms. Tafoya sent Complainant a letter amending the September 25, 2018 letter. The letter notified Complainant of his return to work date and the date the paid administrative leave would end.

148. On September 28, 2018, Complainant initiated a Step I grievance. In his Step I grievance, Complainant provided the following Statement of Grievance:

> On 9/20/18 I met with Christine [Tafoya] and an H.R. representative. I was informed that I was authorized to return to duty and would receive pay retroactive to 8/28/18. My retroactive pay and retroactive restoration of leave which was taken should go back to an earlier date. I was placed on forced leave without pay and my leave was run off. The Department received my doctor's certification I was fit for full duty that was dated 1/29/18. The Department wrongfully ignored the medical information. I was not given any notice of a right to appeal this forced leave.

149. In his Step I grievance, Complainant requested the following relief, "I am requesting a return of all my leave that was taken and back pay retroactive to being placed on forced leave."

150. In his Step I grievance, Complainant alleged disability and FML retaliation.

151. On September 29, 2018, following an email from Ms. Clawson, Complainant chose to return to work on the Children's Unit with a schedule from 3:00 p.m. to 11:00 p.m. Monday to Friday.

152. On October 1, 2018, Ms. Clawson sent Complainant a letter accepting his reasonable accommodation request.

153. On October 31, 2018, Ms. Katzenmeyer conducted a Step I grievance meeting.

154. On November 2, 2018, Ms. Katzenmeyer issued a Step I grievance decision denying Complainant's requested relief.

155. On November 12, 2018, Complainant initiated a Step II grievance.

156. In the Step II grievance, Complainant requested the following relief, "I request that all of my leave that was taken and back pay be reinstated. .[sic]I request attorney fees and costs for having to grieve to obtain my due back wages to me."

157. Complainant alleged disability and FML retaliation in his Step II grievance.

158. On December 4, 2018, Jill Marshall, CMHIP's Chief Executive Officer, conducted a Step II grievance meeting. Complainant attended the meeting with his attorney.

159. Ms. Marshall received an extension of time to respond to Complainant's Step II grievance.

160. On December 17, 2018, Ms. Marshall issued a Step II Grievance Response. Ms. Marshall wrote in part:

> On January 30, 2018 your appointing authority requested a psychological fitness for duty (PFFD) evaluation in accordance with the Universal State Personnel System Policy. At this time, you were placed on paid administrative leave. An independent evaluator determined you were unfit for duty at which time you were placed on Short Term Disability leave. Upon your submission of documentation

> from your personal provider you were returned to paid administrative leave and your documentation was sent to the independent evaluator for review. You were returned to work once you were determined fit for duty. I find that your fitness for duty process was handled appropriately and consistent with Board Rules and Universal State Personnel System Policy for PFFDs.
>
> With regard to you stating that you were not able to grieve the process, I disagree and find that you were able to grieve the fitness for duty process in accordance with State Personnel Board Rule 8-8.
>
> Finally, your grievance dated November 8, 2018 indicated that you alleged discrimination. As discussed during our meeting on December 4, 2018 your allegations of discrimination were referred to Human Resources for investigation. The investigation is currently in process and the results of the investigation will be shared with you upon completion.

161. The Step II grievance decision advised Complainant of his appeal rights and provided contact information for the State Personnel Board.

162. Complainant timely filed a petition for hearing on Respondent's Step II grievance decision.

DISCUSSION

A. RESPONDENT FAILED TO NOTIFY COMPLAINANT OF HIS RIGHT TO DISPUTE A DECISION THAT IMPACTED COMPLAINANT'S PAY.

On October 1, 2018, Complainant filed an appeal with the State Personnel Board. Complainant wrote, "Mr. Pace was wrongfully removed from employment and put on leave by Ms. [Tafoya] who claimed he was unable to perform. He was not given any appeal rights. On 9/20/18, he was verbally informed he was able to return to work with retroactive pay back to 8/28/18. He had pay and leave rights wrongfully taken through 8/27/18 and has lost pay and leave. A Grievance has also been filed." As discussed below, Complainant's appeal was not untimely as to Respondent's February 22, 2018 action that impacted his base pay.

On December 27, 2018, Complainant filed a petition or hearing on Respondent's Step II Grievance decision. The petition was timely filed.

Board Rule 8-4 states:

> Affected persons shall be informed, in writing, of any rights to dispute a final agency decision on a grievance or an action that adversely impacts pay, status, tenure, or a performance rating and award. Such a notice must include the time limit to exercise such rights, the official and address to whom the dispute should be directed, the requirement that the dispute must be in writing, and the availability of any standard appeal form.

The language of Board Rule 8-4 is clear and unambiguous, and requires an agency to provide notice of "any rights to dispute…an action that adversely impacts pay." *See Berumen v. Dep't of Human Servs.*, 304 P.3d 601, 606 (Colo. App. 2012) ("And as with statutes, if the language of a regulation is clear and unambiguous, we do not resort to other rules of construction. (citation

omitted)." Board Rule 8-4 required Respondent to provide notice of his right to dispute any action that adversely impacted his pay.

An individual has ten days after Respondent takes an action or makes a decision to file a charge of discrimination, file a petition for hearing, or initiate a grievance. *See* § 24-50-125.3, C.R.S ("An applicant or employee who alleges discriminatory or unfair employment practices, as defined in part 4 of article 34 of this title, in the state personnel system may appeal within ten days of the alleged practice by filing a complaint in writing with the board or the Colorado civil rights division in the department of regulatory agencies…"), Board Rule 8-8(A)(1) ("The employee must initiate the grievance process within 10 days of the action or occurrence being grieved, or within 10 days after the employee had knowledge of or reasonably should have had knowledge of the action or occurrence."), and Board Rule 8-25 ("If an employee or applicant seeks to have an allegation of discrimination reviewed by the Board, that person must file a petition for hearing within 10 days of the alleged discriminatory action or receipt of any final written decision (including, but not limited to, grievance decisions, selection decisions, or performance pay system dispute resolution decisions).").

i. PAID ADMINISTRATIVE LEAVE AND REQUEST FOR PFFD

Respondent placed Complainant on paid administrative leave and requested a PFFD evaluation on January 30, 2018. Complainant did not file any grievance, petition for hearing, or appeal of Respondent's January 30, 2018 decision until October 2018, more than 10 days after Respondent's January 30, 2018 decision. Pursuant to statute and Board Rules, Complainant had 10 days to either grieve or file a petition for hearing with the State Personnel Board following Respondent's January 30, 2018 decision. *See* § 24-50-125.3, C.R.S., Board Rule 8-8, and Board Rule 8-25.

Respondent's January 30, 2018 decision did not adversely impact Complainant's, "pay, status, tenure, or a performance rating and award." Respondent was then not required by Board Rule 8-4 or statute to provide Complainant notice of his right to dispute Respondent's decision. The Board does not have jurisdiction to review Respondent's January 2018 decision to place Complainant on paid administrative leave and request a PFFD evaluation because Complainant did not timely dispute the decision. See *State Pers. Bd. v. Gigax*, 659 P.2d 693, 694 (Colo.1983) ("The ten-day limitation set forth in section 24-50-125(3), C.R.S. 1973 is mandatory. Filing of a petition for appeal with the Board or a request for an extension of time in which to file an appeal within the ten-day period is a condition precedent to further action.").

ii. DETERMINATION TO END PAID LEAVE WHEN COMPLAINANT'S LEAVE AND ABSENCE FROM WORK ARE INITIATED BY RESPONDENT

On February 22, 2018, Respondent issued a decision removing Complainant from a paid leave. In this case, Respondent initiated Complainant's leave and absence from work. Complainant did not initiate his leave and absence from work. When Respondent ended the paid portion of leave, it took an action that affected Complainant's base pay. Although Complainant was eligible to use accrued leave and apply for disability payments, the disability payments did not equal the full amount of Complainant's pay. Respondent then had an obligation to notify Complainant of his right to dispute that action under Board Rule 8-4.

Respondent did not notify Complainant of his right to dispute its decision. Complainant was entitled to file an appeal by § 24-50-125(5), C.R.S. ("In addition, upon request by the

employee or the employee's representative and within the period provided in section 24-50-125.4 (2), 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 rule, status, or tenure.") As Respondent failed to notify Complainant of his right to dispute its decision in compliance with Board Rule 8-4, the ten-day time period for dispute did not begin. The remedy to Complainant for Respondent's failure to provide notification pursuant to Board Rule 8-4 is a reasonable tolling of Complainant's deadline for filing an appeal. Given this tolling, Complainant's appeal, as related to Respondent's decision to remove him from paid administrative leave, was timely appealed to the State Personnel Board.[10]

B. RESPONDENT DID NOT MANUFACTURE INFORMATION PROVIDED DURING THE PFFD PROCESS.

Complainant alleged that Respondent manufactured untruths about Complainant's behavior during the time period in question. Complainant failed to demonstrate Respondent manufactured untruths about his behavior.

Complainant's own writings, that occurred contemporaneously to the events in question, demonstrate that Complainant was suffering from a medical condition. Complainant's own writings further demonstrate that his medical condition impacted his ability to perform his job. Complainant's own writings corroborate other evidence that during the time period in question Complainant's behavior changed and Complainant was not meeting performance expectations. Complainant's contradictory testimony at the hearing is not credible.

In December 2017, Complainant wrote, in response to how his impairments were affecting his ability to perform certain activities: "INABILITY TO FUNCTION NORMALLY WHILE @ WORK, BEING TO [sic] FATIGUED & PHYSICALLY ILL TO PERFORM QUALITY JOB PERFORMANCE, LACK OF MEDICATION CONSISTANCY [sic]". Complainant further wrote he became unable to perform these work activities on November 26, 2017.

In January 2018, Complainant described the job functions he was having difficulty performing as: "FATIGUED, STAYING AWAKE @ WORK, GETTING UP TO GO TO WORK, TO [sic] TIRED TO INTERACT WITH PATIENTS APPROPRIATELY, MAKING GOOD DECISIONS, CONCENTRATION, BEING ABLE TO FUNCTION WITHOUT FEELING FATIGUED & SICK". Complainant wrote that he was having difficulty staying awake at work. This statement corroborates testimony from Ms. Ortiz and evidence that Ms. Ortiz received reports of Complainant putting his feet up on a desk and closing his eyes while on duty. Complainant acknowledged in a meeting with Ms. Ortiz that he had closed his eyes while on duty by explaining he was resting his eyes. Ms. Ortiz's testimony regarding the meeting on the issue is credible. This statement also corroborates Complainant was having performance issues during this time

[10] Respondent argued at hearing it would be cost prohibitive to require state agencies to keep employees on paid administrative leave following a finding the employee was not fit for duty, and would cause state agencies to be forced into taking performance management steps in lieu of providing employees a valuable opportunity to go through the PFFD process. The ALJ's conclusion is not that an employee cannot be removed from paid leave, it is that the state agency has an obligation to notify employees of their right to dispute the agency's action under Board Rule 8-4 in the unique circumstance where the agency has initiated an employee's absence from work and then takes an action that will require the employee to continue on the employer initiated leave and will result in the employee not receiving their full pay.

period. An inability to stay awake at work is a performance issue. Complainant listed these job functions he was having difficulty performing and they correspond with the job functions Respondent described Complainant having difficulty with in the time period.

In January 2018, Complainant also wrote, "I AM SUFFERING & STRUGGLING GREATLY & 12 HR GRAVEYARD SHIFTS ARE MAKING MY HEALTH & SITUATION VERY DIFFICULT TO MANAGE. I HAVE BEEN HOSPITALIZED & HAD TO GO TO EMERGENCY ROOM SEVERAL TIMES IN ORDER TO HANDLE MY [medical condition]. 12 HR GRAVEYARD SHIFTS HAVE INCREASED STRESS, [medical condition], & [medical condition]." This corroborates testimony from Ms. Ortiz and Ms. Tafoya that Complainant was exhibiting out of character behavior that gave them cause for concern in this time period. Complainant wrote he was "suffering & struggling greatly" following the change to the 12-hour shift.

Much of Ms. Tafoya's concern, stemmed from her December 12, 2017 meeting with Complainant. Ms. Tafoya's account of the meeting is more credible than Complainant's account. First, Complainant had been up for an almost 24-hour period at the time of the meeting. That alone is likely to result in abnormal behavior and a less put together appearance. Second, as above, the behavior described by Ms. Tafoya is consistent with Complainant's own written statements about his behavior. Third, Ms. Tafoya took notes about the meeting near the time of the meeting. Ms. Tafoya's meeting notes are consistent with her testimony.

There is sufficient evidence in the record, both through documents and credible testimony, to demonstrate by preponderance of the evidence that the information provided in the Referral Information section of Doctor BG's report was not manufactured by Respondent. The evidence in the record demonstrates the information was rooted in Complainant's behavior and statements made at work. Ms. Tafoya's testimony that she smelled the stale smell of alcohol on Complainant during the December 12, 2017 meeting is credible. There is credible evidence in the record that Complainant compared himself to a patient while speaking with both Ms. Ortiz and Ms. Tafoya. Both Ms. Ortiz and Ms. Tafoya provided credible testimony that Complainant referenced medications he was taking. Ms. Ortiz presented credible testimony that Complainant expressed concern about finances. Ms. Ortiz also provided credible testimony that at least one of Complainant's co-workers expressed concern to her about Complainant. Complainant has had a DUI. Complainant was experiencing issues with alcoholism in the time period, as he told Ms. Ortiz he tried to get into rehab for alcoholism. The totality of evidence supports that the information provided for the PFFD evaluation came was not manufactured by Complainant. Complainant failed to demonstrate that Respondent manufactured information for the PFFD evaluation to achieve a desired discriminatory result.

Complainant had Doctor WM testify at the hearing. Doctor WM was not offered as an expert witness. The reliability of Doctor WM's finding of Complainant to be fit for work in August 2018 is not at issue. Whether or not the Doctor WM's finding was reliable, Respondent brought Complainant back to work in late 2018 based upon Doctor WM's finding. Doctor WM's finding also has no bearing on the validity of Doctor BG's finding that Complainant was not fit for duty in February 2018. First, Doctor WM was not offered as an expert. Second, Doctor WM began treating Complainant in March 2018 and issued his finding at least five months after Doctor BG issued her finding.

C. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT IN VIOLATION OF CADA.

Complainant has the burden to prove by a preponderance of the evidence that he was discriminated against on the basis of his disability. *Colorado Civil Rights Com'n v. Big O Tires, Inc*., 940 P.2d 397, 400-01 (Colo. 1997). Complainant claims Respondent discriminated against him in violation of CADA. CADA provides that it is a discriminatory or unfair employment practice to:

> …discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability...; but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job.

Section 24-34-402(1)(a), C.R.S.

To establish a *prima facie* case of discrimination in employment on the basis of one of the protected classes, Complainant must demonstrate:

> First, an employee must show that he belongs to a protected class. Second, the employee must prove that he was qualified for the job at issue. Third, the employee must show that he suffered an adverse employment decision despite his qualifications. Finally, the employee must establish that 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).

The evidence in the record establishes Complainant is disabled within the meaning of the law. Respondent does not dispute that Complainant is a qualified individual with a disability. Respondent, in fact, found Complainant was a qualified individual with a disability when it went through the reasonable accommodation process with Complainant in January 2018. Therefore, Complainant belongs to a protected class on the basis of disability and established the first element of a *prima facie* case of discrimination.

Complainant failed to demonstrate he was qualified for the job at issue following the fitness for duty evaluation. Complainant argued at hearing that he was successfully performing his job duties in the time period and therefore was qualified for the job at issue. Complainant argued this was supported by Doctor WM's evaluation and Doctor MSD's January 29, 2018 note. Neither of these demonstrate the PFFD evaluation result was incorrect. Complainant's ability to successfully perform the essential functions of his job following the fitness for duty evaluation is not supported by the evidence in the record. Complainant did not pursue reasonable accommodations after the PFFD evaluation until August 2018. Complainant failed to demonstrate the second element necessary to establish a *prima facie* case of discrimination.

Respondent's decision to take Complainant off of a paid leave that it initiated and prohibit him from returning to work constitutes an adverse employment action. Respondent's decision

impacted Complainant's pay. The evidence in the record establishes the third element of a *prima facie* case of discrimination on the basis of disability.

To establish the fourth and final element of a *prima facie* case, Complainant must proffer evidence that supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297. Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. *See George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). "Direct evidence is '[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption.' (citations omitted)." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). However, as the Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi*, 995 P.2d at 296. "[E]mployees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis." *Id*. Complainant may rely on, "existing conditions from which a fair inference of such discrimination could legitimately be drawn." *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Complainant failed to present direct evidence or indirect evidence of discrimination. Complainant began seeking a schedule change in December 2017. Prior to beginning a formal accommodation process, Complainant sought a schedule change from Ms. Ortiz and Ms. Tafoya. Both discussed options for alternate schedules with Complainant. The alternate schedules included moving to day shift, moving to the nurse pool, or working an 8.5-hour schedule. Complainant declined the options presented. Complainant specifically wanted to work a four day per week, 10-hour per day schedule. In seeking the changes to his schedule, Complainant exhibited behavior and made statements that gave Ms. Tafoya and Ms. Ortiz concern for Complainant's health and his ability to perform his job duties. In December 2017, Complainant also began submitting documentation that stated he was having difficulty performing his job duties.

On January 10, 2018, Complainant presented a REQUEST FOR REASONABLE ACCOMMODATION with medical documentation to Respondent. The REQUEST FOR REASONABLE ACCOMMODATION contained information that reasonably caused Respondent to have concern for Complainant's ability to competently perform his job duties while working graveyard shift. Complainant works in a position that is responsible for the safety of patients in Respondent's care. Complainant's own statements indicate he was experiencing issues that would impact his ability to perform the necessary functions of his position and ensure the safety of patients while working graveyard shifts.

On January 16, 2018, Respondent offered Complainant an ADA accommodation that would permit him to work nearly the precise shift[11] his medical provider suggested on Complainant's REQUEST FOR REASONABLE ACCOMMODATION. It is important to note, the reasonable accommodation suggested by Complainant's provider was not a 10-hour shift, but an 8.5-hour shift. On the same date, Complainant declined that accommodation.[12]

[11] Complainant's medical provider, Doctor MSD, did not recommend Complainant work a 10-hour shift as an accommodation. Respondent offered Complainant an accommodation that matched the shift recommended by the medical provider, less 30 minutes (an 8-hour shift in lieu of an 8.5-hour shift).

[12] Whether or not that accommodation was a reasonable accommodation within the meaning of the law is not an issue before the Board. As discussed above with the other timeliness issue, Complainant did not timely appeal the ADA Accommodation process. Complainant did not file a claim of discrimination or

On January 29, 2018, Complainant presented another note from his doctor that said he could work graveyard shifts. The information in the note contradicted the information in the REQUEST FOR REASONABLE ACCOMMODATION provided by Complainant less than three weeks prior. Complainant had also been verbally conveying to Ms. Tafoya and Ms. Ortiz how difficult it was for him to work the graveyard shift since at least December 2017. The doctor's note reasonably did not end Respondent's concerns for Complainant's ability to competently perform his job duties while working a graveyard shift.

Respondent then asked Complainant to undergo a PFFD. The request complies with the Universal Personnel Policy on PFFD evaluations, which allows an appointing authority to request a PFFD when they believe a person's ability to perform their job is impaired or poses a safety risk. Complainant voluntarily agreed to the PFFD evaluation. The PFFD evaluator determined Complainant was not fit for duty. Then Respondent took Complainant off of paid administrative leave, because it now considered Complainant unable to work because of his own medical condition. This is typical course of action after a person is found to be unfit for duty in the PFFD process and complied with Board Rule 5-5(A).

This sequence of events does not raise any inference of discrimination. Respondent, through Ms. Tafoya and Ms. Ortiz, exhibited a willingness to work with Complainant on adjusting Complainant's schedule when it became aware there was an issue, and possibly a disability, that prevented Complainant working the graveyard shift. The evidence demonstrates it was Complainant who was unwilling to accept alternate shift options that did not return him to his prior 10-hour per day, 4-day per week schedule, a schedule that Respondent no longer offered any employee. Respondent requested a PFFD evaluation after Complainant declined the offered accommodations and presented a doctor's note that contradicted his prior statements and his prior request for accommodation. This doctor's note also contradicted prior medical documentation that provided the graveyard shift was negatively impacting Complainant's health and ability to perform his job duties. Ms. Tafoya began exploring the possibility of a PFFD evaluation before Complainant declined the accommodation. Respondent only took adverse action against Complainant after it was determined Complainant was not fit for duty following the PFFD evaluation.

It is important to note that Complainant did not request additional reasonable accommodations during his period of leave, despite being represented by counsel and receiving notification of his right to request accommodation, until August 2018. Despite Complainant's failure to ask, Respondent provided Complainant what would likely be considered a reasonable accommodation after it was determined Complainant was not fit for duty. This was giving Complainant time for medical care and allowing him to take leave. *See Rascon v. U.S. West Comm'ns Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998).

---

petition for a hearing within 10 days of the January 16, 2018 determination. If it were an issue before the Board, Complainant's contention that the accommodation offered on January 16, 2018 was not reasonable is likely without merit. Complainant accepted a substantially similar schedule upon his return to work in the fall of 2018. The schedule offered in January 2018 was from 2:30 p.m. to 10:30 p.m. with either Monday and Tuesday or Tuesday and Wednesday off. The schedule accepted in September 2018 was 3:00 p.m. to 11:00 p.m. with Saturday and Sunday off. The medical documentation presented in January 2018 did not indicate certain days off per week were required to accommodate Complainant's medical needs.

Complainant presented no evidence that individuals in a similar position were treated differently than Complainant or that any employee was permitted to work a 10-hour shift following the August 2017 schedule change.

Here, Complainant did not demonstrate the reasonable accommodation process or Respondent's request for Complainant to take a PFFD evaluation were motivated by discrimination. The evidence in the record demonstrates Complainant declined an accommodation that fell within the parameters of his doctor's recommendation for an accommodation. Further, Complainant's arguments largely relied on Respondent manufacturing negative information about Complainant. As discussed above, the evidence in the record does not establish Respondent manufactured information. Therefore, the actions of Respondent leading to Respondent's decision to remove Complainant from paid administrative leave do not support an inference of discrimination. Complainant failed to establish the elements necessary to have a *prima facie* case of discrimination under CADA.

Had Complainant established a *prima facie* case of discrimination, Respondent articulated legitimate, nondiscriminatory reason for the adverse action taken on February 22, 2018. Complainant did not demonstrate those reasons were pretextual. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.' (citation omitted)." *Morgan v. Hilti, Inc.*, 108 F. 3d 1319, 1323 (10th Cir. 1997). Complainant argued the January 29, 2018 note demonstrated he was able to continue working the graveyard shift, and Respondent acted discriminatorily by proceeding with a PFFD evaluation after receiving the note. As discussed above, that note reasonably did not end Respondent's concerns for Complainant and his performance. That note contradicted Complainant's behavior and information he had been providing Complainant for a period of almost two months about how the graveyard shift was impacting Complainant's health and ability to perform his job duties. Respondent took adverse action only after receiving an PFFD determination that Complainant was not fit for duty. As discussed below, it was within Ms. Tafoya's discretion under Board Rule 5-5(A) to make this decision. Respondent's legitimate, nondiscriminatory reason for adverse action in this case is worthy of credence. The facts of this case do not support a finding a pretext.

D. RESPONDENT DID NOT RETALIATE AGAINST COMPLAINANT IN VIOLATION OF CADA

Claims of retaliation for engaging in protected activity for alleged violation of CADA are within the Board's statutory authority under § 24-50-125.3, C.R.S. Under CADA, it is a "discriminatory or unfair employment practice … [f]or any person … [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.

To establish a *prima facie* case of retaliation, Complainant must show: (1) protected opposition to discrimination, (2) an adverse employment action occurred, and (3) a causal connection between the protected activity and the adverse employment action. *Smith v. Board of Educ. of Sch. Dist. Fremont RE-1,* 83 P.3d 1157, 1162 (Colo. App. 2003).

Complainant did not engage in protected opposition to discrimination until September 2018, when he filed an internal civil rights complaint with Respondent. As such, Complainant has failed to establish a *prima facie* case of retaliation as related to Respondent's decision to take Complainant off of paid administrative leave in February 2018. Because Complainant did not engage in protected opposition to discrimination until September 2018, there is no causal connection between the February 22, 2018 adverse action and Complainant's protected opposition to discrimination. Complainant has failed to establish a *prima facie* case of retaliation under CADA.

Complainant argued that Respondent's request for a PFFD evaluation was retaliatory for Complainant requesting a reasonable accommodation and then not accepting the reasonable accommodation offered. Complainant argued temporal proximity established the causal connection necessary to raise an inference of discrimination. The ALJ agrees these things were done contemporaneously to Complainant's request for reasonable accommodations. Intervening events, however, may undermine a finding of causation. *See Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 1193, 1203-1204 (10th Cir. 2006). Here, Respondent requested the PFFD evaluation only after Complainant declined an accommodation offered to help with his medical condition and then presented a doctor's note that was inconsistent with documentation he had been providing to Respondent for a period of almost two months. If temporal proximity alone were enough to establish an inference of discrimination, as discussed above, Respondent presented information of a legitimate, non-discriminatory reason for its actions. Complainant failed to establish these reasons were a pretext for discrimination. The evidence in the record does not demonstrate Respondent retaliated against Complainant in violation of CADA.

E. RESPONDENT'S DECISION TO REMOVE COMPLAINANT FROM PAID ADMINISTRATIVE LEAVE WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW

Respondent did not discipline Complainant when it requested Complainant take a PFFD evaluation and later took him off of paid administrative leave upon receiving a determination Complainant was not fit for duty. Pursuant to Board Rule 5-5(A), "Appointing authorities may use discretion to send employees home for an illness or injury 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."[13] Board Rule 5-5(A) allowed Ms. Tafoya to require Complainant to take leave after it was determined Complaint was unfit for duty and had a medical condition that was impacting his ability to perform his job. Ms. Tafoya's decision complied with Board Rule 5-5(A) and was not disciplinary in nature. Ms. Tafoya's decision then was not contrary to rule or law.

Although Respondent did not discipline Complainant, Respondent made a decision that impacted Complainant's base pay. Complainant enjoyed a property interest in his position as a certified state employee. *See* Colo. Const. Art. XII, § 13(8). At a minimum, there must be just cause for compelling the employee to take leave and for refusing to return the employee to work. *See Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994) (certified employees enjoy a "constitutional right to continued employment absent just cause"). Respondent's decision interfered with Complainant's property interest in his position and prevented him from receiving the entirety of his base pay. The question then before the State Personnel Board is whether

[13] This is the Board Rule that was in effect in February 2018.

Respondent's decision to remove Complainant from administrative leave was arbitrary, capricious, or contrary to rule or law?

In determining whether an agency's decision was 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 that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

Ms. Tafoya used reasonable diligence and care to procure evidence before taking adverse action against Complainant. The evidence in the record demonstrates Ms. Tafoya reasonably believed Complainant was suffering from a medical condition that impacted his ability to safely perform his job duties and may impact the safety of the patients he was working with. Ms. Tafoya requested a PFFD evaluation and relied on the PFFD determination that Complainant was unfit for duty when she made her determination. It was within Ms. Tafoya's authority to make that determination under Board Rule 5-5(A) if she felt Complainant had an, "illness or injury that impacts the employee's ability to perform the job or the safety of others." Respondent, through Ms. Tafoya, by having Complainant undergo a PFFD evaluation used reasonable diligence and care to procure evidence before taking action under Board Rule 5-5(A).

Ms. Tafoya gave candid and honest consideration to the evidence before her. As discussed above, the January 29, 2018 doctor's note in proximity to Complainant's observed behavior and submitted documents reasonably did not end Ms. Tafoya's concerns for Complainant's ability to perform his job duties. Ms. Tafoya took a reasonable measure by requesting the PFFD evaluation. Ms. Tafoya relied on the PFFD evaluation which found Complainant unfit for duty and consulted with someone who had experience dealing with PFFD evaluations about proper procedures. Ms. Tafoya gave candid and honest consideration to the information before her.

There is no evidence in the record that supports there was an effort on the part of Respondent to provide Doctor BG with incorrect information or that Respondent made up the information included in the Referral Information section. Indeed, if Respondent had manufactured information to obtain a PFFD evaluation and an unfit for duty determination, relying on that PFFD evaluation would have been arbitrary and capricious.

In the PFFD determination, Doctor BG included incorrect information in the Referral Information section. The incorrect information in the PFFD evaluation was that Complainant appeared at work, on shift, smelling of alcohol. Complainant in fact appeared at work for a meeting smelling of stale alcohol. The incorrect information also included that Complainant repeatedly approached the appointing authority about shift changes, and did not seem to recall prior meetings. Complainant, in fact, approached Ms. Ortiz multiple times about the schedule change. The PFFD evaluation clearly indicates that the evaluators decision was based upon more than the information included in the Referral Information section. Ms. Tafoya's reliance on the PFFD evaluation then does not indicate she failed to give candid and honest consideration to the evidence available.

The evidence presented does not demonstrate "reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley*, 36 P.3d at 1252 (Colo. 2001). Ms. Tafoya had an employee who exhibited behavior and made statements that caused concern for his ability to perform his job duties. Ms. Tafoya permitted that employee to undergo a PFFD evaluation, and received an unfit for duty determination. Only then did Ms. Tafoya remove Complainant from paid leave and make a decision that adversely impacted Complainant's pay. The evidence is such that a reasonable person could reach the same conclusion as Ms. Tafoya. The evidence does not support that a reason person "must reach a contrary conclusion."

As discussed above, Ms. Tafoya's decision was not contrary to rule or law. Ms. Tafoya exercised discretion available under Board Rule 5-5(A) and exercised her discretion in accordance with rule.

The evidence in the record does not demonstrate Respondent's actions were arbitrary capricious or contrary to rule or law.

F. COMPLAINANT DID NOT PROVE BY PREPONDERANCE OF THE EVIDENCE RESPONDENT VIOLATED THE GRIEVANCE PROCEDURES OR VIOLATED COMPLAINANT'S CONSTITUTIONAL RIGHTS

Complainant failed to address the grievance process in his argument. Therefore, Complainant failed to demonstrate Respondent violated the grievance procedures.

Pursuant to the Colorado Constitution, "Persons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." *See* Colo. Const. Art. XII, § 13(8). While Complainant did have a protected property interest in his position, the evidence in the record demonstrates Respondent had just cause for taking the actions it took in February 2018. As discussed above, Respondent its decision on February 22, 2018 was not arbitrary, capricious, or contrary to rule or law. Respondent did not violate Complainant's constitutional rights.

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

Section 24-50-125.5(1), C.R.S., provides, in pertinent part:

> Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate.

A frivolous action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which

it is found that "a party fails to offer or produce any competent evidence to support such an action…" Board Rule 8-33(C).

Complainant is not entitled to an award of attorney's fees. As discussed above, Respondent's actions had a rational basis. Though legally adverse to Complainant, the actions taken by Respondent were for the benefit of Complainant, not as a means to annoy, harass, or otherwise abuse Complainant.

Complainant requested attorney feels for its response to Respondent's Motion to Dismiss for Untimeliness filed November 13, 2020. No formal ruling was issued on Complainant's request. Complainant's request is denied. Timeliness is jurisdictional and can be raised at any point of the proceeding. Although Respondent filed its motion to dismiss only five days before the hearing, Respondent's Motion to Dismiss reasonably followed the November 9, 2020 Order Clarifying Issues.

H. RESPONDENT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Complainant was entitled to review of Respondent's action that impacted his base pay under § 24-50-125(5), C.R.S. ("In addition, upon request by the employee or the employee's representative and within the period provided in section 24-50-125.4 (2), 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 rule, status, or tenure.") Because Complainant is entitled to review and Respondent bore the burden to prove its decision was not arbitrary, capricious, or contrary to rule or law, Complainant's case was not "instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." § 24-50-125.5(1), C.R.S.

CONCLUSIONS OF LAW

1. Respondent did not discriminate or retaliate against Complainant in violation of CADA.

2. Respondent's decision to remove Complainant from paid administrative leave and require leave was not arbitrary and capricious, or contrary to rule or law.

3. Because Respondent's personnel action was not frivolous, done in bad faith, or groundless, Complainant is not entitled to an award of attorney fees and costs.

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

ORDER

1. Respondent's decision to remove Complainant from paid administrative leave is upheld.

2. Complainant's claims relating to his Family Medical Leave will be referred to the State Personnel Director for review.

Dated this 25th day of
January, 2021, at
Denver, Colorado.

/s/ *K. McCabe*

K. McCabe, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of **January, 2021**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Casey Leier, Esq.
William Finger, Esq.
20925-D Upper Bear Creek Road
Evergreen, CO 80439
Casey@fingerlawpc.com
Bill@fingerlawpc.com

Lucia Padilla, Esq.
Senior Assistant Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Lucia.Padilla@coag.gov

Colorado State Personnel Director
Appeals Unit
1525 Sherman Street, 2nd Floor
Denver, CO 80203
DHR_consultingservices@state.co.us

Andrea Woods

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits A-PP and SS.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits 1, 2, 5, 6, 8-18, 20, 22-29, 31, 32, 36, 39, 40, 42, 44-64, and 67-71.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Dean Pace, Complainant

Doctor WM, Clinical Psychologist

Jim Gray, Complainant's Former Co-Worker

Janice Rubidoux, Complainant's Former Co-Worker and Current Employee of Respondent

Christine Tafoya, Psychosocial Program Chief Nurse and Appointing Authority

Kim Ortiz, Respondent's Lead Nurse of Unit J1 and RN IV

Bridget Clawson Braaten, Respondent's Director of Project Management

Nancy Schmelzer, Respondent's ADA Coordinator

Patricia Bowling, Region 1 Civil Rights Manager, Colorado Department of Transportation

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 served 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 served to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rules 8-62 and 8-63, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is $5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-64, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-66, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-70, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-60, 4 CCR 801.