STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2020B046(C)**

<u>AMENDED</u> INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

HOLLY CAPPELLO,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, OFFICE OF BEHAVIORAL HEALTH, COLORADO MENTAL HEALTH INSTITUTE AT FORT LOGAN,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on September 14, 15, 16, 17, 18 and October 6, 2020. The hearing was conducted remotely through a web conference. The record was closed on October 6, 2020. Complainant Holly Cappello was represented by attorney Mark A. Schwane. Respondent Colorado Department of Human Services ("CDHS"), Office of Behavioral Health, Colorado Mental Health Institute at Fort Logan was represented by attorney Eric W. Freund, Senior Assistant Attorney General. Respondent's advisory witness, and Complainant's appointing authority, was David Polunas, Fort Logan's hospital director. Pursuant to State Personnel Board Rule 8-60, the ALJ issues this Amended Initial Decision.

A list of exhibits stipulated to or admitted at hearing is attached hereto as Appendix A.

A list of witnesses who testified at the hearing is attached hereto as Appendix B.

MATTERS APPEALED

In this consolidated matter, Complainant appeals Respondent's decision to demote her from a Psychologist II to a Psychologist I, alleging that she did not commit the acts for which she was disciplined; that Respondent's decision to demote her was arbitrary, capricious, and contrary to rule or law; and that the discipline imposed was not within the range of reasonable alternatives. Complainant also alleges that she was constructively discharged. Complainant requests rescission of her disciplinary demotion, back pay and benefits, attorney fees and costs, and front pay in lieu of reinstatement.

Respondent argues that Complainant committed the acts for which she was disciplined; that Respondent's decision to demote Complainant was not arbitrary or capricious or contrary to rule or law; that the discipline imposed was within the range of reasonable alternatives; that the decision to demote Complainant should be upheld; that Complainant was not constructively discharged; and that Complainant is not entitled to any relief.

For the reasons discussed below, Respondent's decision to discipline Complainant is rescinded, Respondent's constructive discharge of Complainant is rescinded, and Complainant is awarded back pay and benefits, reasonable attorney's fees and costs, and reinstatement to her position as a Psychologist II.

ISSUES

1. Whether Complainant committed the acts for which she was demoted.

2. Whether Respondent's decision to demote Complainant was arbitrary, capricious, or contrary to rule or law.

3. Whether Complainant's demotion was within the range of reasonable alternatives.

4. Whether Complainant was constructively discharged.

5. Whether Complainant is entitled to an award of reasonable attorney's fees and costs.

FINDINGS OF FACT

Background

1. The Colorado Mental Health Institute at Fort Logan ("Fort Logan") is one of two state psychiatric facilities serving the citizens of Colorado who have a mental illness. It is a 94-bed hospital. The other Colorado state psychiatric facility is the Colorado Mental Health Institute at Pueblo (CMHIP). At all times relevant to this matter, Fort Logan was chronically understaffed.

2. Each patient (also referred to as "client") at Fort Logan is assigned to a treatment team. At all times relevant to this matter, the professional staff was organized into 4 treatment teams, each team comprising professional staff such as a psychiatrist, a psychologist, a behavioral health nurse, a social worker, a patient advocate, and others.

3. The Trauma Informed Care ("TIC") unit at Fort Logan was initially funded by a grant arising out of policy initiatives following the Aurora Theater shooting in July 2012.

4. Concisely stated, TIC is the delivery of trauma-specific services, defined as interventions with patients or clients designed to directly address the impact of trauma, with the goals of decreasing symptoms and facilitating recovery. TIC usually involves long-term psychological intervention.

5. Complainant obtained her doctorate in Psychology from the University of Denver in 2001. Her specialty is TIC. She was hired at Fort Logan to head the newly-formed TIC unit, which at most times relevant to this matter consisted of Complainant and one social worker.

6. Complainant was initially hired at Fort Logan in September 2013 as a Psychologist I. (Stipulated fact.) Prior to her hire at Fort Logan, and prior to developing an expertise in TIC, Complainant had practiced for many years as a family therapist, and had testified in court on family matters such as custody and visitation dozens of time.

7. Complainant was subsequently reallocated to a Psychologist II without a pay raise. (Stipulated fact.)

8. At all times relevant to this matter, Complainant worked across the treatment teams, and was the sole TIC psychologist at Fort Logan.

9. Complainant worked with patients at Fort Logan referred to her by the treatment teams, focusing on establishing relationships of trust and then exploring how past traumas informed problematic behaviors. Most of the patients referred to Complainant were those who the treatment teams found most resistant to treatment and improvement. Complainant also provided training in group settings to patients and professional staff.

10. Treatment team psychologists were responsible for the legal certification process, by which the psychologists certified that a patient needed to be involuntarily committed to Fort Logan for treatment. That role often resulted in a patient developing antagonistic feelings toward the psychologist who had certified them, which interfered with the patient/psychologist relationship. Complainant, as the TIC psychologist, was not responsible for certifications, and thus avoided the potential friction experienced by the treatment team psychologists and their patients.

11. Complainant developed an excellent reputation with the Fort Logan psychologists and other professional staff as someone who was capable of establishing relationships of trust with patients, often those who had previously failed to improve, with excellent therapeutic results. Complainant's work ethic was exemplary.

12. Due to the nature of Complainant's work with patients, and the certification role assigned to the treatment team psychologists, Complainant needed to be somewhat circumspect with the information she obtained through work with her patients.

13. David Polunas, Fort Logan's Director, was the delegated appointing authority for Complainant at all times relevant to this case. (Stipulated fact.)

14. Dr. Alan Kent, Fort Logan's Director of Psychology, was Complainant's immediate supervisor during his tenure at Fort Logan. (Stipulated fact.) Dr. Kent obtained his doctorate in Psychology in 1984. Dr. Kent was employed at Fort Logan from March 22, 2018 until his resignation effective October 1, 2019.

Tensions Between Dr. Kent and the Psychologists

15. Prior to Dr. Kent's hire as Fort Logan's Director of Psychology at Fort Logan, Complainant served as interim Director of the Fort Logan Psychology department for approximately six months.

16. At the time of Dr. Kent's hire at Fort Logan, all of the Fort Logan psychologists were women.

17. At the time of Dr. Kent's hire, Complainant was finalizing the annual job performance evaluations for the Fort Logan psychologists for the period April 1, 2017 through March 31, 2018.

18. Dr. Kent objected to Complainant's evaluations of the psychologists, alleging that Complainant was assigning the psychologists ratings that were uniformly too high. Dr. Kent worked at Fort Logan for only seven work days during that evaluation period.

19. Dr. Kent's insistence that Complainant revise the psychologists' evaluations created tensions within the Fort Logan Psychology department. The psychologists viewed Dr. Kent's objections as unwarranted, heavy-handed, and without factual basis.

The Internship Issue

20. Each year, Fort Logan receives hundreds of applications for a handful of internship positions. Internships are required before a psychologist-candidate can earn a license. The Fort Logan Psychology department designated specific days for internship interviews.

21. Dr. Kent communicated with an internship candidate who was unable to schedule her interview on the designated dates. Dr. Kent agreed to make a special accommodation for that candidate and requested that two Fort Logan psychologists volunteer to interview that candidate.

22. Several Fort Logan psychologists objected to the special accommodation afforded that candidate, believing that the accommodation for that candidate, which was not afforded to other internship candidates, gave the appearance of favoritism, which was strongly disfavored by the American Psychological Association (APA).

23. Dr. Kent was irritated by those objections, and viewed them as questioning his authority. Emails were exchanged, and tempers flared.

24. In December 2018, Dr. Kent contacted Cynthia Nunez, Human Relations (HR) partner, and expressed his concern that the psychologists were being resistant to his authority and were bordering on insubordination. Throughout December 2018, Dr. Kent communicated with Ms. Nunez about the issues he was experiencing with the psychologists.

25. Dr. Kent and the psychologists met on December 6, 2018 about the internship matter. Dr. Kent read a two-page document expressing his displeasure with the psychologists and how they objected to his decision to accommodate the candidate who was unable to make herself available during the scheduled interview dates. Dr. Kent appeared angry and hostile. The psychologists attempted to discuss their objections, but Dr. Kent interrupted them or spoke over them. At one point, Complainant stated that the psychologists were “trauma bonding” over this issue and Dr. Kent’s supervisory style. Dr. Kent responded by getting very angry and left the meeting. Most of the psychologists were very upset by what they viewed as Dr. Kent’s overly emotional reaction, hostility and anger. At least one psychologist started crying and left the facility for the day.

26. In his weekly meetings with Mr. Polunas, Dr. Kent complained about the psychologists’ resistance to his supervision and authority. Mr. Polunas expressed support for Dr. Kent.

HR Becomes Involved

27. On December 14, 2018, Dr. Kent submitted a gender discrimination complaint against Complainant and Dr. Gina Signoracci, one of the Fort Logan psychologists, arising from their perceived attacks and comments that Dr. Kent viewed as unfounded. On his Employee Discrimination Complaint Form, Dr. Kent wrote:

> Two of my direct reports, Gina Signoracci and Holly Capello [sic], have engaged in a consistent pattern of unfair, gender-based labeling and stereotyping of me which has impeded my ability to fulfill my supervisory duties. I recently made a simple, direct request within the scope of my authority and they both responded with stereotypic, gender-based characterizations. When they disagreed with my decision, I listened to their

perspective and heard their feedback. However, when I responded to what I perceived as unfair criticism, they accused me of being hostile and aggressive.

28. After consulting with the CDHS Office of Civil Rights, Dr. Kent withdrew his complaint and suggested individual mediation with Complainant and Dr. Signoracci.

29. Two psychologists, Dr. Diana Luckman and Dr. Signoracci, also contacted Ms. Nunez in December 2018 and January 2019, and requested a team meeting with Dr. Kent and all the psychologists. Several psychologists communicated with Ms. Nunez over the next few months complaining that Dr. Kent was creating a hostile workplace.

30. In response, Dr. Kent told Ms. Nunez that he was open to a team meeting, but only after resolving communication issues with Complainant and Dr. Signoracci.

31. In late December 2018 or early January 2019, Ms. Nunez informed Mr. Polunas that the psychologists were alleging that Dr. Kent was creating a hostile work environment.

32. Mr. Polunas felt that Ms. Nunez was too supportive of the psychologists and needed to have a more balanced perspective on the relationship between the psychologists and Dr. Kent.

33. Mr. Polunas contacted Laura Koeneman, who was then an Interim Deputy Director of CDHS' Office of Administrative Solutions, and requested that Ms. Nunez be removed from investigating the psychologists' complaints against Dr. Kent and be replaced by a different HR business partner. Valerie Cordova, a recent hire, replaced Ms. Nunez in dealing with the complaints.

34. No action was taken by Respondent to investigate the psychologists' complaints against Dr. Kent until the psychologists submitted a written complaint in July 2019.

<u>Patient H.W.</u>[1]

35. H.W. was a patient at Fort Logan beginning on May 1, 2018. H.W. had a few criminal charges against her and had been a patient at CMHIP but was transferred to Fort Logan after a protective order was entered against her barring her from CMHIP.

36. H.W. had a diagnosis of a delusional disorder, among other things.

37. There was a protective order against H.W. that prohibited her from contacting her minor daughter.

38. When H.W. came to Fort Logan, she was resistant to any therapeutic intervention. After several months, she was stabilized and requested assistance from Complainant as the TIC psychologist.

39. Complainant began working with H.W. in or about November 2018. Complainant established a level of trust with H.W. and explored H.W.'s feelings of trauma that were interfering with her mental health progress.

[1] To protect this person's privacy, and because her full name is not relevant to this decision, she is referred to by her initials only.

40. H.W. revealed to Complainant and members of her treatment team that she had not had contact with her child for six years and was traumatized by that lack of contact.

41. H.W. told Complainant that her family was wealthy and influential in Pueblo and that any professional who had tried to help her in the past had been the recipient of retaliatory actions from her family and those they influenced.

42. H.W.'s treatment team, as well as Fort Logan's patient advocate Donna Trowbridge, discussed H.W.'s issues and her desire reestablish contact with her daughter. The treatment team was in favor of Complainant offering to supervise any contact between H.W. and daughter if the court should would permit such contact. The team discussed the impact on H.W. of her lack of contact with her child. Complainant opined that contact with her child might be beneficial to H.W., and the treatment team was generally in agreement with that opinion. Dr. Robert Hernandez, who was one of the psychiatrists on H.W.'s treatment team, agreed.

More Friction between Complainant and Dr. Kent

43. On February 14, 2019, Complainant met with Mr. Polunas and Dr. Kent. During the meeting, Dr. Kent stated that he had seen Complainant's confidential survey, on which she had marked Dr. Kent as "unsatisfactory" in multiple categories. Complainant stated that she was upset that Dr. Kent accessed her confidential information and that it had clearly impacted her relationship with Dr. Kent.

44. On February 15, 2019, Complainant called Ms. Nunez regarding the February 14, 2019 meeting.

45. On February 19, 2019, Complainant emailed Ms. Nunez and outlined what happened during the February 14, 2019 meeting. Complainant added, "I would like your help in this matter as I believe I am now functioning in a hostile work environment in which retaliation seems to exist. I am facing mediation with Alan [Kent] probably sometime in March. Thank you in advance for your help with this matter."

Complainant Letter to Pueblo Court

46. Complainant wrote a letter, dated April 5, 2019, addressed to the Pueblo County court ("the Letter"). The Letter read, in its entirety, as follows:

> I am writing on behalf of Dr. H.W.[2] Dr. W. is currently hospitalized at Colorado Mental Health Institute at Ft. Logan (CMHI-FL) where she receives weekly individualized trauma treatment from me. It is my understanding Dr. W. hasn't had contact with her minor daughter since 2014 due to a protective order requiring supervised visitation. I am willing to provide supervision so Dr. W. and her daughter can communicate by phone or in person. Unless there are issues of risk or harm to the minor child that I am unaware of I believe contact could be beneficial in strengthening the parent-child bond.
>
> I can be reached at [redacted] if additional information is needed. With Dr. W.'s permission, I will provide additional information regarding her current status.

47. The Letter never made it into Fort Logan's electronic health record for H.W.

[2] H.W. claimed to be some sort of doctor, although not a medical doctor, and referred to herself as such.

Letter from Alleged Stepmother

48. On April 30, 2019, Complainant received an email from someone claiming to be the stepmother of H.W.'s daughter, expressing concerns about the possibility of visitation with H.W. and her child.

Letters Sent to CDHS

49. In late May 2019, H.W. sent a copy of the Letter, along with a handwritten note, to the CDHS executive management. Complainant's Letter and the accompanying handwritten note, was routed to Michael Tessean, who was then the Deputy Director of CDHS' Office of Behavioral Health ("OBH").

50. The handwritten note, dated April 13, 2019 and presumably written by H.W., read:

> To whom it may concern @ Social Services,
>
> I am Dr. H.W. the mother of O.W. I have enclosed Dr. Cappello's letter mandating re-unification to occur between my child … and myself . . . .
>
> As Pueblo Colorado actors etal [sic] have failed to comply with my parental rights that I'm entitled to, I am therefore, sending to your dept this letter – in hopes you'll report this to FBI, CBI and take action as to the legalized kidnapping that has occurred in [court case] 2007DR1166 in 2013.
>
> I have not seen or heard from my child in over (6) six years thus the reason I'm writing you again as due process mandates.
>
> Please help me save O. – please.

51. Mr. Tessean, in turn, forwarded the Letter and the handwritten note to Mr. Polunas. Mr. Tessean directed Mr. Polunas to have Dr. Cappello's supervisor – Dr. Kent -- investigate the background of the Letter.

Dr. Kent Begins to Investigate

52. On May 30, 2019, Dr. Kent spoke with Complainant and asked her if H.W.'s treatment team was aware of and approved the Letter. Complainant indicated that the treatment team approved of what she was doing.

53. Dr. Kent then spoke with Mr. Tessean, and told him that the treatment team was aware of and approved Complainant writing the Letter. Mr. Tessean expressed his view that if the treatment team supported something like this, it only heightened his level of concern. Mr. Tessean told Dr. Kent to "dig deeper," and suggested some questions that he wanted Complainant to answer. Dr. Kent understood that the upper management of CDHS, including Mr. Tessean, were very concerned about this matter.

54. On May 30, 2019 at 3:45 p.m., Dr. Kent sent an email to Mr. Polunas, and copied Mr. Tessean and Terry Scofidio, the Division Director of the Colorado Mental Health Institutes. He wrote:

> Thanks for bringing this issue to my attention. I have had an initial discussion with Dr. Cappello and have learned that the treatment team is aware that this

> letter was sent and feels it was appropriate to do so. Michael has raised some thoughtful questions and I will follow up with Dr. Cappello and those involved in the care of this patient to ensure that proper process and protocol was followed. I will advise you if there are any further concerns or revisions in protocol to be made.

55. On May 30, 2019 at 4:31 p.m., Dr. Kent forwarded the above email to Complainant, and wrote:

> I sent the email below after reviewing it with David [Polunas]. Since the original email was sent by Michael [Tessean] and copied to Terry [Scofidio], I responded to them all.
>
> As I explained, your letter to the court was apparently accompanied by the letter attached below. As you can see, her letter also stated that you "mandated" the reunification with her child, which of course you did not.
>
> Michael [Tessean] raised some fair questions and I think you and I need to talk this through so I have the full context. I have already received a return email form Michael asking that I gather more information about this situation and report back to him.
>
> How would you like to proceed? Shall we find a talk to talk? Do you want to include Dr. Hernandez in this conversation?

56. On Friday, May 31, 2019, Dr. Kent emailed Complainant at 8:35 a.m., and wrote:

> I heard back from Michael Tessian [sic] last night. Apparently the concern about the letter came from executive leaders of CDHS (which means above Michael). I did explain that this might be a reflection of a potentially contentious custody situation.
>
> We do need to talk about this soon so I can offer a response to their concerns. I am taking some leave time this afternoon but I have lots of flexibility on Monday. Please let me know what you prefer.

57. After Complainant responded and indicated that she could meet with Dr. Kent on Monday, June 3rd, Dr. Kent sent her an email at 10:38 a.m. on May 31, 2019. He wrote:

> I reviewed your HER[3] and your notes and you have thoroughly documented your sessions with the client around her parenting issues. I have no doubt that you thoughtfully made the decision to send this letter and intended to support and advocate for your client.
>
> I do have some reasonable questions that have been raised that we need to discuss. Remember that the director of OBH is a psychologist and may have asked some of these questions:
>
> 1. Is it the role of the treating psychologist to intervene in a matter like this or is it crossing a boundary?

[3] Presumably, this stands for health electronic record.

2. Should the parent's treating psychologist be the individual to supervise visitation? Wouldn't that potentially create a dual-role?

3. Should a treating psychologist at Fort Logan send this type of letter to the court without having been asked or invited to do so by the court? Isn't there a risk of involving ourselves in a highly contentious matter which goes beyond our treatment role?

I look forward to understanding your perspective on this case.

58. On Sunday, June 2, 2019, Complainant responded to Dr. Kent's email as follows:

Maybe we could meet after morning report on Monday? Here are some of my thoughts:

1. I didn't send the letter to the court. The client did. The reason the letter is addressed to the court and DHS is because I have been told that writing "to whom it may concern" could be a HIPPA [sic] violation. The client has trauma regarding her child residing with people she believes may be abusive. She alleges in childhood she was abused and her mother left due to domestic violence. She was never protected and she wanted to do something differently than what happened to her. I researched with Jen [Vasquez] in admissions and found there has never been any abuse or neglect charge brought against my client. She has been uncooperative with people at different agencies that provide supervised visitation of children and their parents. I don't believe this makes her an unfit parent just a difficult person to deal with. We talked about her options and she decided to request a hearing. She knew the court would want her to be supervised IF she was allowed to speak with her child. I was just willing to be present to support my client and make sure she didn't say or do anything harmful. I wasn't planning on providing a therapeutic interaction between them. I believe the court would decide whether this could occur, under what circumstances, and probably a GAL[4] would be assigned to talk with the child first and advocate for them.
2. I don't think being present with my client during a phone call presents a dual role. I'm her therapist providing therapeutic support for her. I'm present at many meetings with clients and their family or community providers. In fact, I thought we had been asked to try and help facilitate more family involvement. I have also spoken with this client's father. The client subsequently decided she didn't want to have him visit or speak with him so we discontinued this communication.
3. I think we are always at risk of being subpoenaed. I don't think that should keep us from doing what is clinically best for the client. As stated, I didn't initiate this contact. The client did. I'm also wondering how these letters were obtained by individuals at OBH. My guess is the family (who my client alleges abuse by) sent them because a court hearing is scheduled for the end of June. I don't know whether this clients [sic] allegations are true. I do believe she should have the opportunity to let the court decide whether she can have contact with her child. As stated, I'm not planning on providing therapy. I'm just attempting to help my client advocate for herself and have her day in court IF that's what she wants AND a judge determines that should occur.

[4] This refers to a Guardian ad Litem, a person appointed by the court to represent and protect the interests of a minor.

Hope this clarifies my actions a little bit.

Dr. Kent Investigates Further

59. On June 3, 2019, after the second mediation session between Dr. Kent and Complainant, they met to discuss the Letter. During this meeting, which turned contentious, Complainant explained that H.W. is traumatized by not having contact with her child for the last six years, and the Letter she wrote advocated for her client and was a common practice. Dr. Kent expressed his concerns and disagreement with Complainant's actions. He questioned the wisdom of giving the Letter directly to H.W., who had a delusional disorder, and questioned Complainant's statement that visitation could strengthen the parent/child bond without knowing anything about the child. Dr. Kent also expressed concerns that the Letter was on CDHS letterhead and that the Letter was beyond the role of an inpatient trauma psychologist. There was no Fort Logan policy prohibiting the use of CDHS letterhead for letters written by Fort Logan psychologists.

60. Complainant became upset with Dr. Kent's criticisms and alleged that Dr. Kent did not have her back, was unsupportive, and that is why she did not feel comfortable working with him. Complainant also questioned why OBH was concerned about the Letter and raised the possibility that H.W.'s family may have been involved to keep H.W. from seeing her child. Dr. Kent explained that he had a right to question Complainant's actions, that he was her supervisor and that would not be changing, and if she did not like it, then maybe her position at Fort Logan was not the right for her.

61. After this meeting, Dr. Kent and Complainant agreed that they would no longer pursue mediation.

62. Dr. Kent viewed Complainant's response to his questioning her actions as abusive and full of rage. Dr. Kent was disturbed that Complainant appeared to deny any possibility that she may have mishandled the matter.

63. On June 3, 2019, Jennifer Vasquez, Fort Logan's Director of Admissions who maintained all legal information regarding Fort Logan patients, sent an email to Dr. Kent summarizing H.W.'s recent legal issues. Dr. Kent forwarded the email to Complainant.

64. After meeting with Complainant, Dr. Kent spoke with several others as he attempted to gather more information and "dig deeper" per Mr. Tessean's instructions.

65. On June 3, 2020, Dr. Kent spoke with Dr. Angela Gutjahr, the psychologist on treatment team 1. Dr. Gutjahr told Dr. Kent that she was aware that Complainant was working on H.W.'s custody concerns and was aware of Complainant writing the Letter to the court on behalf of H.W. She indicated that she had no concerns about the Letter.

66. Shortly after speaking with Dr. Gutjahr, on June 3, 2020, Dr. Kent had a brief conversation with H.W.'s treatment team's psychiatrist, Dr. Robert Hernandez. Dr. Kent introduced the subject by saying that CDHS' and OBH's executive management had expressed concerns about a letter Complainant had written on behalf of H.W. and asked Dr. Hernandez if he knew about the Letter. Dr. Hernandez told Dr. Kent that he knew nothing about the Letter and never heard it discussed at Treatment Plan Review ("TPR") meetings. Dr. Kent asked Dr. Hernandez if he would have approved the Letter and if he approved handing it directly to H.W. He said no to both questions. Dr. Hernandez admitted that that H.W.'s treatment team discussed the issue of custody and its impact on H.W., and that the team thought that H.W.'s contact with her child might be beneficial to H.W.

67. If Dr. Hernandez had told Dr. Kent that Dr. Hernandez was aware of the Letter and supported it, Dr. Kent would have concluded his investigation and been satisfied that Complainant was without fault.

68. Dr. Kent did not check back with Dr. Gutjahr concerning the discrepancies between her recollection of the matter and Dr. Hernandez's denial of any knowledge of the Letter.

69. No one discussed the Letter with Dr. Hernandez after his brief conversation with Dr. Kent on June 3, 2019.

70. Despite expressing his view to Dr. Kent that he disapproved of the Letter and handing it directly to H.W., Dr. Hernandez did not discuss the matter with Complainant and took no action about the issue.

71. On June 3, 2019, Dr. Kent spoke with Nancy Kehiayan, Fort Logan's Director of Nursing, who raised several questions about the matter, and characterized Complainant's actions in this matter as "cowboy psychology," and as "operating independent of the team."

72. On June 4, 2019, Dr. Kent spoke with Dr. Danielle Weittenhiller, Director of Forensic Services, who opined that H.W.'s custody issues were not related to the reasons she was hospitalized at Fort Logan. Dr. Weittenhiller expressed concerns that, based on what Dr. Kent said, Complainant appeared to have operated outside of H.W.'s treatment team. Dr. Weittenhiller stated that she wouldn't have written such a letter, nor would she have given it to the patient.

73. On June 5, 2019, Dr. Kent spoke with Lorie Sanchez, an HR analyst. Based on what Dr. Kent told her, she said it sounds more serious than a corrective action and asked if it should be reported to the Board of Psychology. She indicated that they may have enough to consider administrative leave for further investigation.

74. On June 5, 2019, Dr. Kent spoke with Dr. Peggy Hicks, a CMHIP staff member, who reported that a similar situation occurred at CMHIP with another staff member losing her license.

75. Dr. Kent obtained a court document about the similar situation to which Dr. Hicks referred. To Dr. Kent, this document was the most relevant and significant document he obtained during his investigation, and he viewed it as being virtually identical to Complainant's actions regarding H.W.

76. The Stipulation and Final Agency Order in the case to which Dr. Hicks referred indicates that the sanctioned staff member was a licensed professional counselor, not a psychologist, and the Board involved in that case was the Board of Licensed Professional Counselor Examiners. In that case, the CMHIP staff member was found to have failed to document certain details in H.W.'s records, and the staff member failed to refer H.W. to an appropriate practitioner when H.W.'s problems were beyond her training, experience, or competence. The CMHIP staff member also communicated with H.W. via telephone after terminating the therapeutic relationship, and she made an inappropriate custody recommendation regarding H.W.'s child in a letter to the court. The CMHIP staff member did not lose her license; she was placed on probation.

77. On June 7, 2019, Dr. Kent spoke with Denise Gronki, H.W.'s treatment team's social worker, who indicated that that she was not aware of a letter being written to the court about

the client's concern about her daughter. Dr. Kent did not ask her about discussions the treatment team had about how to support H.W. in her concern regarding her lack of contact with her child.

78. Dr. Kent also reviewed the progress notes for H.W.

79. Dr. Kent also reviewed American Psychological Association (APA) ethical standards regarding record keeping and child custody assessments, as well as Colorado statutes and regulations regarding record keeping.

80. On June 7, 2019, Dr. Kent spoke with two attorneys at the Attorney General's ("AG's") office.

81. Dr. Kent did not speak with other Fort Logan staff members who had knowledge of the matter, including, but not limited to, nurse manager Miriam Taylor and patient rights specialist Donna Trowbridge.

82. Dr. Kent was concerned that Dr. Hernandez did not know about the Letter. He viewed Complainant's statement about strengthening the parent/child bond as offering an opinion about the child without knowing about the child. Although there were no ethics guidelines that prohibited Complainant from giving the Letter to H.W., he thought once the Letter was given to H.W., Complainant had no control over what H.W. would do with it. Also, given the fact that the Letter was on CDHS letterhead, the Letter could end up involving CDHS in a contentious custody dispute, something CDHS was very sensitive about because it was already in protracted litigation arising from purported delays in court-ordered competency evaluations for inmates awaiting trial.

Dr. Kent's Investigative Report

83. On June 7, 2019, Dr. Kent sent his investigative report to Mr. Polunas. Dr. Kent would have written the report differently if Complainant had taken responsibility for her actions, in other words, admitted that she mishandled the April 5, 2019 Letter. Dr. Kent also would not have taken certain subsequent actions if Complainant had admitted error, such as filing a complaint against Complainant with the Colorado Board of Psychologist Examiners (see below).

> At the request of executive administration of CDHS, and a specific request from the Deputy Director of OBH to "dig deeper" into the clinical decision-making with regard to Dr. Cappello's treatment of a patient at CMHIFL, I have conducted a thorough investigation of the matter. I share my findings with you below.
>
> In addition to getting a written response from Dr. Cappello to the concerns and meeting with her to gain her perspective on the issue, I have carefully reviewed the client's clinical and criminal record and have interviewed several relevant parties, including members of the treatment team, staff at Court Services, several child psychologists, the Directors of Quality Improvement and Medical Records, and the TIC Director at CMHIP. In addition, I have reached out to HR and the AG's office for consultation and reviewed CCR[5] regulations, American Psychological Association (APA) Record Keeping Guidelines, and APA's Guidelines for Child Custody Evaluations.
>
> Here are my findings and conclusions on this matter.

[5] Colorado Code of Regulations.

• In discussing this matter with me, Dr. Cappello stated that Dr. Hernandez and the treatment team were aware that she wrote this letter and gave it to the patient. Dr. Hernandez told me he was unaware of the letter and that it was never discussed with him nor at a TPR meeting. Further, he said he wouldn't have supported such a letter since it is up to the court to order a parent/child interaction evaluation. He also expressed concern that focusing on the child custody issues would destabilize the patient at a time she is preparing for discharge.

• The patient was admitted to the hospital for competency restoration related to multiple, serious legal charges. Intervening in her child visitation/custody matter is beyond the scope of Dr. Cappello's role as the TIC therapist and it potentially puts the Institute in the unnecessary situation of getting involved in a contentious child custody matter. Submission of the letter on CDHS stationary [sic] implies that the clinical team and the Institute staff are in support of the client resuming visitation with her child. This Is clearly not the case.

• Dr. Cappello's letter was addressed to the court, but she told me that she handed it directly to the patient, an individual with a documented diagnosis of schizoaffective and delusional disorders. Once the letter is given to the patient, it Is out of our control and there is no way to know how it may be used. In fact, the patient apparently sent the letter to CDHS and mischaracterized Dr. Cappello's statement as "mandating reunification." Additionally, the patient's letter included comments suggesting that the FBI and CBI should investigate the situation. Dr. Cappello told me that it is her "standard clinical practice" to write such a letter and give it to a patient. Not one professional I spoke with agreed that it would be appropriate to write such a letter addressed to the Court and then give it directly to a patient with a serious and persistent mental illness.

• Of great concern is the fact that there is no documentation in BEHR[6] that this letter was ever written or given to the patient. CCR 21.280.93 requirements state that "Records shall contain .... correspondence to and from relevant agencies and Individuals." Neglecting to provide documentation of this letter in BEHR is a clear violation of CCR regulations. APA Record Keeping Guidelines state that records should include "the nature of professional intervention or contact (e.g., letters ...) and may also contain "other specific information ... Including case-related telephone, mail and email contacts." Even if the actual letter wasn't scanned into the record, every clinical and legal consultant I spoke with firmly agreed that Dr. Cappello had an obligation to document the fact that she wrote the letter and gave it to the patient. The fact that Dr. Cappello did not document this action nor review it with the treating psychiatrist gives the impression that she may have been trying to conceal this activity.

• TIC therapists operate as consultants to the treatment team. It is clear that the TIC psychologist does not lead the treatment team. Actions such as these should never be taken without the full knowledge of the legally responsible clinician (psychiatrist/LIP) and a full discussion and approval of the treatment team. Further, Dr. Cappello told me that the focus of the TIC treatment is

[6] Behavioral Electronic Health Record.

"traumatic issues related to losing her child." If this is the case, it should be documented as an intervention in the treatment plan and iPOC and the treatment team should be aware of it.

• As the patient's therapist, Dr. Cappello has no first-hand knowledge of the reasons there is a protection order keeping the child from this patient. In writing this letter, Dr. Cappello has accepted the sole input of a seriously mentally ill, delusional client without having any historical information about why the child was removed or why the protection order was put in place. By writing this letter, Dr. Cappello has potentially put CDHS in jeopardy of getting pulled into a custody battle which is completely unrelated to the reasons for the client's hospitalization. It displays highly questionable clinical judgment and over-reliance on the self-report of a seriously mentally ill patient.

• This patient has multiple pages of criminal charges and multiple restraining orders in place. She has been accused of stalking individuals, including staff at CMHIP. Making a statement that supervised visitation "could be beneficial in strengthening the parent/child bond" is not currently supported by the history and evidence. Again, it shows questionable clinical judgment to make this type of statement to the court without any knowledge of the child's status. The American Psychological Association has disseminated very specific and detailed guidance about psychologists' involvement in child custody situations. APA guidelines note that "psychologists render a valuable service when they provide competent and *impartial* (italics inserted by me) opinions with direct relevance to the psychological best interests of the child" and further state that "psychologists strive to base their recommendations, if any, on the best interests of the child." These guidelines go on to state that "the most useful and influential evaluations focus upon skills, deficits, values and tendencies relevant to parenting attributes and a child's psychological needs." While Dr. Cappello wasn't conducting a formal evaluation, she was weighing in on a highly contentious issue without adequate background or information and without being asked by the Court to do so. While Dr. Cappello could certainly offer her opinion that visitation would be helpful for the *patient,* she doesn't know how such a visit would impact the child. In fact, advocating for visitation could well be harmful to the child. We simply don't know since we have no information about the status of this child from an independent professional. Dr. Cappello's decision to make this statement in a letter addressed to the court goes beyond the scope of her knowledge of the situation and her role.

• Several psychologists from CMHIP and Forensic Services told me that that this is a very complex legal case and this patient is known to be highly litigious and adversarial. Dr. Cappello has potentially involved herself and the Institute in a legal matter that is beyond the scope of her role and unrelated to the reason for the patient being placed at CMHIFL.

• Psychologists in the Forensic Unit have described this patient as "a highly intelligent, skillful manipulator" who has a tendency to "try to isolate clinicians" and has done so in the past. It appears that Dr. Cappello acted alone and in Isolation in taking this action with the client. Further, it appears that her objectivity and boundaries in this case are certainly open to question.

• Dr. Cappello's progress note in BEHR on 5/15/19 uses the full name of another individual as well as one of the alleged victims of the patient's stalking behavior. CMHIFL policy on Medical Record Documentation (36.01) clearly states that "when references to family, friends, are made, the individual's name should be limited to his/her first name and the initial." Dr. Cappello violated hospital policy by including the full names of victims and collaterals in the record.

• In addition to the above violation, Dr. Cappello's progress note of 5/15/19 appears to report the client's statements as fact, without using common terms such as "alleged" or "claims." Several of the statements reported in the progress note (especially those related to a celebrity) are unproven and are possibly part of the patient's fixed delusional system. Dr. Cappello's "Assessment" statement reads that the patient is "well organized and seemingly without delusional content." Given the history of this patient's behavior with the celebrity, the allegations of stalking, and the multiple outstanding criminal charges, it appears premature to state that the client's report is "without delusional content." Again, Dr. Cappello's objectivity and clinical boundaries appear questionable in this statement.

I fully appreciate that Dr. Cappello's intention was to advocate in what she believes is in the best interest of her patient. However, in reviewing this matter in its entirety, the consensus Is that Dr. Cappello used poor clinical judgement in writing a letter on behalf of this client, giving it directly to the patient, and then, not documenting this interaction in any manner. It is clear that Dr. Cappello acted outside the role of a TIC therapist and, of most concern, did so without the awareness of the treating psychiatrist. These actions raise questions about Dr. Cappello's clinical objectivity and appropriate boundary setting in this case. Further, there is clear evidence that she violated hospital policy and CCR regulations by not documenting a significant clinical intervention. Lastly, based on APA guidelines and community practice standards, Dr. Cappello should not have intervened in this patient's custody or visitation situation by addressing a letter to the Courts.

When I first met with Dr. Cappello to discuss this situation on June 3rd, she immediately discounted the concerns raised and described her actions as "standard practice." She explained that she has done this type of work before and has supervised others who did so. Further, she questioned whether OBH was reacting to her letter "because the family opposing this patient has money." Dr. Cappello was unwilling to acknowledge *any* concerns with her actions nor consider any reason to reconsider them. Instead, she then expressed frustration that I was questioning her actions in this case and she then attacked me for "not having my back" and "not being supportive." She also stated that this situation is an example of why she doesn't want to be supervised by me. I responded by stating that "I can't be your cheerleader'' and won't support questionable clinical behavior and actions I don't agree with or that violate hospital policy. I further told her that you have already made it clear that I am to serve as her supervisor and that she will need to work with me.

In summary, based on my review of the situation, I have significant concerns about Dr. Cappello's clinical decision making and actions in this situation. Further, I am distressed that she misled me about Dr. Hernandez's awareness

> of the situation. I also see clear violations of hospital policy and CCR regulations regarding the lack of documentation of a significant clinical activity.
>
> Finally, of great concern, is the fact that Dr. Cappello was unwilling to entertain any possibility that she had conducted herself inappropriately. Instead, she maligned the motivations of OBH and attacked me for asking questions.
>
> Her reaction to a legitimate review of her clinical decision-making gives me great concern and raises questions regarding her overall clinical interventions.

84. Dr. Kent did not include in his report to Mr. Polunas that Dr. Gutjahr told him that she was aware of Complainant's writing the Letter, that she was aware that Complainant was working on client's child visitation concerns, and that she did not have any concerns about the Letter. Dr. Kent also did not include the fact that Dr. Hernandez told him that H.W.'s treatment team discussed the issue of custody and its impact on H.W. and that the team thought that contact with child might be beneficial to H.W. Dr. Kent also did not reveal that there were several staff members who may have had information about this matter with whom he did not speak, such as Donna Trowbridge and nurse manager Miriam Taylor.

85. On June 17, 2019, Dr. Kent spoke again with Dr. Hicks, who asked whether Dr. Kent intended to file a complaint with the Board of Psychologist Examiners. Dr. Kent decided to seek professional consultations to ascertain whether he was obligated to report the matter to the Board of Psychologist Examiners.

86. On June 17, 2019, Dr. Kent consulted with Dr. Morgan Sammons, Executive Director of the National Register of Health Service Psychologists. Dr. Kent asked Mr. Sammons whether he was obligated to report the matter to the Board of Psychologist Examiners. Dr. Sammons expressed concerns based on what Dr. Kent told him, but did not offer a clear opinion about whether Dr. Kent had an obligation to report the matter to the Board of Psychologist Examiners.

87. On June 17, 2019, Dr. Kent consulted with the American Psychological Association's Office of Ethics' consultant on duty. The consultant referenced Ethical Code 6.01 and 9.01. Based on Complainant stating in her Letter that "I believe contact could be beneficial in strengthening the parent-child bond," the consultant said that it appears that Complainant was making a recommendation about the child without evidence to support that recommendation.

88. Subsequently, Dr. Kent spoke with Dr. Joe Scroppo with the APA Insurance Trust. Dr. Kent shared the quote, "I believe contact could be beneficial in strengthening the parent-child bond." Dr. Scroppo opined that it was improper to make a recommendation without evaluating the child, that it was contrary to professional standards. and that Complainant performed services outside of the scope of her role.

<u>The June 2019 State Personnel Board Rule 6-10 Meeting</u>

89. On June 19, 2019, Mr. Polunas sent Complainant a notice of a State Personnel Board (Board) Rule 6-10[7] meeting, stating in part that:

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[7] Board Rule 6-10 provides, in pertinent part, "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision."

> At that meeting, we will discuss the information that causes me to believe that disciplinary action may be appropriate, which includes, but is not limited to, the following: allegations that you sent a letter directly to patient H.W. on April 5, 2019 urging the court to reunite the patient and her daughter. This action was allegedly not documented in the medical record and was performed without the knowledge or approval of the physician in charge of this patient's care, and without regard to the patient's history.

90. At Mr. Polunas' request, Dr. Kent generated a list of questions for Mr. Polunas to ask Complainant at the upcoming Rule 6-10 meeting.

91. Respondent held two meetings pursuant to Rule 6-10 on June 26, 2019 and August 7, 2019. (Stipulated fact.)

92. The first Rule 6-10 meeting was held on June 26, 2019, with Complainant accompanied by another Fort Logan psychologist, Dr. Janet Dodd. Mr. Polunas asked only the questions prepared for him by Dr. Kent, and asked no follow-up questions. For example, Mr. Polunas asked if Complainant considered what the client may do with the Letter. Complainant answered, "Yes." Mr. Polunas did not ask Complainant to elaborate on her answer, he just went on and asked the next, unrelated question. Mr. Polunas asked the questions provided by Dr. Kent, listened to Complainant's answers, then went on to the next question.

93. During the Rule 6-10 meeting, Complainant stated that she was not making a recommendation about H.W.'s child, nor was she making any kind of evaluative statement. Dr. Dodd added that "There is no evaluation of the child happening here at all. The only request is that the mother be able to advocate for herself to meet with her child. There's no evaluation of the child or recommendation about the child that's taking place here."

94. During the Rule 6-10 meeting, Complainant stated her belief that Dr. Kent was biased and that she had made repeated phone calls to HR asking for a new supervisor. Mr. Polunas did not respond.

95. Immediately following the Rule 6-10 meeting, Mr. Polunas emailed Mr. Tessean, stating:

> Hi Michael. I want to follow up with you re: your emailed concerns with a CMHIFL psychologist drafting a letter to the court recommending parent/child reunification. I just completed a 6-10 meeting with Dr Cappello re: her non-approved court letter. I'm reviewing her responses, and will request a CMHIP psychologist . . . perform a more thorough review of Dr Cappello's BEHR documentation in order to determine whether this was an isolated incident or part of a pattern of behavior. I'll keep you informed as events transpire, thanks

<u>Complainant Provides Additional Information</u>

96. On June 27, 2019, Complainant sent the following email to Mr. Polunas:

> I wanted to send some additional information regarding your questions asked in yesterday's meeting. I was told by Angie Gutjahr that team one staff were setting up transportation for HW to court regarding the custody hearing for supervised contact. This suggests the team is in support of HW having supervised contact. Angie also informed me that Dr. Hernandez told staff he thought I would be willing to monitor the phone calls between her and her

daughter. So, I'm a bit confused because it sounds like he supports this potential activity. In yesterday's meeting, the allegation was that Dr. Hernandez was not in support of my actions. In my discussion with Angie, it sounded as if Dr. Hernandez had been asked by Alan if Dr. Hernandez supported HW receiving custody. He does not support this and neither do I. I would've talked with Dr. Hernandez today but he was out and will be out tomorrow. I included Angie on the email (with her permission) so you could follow-up with her directly if you would like to.

97. Mr. Polunas failed to take any action based on the information Complainant provided to him in her June 27th email.

98. Mr. Polunas decided to place Complainant on administrative leave with pay effective July 1, 2019. In his notice to Complainant, Mr. Polunas wrote:

> I am granting administrative leave pending the investigation of your use of state letterhead to provide an unauthorized court recommendation without the permission of the treating physician, and not documenting your intervention in the electronic medical record. You will remain on paid administrative leave until the completion of the investigation, which should be concluded in approximately 2-4 weeks.

Peer Review of Complainant's Documentation

99. On June 20, 2019, Dr. Kent sent an email to Dr. Hicks, writing, in pertinent part:

> Based on the seriousness of the findings of my investigation, [Mr. Polunas] is considering having the employee go out on Administrative Leave so that we can conduct a more formal clinical review of this client's care and the treatment of others. He wondered whether there might be a strong, experienced, TIC therapist at Pueblo who might be able to provide an independent, objective clinical review of some of the treatment cases. Is this something that your or someone on your team might be able to assist with?

100. On June 21, 2019, Dr. Hicks emailed Dr. Kent, indicating that Dr. Michelle Arriaga would be "an excellent choice" to perform a clinical review.

101. In a subsequent email to Dr. Hicks in late June 2019, Dr. Kent indicated that he was planning on leaving Fort Logan in early August.

102. Dr. Arriaga agreed to conduct a peer review of Complainant's documentation. Dr. Kent provided the questions she should address, and chose the patient files he wanted her to review.

103. Dr. Arriaga was not a TIC specialist and was not familiar with how psychologists at Fort Logan performed their duties in ways that differed from practice at CMHIP. For example, communication between and among Fort Logan behavioral health professionals was more informal than at CMHIP, often occurring through brief conversations in passing in hallways or at the nurses' stations.

104. Based on her review of the records and conversations with Dr. Kent, Dr. Arriaga issued her report on July 25, 2019. In general, Dr. Arriaga was critical of Complainant's documentation. Dr. Arriaga identified boundary issues with two clients, inadequate

documentation, minimal communication with treatment teams (according to her supervisors), and an individual treatment approach rather than an agency-wide approach, based on an article that implied that a true TIC approach to treatment is agency-based rather than individual-based.

105. Mr. Polunas did not base his subsequent disciplinary decision on Dr. Arriaga's peer review of Complainant's work and documentation.

The Psychologists Submit an HR Complaint and Raise Issues with Mr. Polunas

106. On July 3, 2019, Dr. Luckman contacted Richard Fields, a CDHS Office of Civil Rights investigations supervisor, to discuss her concerns about her supervisor, Dr. Kent. A meeting was scheduled for July 10, 2019.

107. Subsequently, Dr. Luckman contacted Mr. Fields and asked if two other psychologists who shared concerns about Dr. Kent could join the July 10th meeting. Mr. Fields assented.

108. After the other psychologists at Fort Logan learned that Complainant had been placed on administrative leave, Drs. Dodd, Gutjahr, and Luckman requested a meeting with Mr. Polunas to discuss their concerns about Dr. Kent. Mr. Polunas agreed, but insisted that Dr. Kent attend as well, and scheduled a meeting for July 8, 2019/

109. The psychologists were accompanied by a Colorado WINS representative. Because of that, Mr. Polunas cancelled the meeting.

110. On July 9, 2019, Drs. Dodd, Gutjahr and Luckman, sent Mr. Polunas a letter, expressing their concerns about Dr. Kent, which focused on what the psychologists viewed as Dr. Kent's violations of the CDHS Code of Conduct.

111. More specifically, the psychologists alleged that Dr. Kent was hostile and extremely angry during the December 6, 2018 meeting, which the psychologists found extremely distressing, prompting four members of the psychology department to contact Ms. Nunez by email and telephone.

112. The psychologists also noted that requests to resolve the departmental conflicts had been met by Dr. Kent's insistence that mediation be completed with two psychologists first, which has not yet occurred. They also stated that Dr. Kent communicated with them in a patronizing and condescending manner that he fails to perceive

113. They also pointed out that placing Complainant on administrative leave was having a significant and negative impact on Complainant's patients and on them because of their increased workload.

114. Concerning the investigation into Complainant's work with H.W., the psychologists wrote, "we are concerned that if any portion of the investigation included Dr. Kent, it may have been less than objective, as Dr. Kent was in mediation with the employee involved at the time the investigation took place.

115. The psychologists raised the issue of apparent retaliation arising from the fact that within an hour of the termination of the July 8th meeting, the psychologists were informed that their presence was no longer required at the hospital's morning meeting. "This action appears to us to be in retaliation for our attempts to raise awareness of the problems in our department, and our attempts to get some resolution to these issues."

116. The psychologists concluded:

> In sum, we do not feel comfortable or safe meeting with Dr. Kent on an individual basis, but are required to do so. His behavior and outbursts have us working in a hostile environment where we no longer feel safe. Our attempts to engage him in productive dialogue have been met with responses ranging from indifference to rage. . . . We are hopeful that you will respond promptly, as we have struggled without receiving any helpful response for over half a year.

117. Another meeting was scheduled for July 9, 2019, with the three psychologists, Mr. Polunas and Dr. Kent. At the meeting, Drs. Dodd, Gutjahr, and Luckman expressed their concerns about Dr. Kent.

118. Dr. Kent viewed the meeting as an "ambush," and viewed the psychologists' claims and allegations as "outrageous." Dr. Kent stood up, said he didn't' need to be a part of the meeting, and walked out. He believed that the psychologists were retaliating against him on behalf of Complainant.

119. During the July 10, 2019 meeting with Mr. Fields, Drs. Dodd, Gutjahr and Luckman told Mr. Fields that they felt threatened by Dr. Kent's emotional reactions when the female psychologists raised concerns or criticisms of his conduct. They thought that Dr. Kent was ill-equipped to supervise a group of strong women. They expressed their belief that Dr. Kent retaliated against Complainant because she had challenged his behavior and decisions publicly and privately in December 2018 and thereafter. They informed Mr. Fields of their meeting with Mr. Polunas and Dr. Kent on July 9, 2019 and stated their sense that Mr. Polunas appeared more interested in supporting Dr. Kent than in taking their concerns seriously.

120. The psychologists submitted Employee Discrimination Complaint Forms on July 11, 2019. On her form, Dr. Luckman stated that "I want to feel safe and secure @ my job & no longer fearful of punishment/retaliation. I currently don't trust my supervisor & need to either feel that I can trust him or I need a new direct supervisor." She also wrote, "All psychologist listed can speak to issues addressed w/Dr. Kent – disrespect, hostility, aggression, condescending tone, & overall anxiety and lack of awareness."

121. On her form, Dr. Dodd wrote:

> Dr. Kent has exhibited difficulty in maintaining a professional demeanor at times, and on more than one occasion has presented as openly hostile. He speaks at times with a patronizing and condescending tone, and he seems unable to hear and/or respond to feedback about this. At times, he has made statements which are suspicious of my motives, almost to the point of paranoia. I believe that I am currently working in a hostile workplace environment, and I do not feel safe continuing without receiving some sort of outside intervention. I began asking for help from HR in December 2018 or January 2019. I have received no help of any kind, and this workplace atmosphere makes it a struggle for me to continue to do my job to the best of my ability.

Dr. Kent Submits an HR Complaint

122. Meanwhile, on July 9, 2019, after his meeting with the female psychologists and Mr. Polunas, Dr. Kent contacted Vernon Jackson, Manager of the Center for Equal Opportunity,

to express his concerns about his interactions with the female psychologists and his desire to file a formal complaint against some of those psychologists. Mr. Jackson referred Dr. Kent to Mr. Fields.

123. Dr. Kent met with Mr. Fields on July 12, 2019. Dr. Kent alleged that the complaints the psychologists were raising against him, particularly that he was aggressive and hostile, were based on his gender.

124. Based on his initial interviews with Drs. Dodd, Gutjahr, Luckman, and Kent, Mr. Field decided that a consolidated investigation was warranted.

125. Kent filed an HR complaint on July 15, 2019, encouraged by Mr. Polunas. He refereed prior complaints that the psychologists submitted to HR or the Office of Civil Rights, characterizing these complaints as "unsubstantiated." He wrote that "This group of female employees have created a hostile work environment by engaging in ongoing, unlawful activities resulting in a coordinated pattern of harassment, based on my gender, with the intent of keeping me from performing my job and the goal of causing me to be fired or resign my position." He added that, "Despite my ongoing efforts to find a conciliatory, non-confrontational solution, Drs. Dodd, Luckman, and Gutjahr continued their retaliatory actions by filing a complaint against me in the first week of July, 2019 when I conducted a clinical investigation which was directly requested of me by Michael Tessean, Deputy Director of the Office of Behavioral Health."

126. The relief Dr. Kent was seeking in this complaint was "a full and complete investigation to be conducted by the Office of Civil Rights, including interviews with all my witnesses. If my claims are substantiated as the evidence supports, I expect appropriate personnel actions to be taken against these employees, up to an [sic] including termination."

Mr. Fields' Investigative report

127. Mr. Fields conducted an investigation into the psychologists' complaint as well as Dr. Kent's complaint. He issued his report on August 19, 2019. He concluded that "the evidence does not support a finding that any of the parties in this investigation violated the CDHS Policy 1.2. "Preventing Sexual Harassment," nor did it "support a finding that the parties violated the CDHS Employee Code of Conduct." During his interviews with those who had lodged complaints, each reiterated the concerns they had previously raised. In speaking of his investigation into Complainant's April 5, 2019 letter, Dr. Kent represented to Mr. Fields that he was completely objective in his review. When asked by Mr. Fields if he thought it appropriate for him to review Complainant's work given the tension between them and their involvement in mediation, Dr. Kent said that his review was a directive from his supervisor Mr. Polunas and Mr. Tessean. In his report, Mr. Fields wrote, "*Mr. Kent's decision to file a formal complaint against his staff right after they raised concerns about him is troubling and could be viewed as retaliation under certain circumstances*." (Italics in original.)

Dr. Kent Consults with Alleged Ethics Consultants

128. On July 3, 2019, Dr. Kent contacted the American Board of Professional Psychology (ABPP) Ethics Committee.

129. On July 4, 2019, Dr. Barney Greenspan, the Chair of the ABPP Ethics Committee, responded to Dr. Kent, writing:

> Thank you for contacting the ABPP Ethics Committee on July 03, 2019 with you question.

> Specific information is lacking about the nature of the "..... highly questionable and troubling actions .....". You stated that your institution has taken administrative/personnel actions against the supervisee. However, it is unclear what specific actions were taken (e.g., a verbal and/or written warning, and/or reprimand and/or suspension), including the details of these actions, which might reflect the severity of the behavior.
>
> Our Committee is requesting this further information to make a responsible response.

130. On July 8, 2019, Dr. Kent replied to Dr. Greenspan at the ABPP:

> Upon further review of the situation, I believe that I likely do have an obligation to report another psychologists [sic] behavior to the Board of Psychology. I have written a draft statement to the Board and I would welcome an opinion from the Ethics Committee if they agree that this is a [sic] offense that warrants a mandated report. It should be noted that Colorado does require that psychologists make a report if they learn of a situation that violates Board rules or practice standards. I believe the behavior in question reaches that threshold, but I would welcome your opinion. I don't take this action lightly and I would value an independent perspective.

<u>Dr. Kent Submits a DORA Complaint Against Complainant</u>

131. On July 9, 2019, Dr. Kent submitted an online complaint against Complainant with the Colorado Division of Regulatory Agencies ("DORA"), of which the Board of Psychologist Examiners is a part:

> I am the Director of Psychology at the Colorado Mental Health Institute at Fort Logan. In that capacity, I serve as the administrative supervisor of Colorado licensed psychologist, Dr. Holly Cappello (PSY0002722). I was directed by the executive administration of the Colorado Department of Human Services to investigate the treatment that Dr. Cappello provided to a patient at CMHI Fort Logan. My investigation revealed evidence of possibly practicing outside generally accepted standards of the profession (CRS 12-43-222) and evidence of failing to make essential entries on a patient record (CRS 12-43-22). As mandated by Rule 7 established by the CO Board of Psychological [sic] Examiners, I am filing this report.
>
> Dr. Cappello was treating a patient with a serious and persistent mental illness who was first admitted to CMHI Pueblo for restoration of competency as a result of multiple serious criminal charges. The patient was later transferred to Fort Logan where Dr. Cappello began to provide individual psychotherapy. The record indicates that the patient has a minor daughter and a protective order has reportedly been in place for at least six years which prohibits the patient from having unsupervised contact with her daughter. Neither Dr. Cappello nor any staff at CMHI Fort Logan has any first-hand knowledge of the child's current status or condition. Without the knowledge of the treating psychiatrist or nurse manager on the treatment unit, Dr. Cappello wrote a letter on CDHS stationary addressed to the "Pueblo County Courts & Child Protective Services" offering to "provide supervision so Dr. X and her daughter can communicate by phone and IN person." Further, the letter goes on to state that "Unless there are issues of risk or harm that I am unaware of I believe

contact could be beneficial in strengthening the parent-child bond." It should be noted that the hospital has no evidence to support the client's claim that she has a doctorate- though the letter refers to the patient as "Dr."

This patient has multiple pages of open criminal charges and multiple restraining orders in place. She has been accused of stalking individuals, including staff at CMHIP. Making a statement that supervised visitation "could be beneficial in strengthening the parent-child bond" does not seem supported by the history and evidence and is not reflective of the treatment team's opinion. In fact, the treating psychiatrist expressed concern that Dr. Cappello's involvement in the custody matter was unrelated to the reason for the patient's hospitalization, outside the scope of the staff's knowledge, and could potentially result in a deterioration of the patient's status.

The American Psychological Association has disseminated very specific and detailed guidance about psychologists' involvement in child custody situations. APA guidelines note that "psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the psychological best interests of the child" and further state that "psychologists strive to base their recommendations, if any, on the best interests of the child." These guidelines go on to state that "the most useful and influential evaluations focus upon skills, deficits, values and tendencies relevant to parenting attributes and a child's psychological needs." Although Dr. Cappello didn't conduct a full custody evaluation, her comments to the Court do not appear to meet this standard. Further, APA guidelines also state that psychologists have adequate evidence to support their statements and recommendations. While Dr. Cappello could certainly offer her opinion that visitation would be helpful for her *patient*, there is no evidence of how such visitation may impact the child. Members of the hospital staff believes that advocating for visitation could potentially be harmful to the child, especially since the staff have no independent information about the status of the child. Dr. Cappello's decision to make this unilateral statement in a letter addressed to the court appears to go beyond the available evidence and the scope of her knowledge of the situation. When challenged with this concern, Dr. Cappello replied that this is her "standard practice" and she saw no problem whatsoever with writing the letter. Further, she questioned the motivation of me and CDHS for even raising the question.

In a follow up conversation, Dr. Cappello admitted that instead of mailing the letter to the court, she gave it directly to the patient who has a diagnosis of schizoaffective disorder and delusional disorder. The patient later sent Dr. Cappello's letter to authorities with a cover letter stating that Dr. Cappello was "mandating reunification" with her child and the client asked that the situation be reported to the FBI and CBI.

Upon reviewing the record, it was discovered that Dr. Cappello never documented having written such a letter nor did she document giving the letter directly to the client. Further, a copy of the letter was not scanned into the record- despite having been written on official CDHS stationary. The treatment team would never have been aware of this letter if it hadn't come to the attention of the senior administration of CDHS.

> CCR 21.280.93 requirements state that "Records shall contain….correspondence to and from relevant agencies and individuals. "A letter regarding child visitation addressed to the Court would seem to meet this standard. Further, APA Record Keeping Guidelines state that records should include "the nature of professional intervention or contact (e.g., letters, phone contacts…) and may also contain "other specific information… including case-related telephone, mail and email contacts." Dr. Cappello took this significant clinical action, didn't share it with key members of the treatment team, and elected not to document it in the chart. When this was discussed with her by the hospital administrator, she offered no acceptable explanation for not documenting the interaction. She reportedly stated she was behind in documentation and had other documents she didn't have time to scan into the record. It should be noted that the meeting to discuss this situation occurred over two months after Dr. Cappello wrote the letter. The hospital administration is reviewing the matter from a personnel perspective. However, I am filing this report of possible violations of CRS 12-43-222 to fulfill my obligation as required by Board of Psychological [sic] Examiners Rule 7.

132. Dr. Kent's DORA complaint contains several misrepresentations. The available evidence establishes that Dr. Hernandez did not express concern that "Dr. Cappello's involvement in the custody matter was unrelated to the reason for the patient's hospitalization," and was "outside the scope of the staff's knowledge." there was no evidence that "Members of the hospital staff believes [sic] that advocating for visitation could potentially be harmful to the child." Only Dr. Hernandez allegedly stated that belief in his brief conversation with Dr. Kent on June 3, 2019. The statement, "The treatment team would never have been aware of this letter if it hadn't come to the attention of the senior administration of CDHS" is belied by information provided to Dr. Kent by Dr. Gutjahr. Dr. Kent's reference to APA guidelines regarding child custody matters fails to disclose that these guidelines are not rules, and are not applicable to Complainant's Letter to the court because Complainant was not providing a forensic evaluation of child custody or visitation issues, as further discussed below.

<u>The Second Rule 6-10 Meeting</u>

133. On August 1, 2019, Mr. Polunas emailed Dr. Kent:

> Good morning. As you know, the document review by Dr Arriaga is complete; I've attached my annotated copy for your review - Colleen, I know that you have a copy already. I'd like to request that you develop a list of further questions in order for me to use during an upcoming 6-10 meeting. Unfortunately, I have a tight turnaround time for these questions to be sent to the AG - can you send these to me today? Thanks in advance for your continued assistance

134. On August 1, 2019, Dr. Kent provided questions to Mr. Polunas for the next Rule 6-10 meeting with Complainant.

135. Another Rule 6-10 meeting with Complainant and Mr. Polunas was held on August 7, 2019. Again, Mr. Polunas asked the questions provided by Dr. Kent, focused primarily on Dr. Arriaga's peer review report.

The Aftermath of the Second Rule 6-10 Meeting

136. On August 13, 2019, Mr. Polunas asked Dr. Kent via email to "develop a list of specific rule or policy violations by Dr. Cappello."

137. Later on August 13, 2019, Dr. Kent sent Mr. Polunas a list of rules and regulations that he believed Complainant violated, and the reasons he believed these rules were violated. The list, and the rationale, would be incorporated, virtually verbatim, in Mr. Polunas' disciplinary letter given to Complainant on November 19, 2019.

138. On August 15, 2019, Complainant wrote a letter to Mr. Polunas regarding Dr. Arriaga's peer review. Complainant noted that Dr. Arriaga specialized in sex offender treatment, and had limited knowledge of trauma treatment. Complainant wrote, "I believe a true 'peer review' would be completed by someone with similar competencies and knowledge." Complainant also noted that Dr. Arriaga communicated with Dr. Kent and with Mr. Polunas, leading Complainant to believe that the information provided to Dr. Arriaga was not unbiased. With respect to Complainant's clinical practice, she wrote:

> I practice from a Self-Trauma model of trauma treatment designed by John Briere, PhD (2014), who is a leader in the trauma treatment community. This is a triphasic model involving three phases of treatment. In the first phase, the practitioner develops a relationship with the client to provide a sense of safety and trust. This involves stabilization of symptoms by creating relational safety through psychoeducation, skill building, and understanding how trauma has impacted the individual's functioning. The second phase involves exposure to traumatic material and correcting any cognitive distortions/beliefs the client has created about their role in the traumatic event. The third phase incorporates helping the client integrate the experience into their life narrative so the trauma is no longer "the story" of their life but rather a part of their story. My groups involve phase one goals; i.e., educating clients about trauma, it's [sic] impact on functioning, and skills to cope with sequelae symptoms. My individual treatment involves all three components of the triphasic model when appropriate. The client in question, HW, was able to obtain the necessary skills for phase two, exposure treatment, and was provided EMDR because she had found this treatment helpful in the past. She was also engaged in stage three behaviors, i.e., advocacy for herself, and this is why I was helping her by writing a letter so she *might* have contact with her daughter *with the court's support*. This was not my decision. It was hers, and the court would decide the appropriateness of her request. I would like to note that Ft. Logan's client advocate provided support and oversight of a phone call the client had with the court in April 2019. In my letter, I volunteered to provide essentially the same service if the court deemed this appropriate.

139. On August 16, 2019, Dr. Kent sent Mr. Polunas the following email:

> Hi Dave,
>
> As Holly's supervisor, below is what I would have considered an acceptable response. Had I received this type of reaction, there would be no Board report, no personnel action, and no frivolous complaint against me.
>
> *On further reflection about this case, I realize that my efforts to be a strong advocate for my client clouded my clinical judgment. I should not have*

involved myself in a child visitation matter without knowing anything about this child's situation and I certainly shouldn't have written that letter on CDHS stationary and not documented it anywhere. At the very least, I should have reached out to the staff in Pueblo to understand more about this patient's history. I now recognize that I should have attended a treatment planning meeting and discussed this with Dr. Hernandez and the rest of the treatment team before writing this letter. I realize now that it was a significant lapse to take this kind of action, hand the letter directly to the client, and not document it in the clinical record. As an experienced psychologist, I know that "if it isn't documented, it didn't happen." I'm sorry for my lapse in judgment here and possibly over-identifying with this client. In the future, I will be sure to consult more regularly with the treatment team and my supervisor. This type of action won't happen again.

> This is the lens through which I view this unfortunate situation. Please feel free to share this email as you see fit.

140. On August 29, 2019, Dr. Kent sent a copy of the DORA complaint he submitted against Complainant to Mr. Polunas. He wrote, “I thought it is important for you and CMHIFL to have a copy of the complaint I filed with DORA. As you can see, like the report I made to you, it is objective and factual. I’ve cited relevant laws and regulations without offering opinions or recommendations.”

<u>Dr. Kent Resigns</u>

141. Dr. Alan Kent tendered his resignation effective October 1, 2019. (Stipulated fact.)

<u>Complainant’s Colleagues’ Supportive Letter to the Board of Psychologist Examiners</u>

142. In early November 2019, several of Complainant’s colleagues collaborated on a letter they intended to send to the State Board of Psychologist Examiners in support of Complainant.

143. Dr. Gutjahr showed Dr. Hernandez a draft of the letter and he volunteered to sign it with one minor change.

144. The letter, dated November 6, 2019, read as follows:

> We have become aware that a colleague, Dr. Holly Cappello, has become the subject of a complaint filed with the Colorado Board of Psychologist Examiners, within which she was accused of making unilateral decisions regarding the treatment of a client residing on Team 1 at the Colorado Mental Health Institute at Fort Logan. It is our understanding that the information provided within this complaint was incomplete and inaccurate.
>
> In fact, over the course of this client’s hospitalization there were numerous conversations regarding the possibility of assisting this client in re-establishing some contact with her child. Initially the team, including Dr. Cappello, did not support this as her symptoms were quite severe and prevented her from being able to work collaboratively with any of us toward this goal. Due to the nature of her symptoms, she was also unable to work collaboratively with any attorney. In addition, we were aware that there were restraining orders in place, as well as custodial constraints, that would need to be addressed by

the legal system. However, we were also aware that her parental rights had not been terminated.

Over several months this client's symptoms improved significantly, to the point that the team agreed that supporting in her self-advocacy regarding having some communication with her child would be an important first step toward rebuilding her life. By that time she and Dr. Cappello had a very solid therapeutic alliance, and the treatment team agreed that offering to supervise phone calls (if the court felt it was in the best interest of the child) was something we were comfortable doing. The team had briefly discussed various possible routes by which the letter could reach the court. Knowing that this client continued to be quite guarded about signing release of information forms, the team left the decision on how to best proceed up to Dr. Cappello and the client.

We provide this information to you as key members of the treatment team who were actively involved in providing treatment and support to this client, in collaboration with Dr. Holly Cappello. We are concerned that this information was not included in the complaint filed against her and offer this statement in support of Dr. Holly Cappello.

145. The letter was signed by Dr. Gutjahr, nurse manager Miriam Taylor, Ms. Gronki, patient rights specialist Donna Trowbridge, Dr. Hernandez, and Dr. Bert Dech, another Fort Logan psychiatrist.

146. The revision in the letter Dr. Hernandez requested was the addition of the last line in the third paragraph, "Knowing that this client continued to be quite guarded about signing release of information forms, the team left the decision on how to best proceed up to Dr. Cappello and the client."

147. Mr. Polunas read a copy of the letter shortly after November 6, 2019. Based on the representations included in the letter, Mr. Polunas asked Dr. Hernandez why he had signed the letter. Dr. Hernandez told him that he was supporting a colleague.

148. Mr. Polunas failed to see any contradiction between what Dr. Hernandez signed onto in the November 6th letter to DORA and what Dr. Kent had told him previously: that Dr. Hernandez denied all knowledge of the Letter.

149. Mr. Polunas did not ask Dr. Hernandez about the substance of the DORA letter, nor did he follow up, or ask anyone to follow up, on the statements included in the DORA letter.

<u>The De Facto Abolishment of the TIC Unit</u>

150. While Complainant was out on administrative leave, Fort Logan management effectively disbanded the TIC unit. No one replaced Complainant as the TIC psychologist, and the TIC unit social worker was reassigned.

151. At the hearing, Mr. Polunas testified that the issue of abolishing the TIC unit had been discussed by the Hospital Management Group for years before it was put into effect. However, the minutes of the HMG meetings for 2018 and 2019 do not support that allegation.

152. The 2018 HMG minutes contain no discussion about the possibility of abolishing the TIC unit. During the May 2, 2019 HMG meeting, according to the meeting minutes, Dr. Kent

"reported that there appears to be a perception by the staff that the hospital is moving away from Trauma Informed Care. HMG discussed the hospital's commitment to the TIC philosophy. They agreed to discuss it at the next Town Hall meeting." During the May 9, 2019 HMG meeting, Dr. Scofidio stated that trauma informed care is a philosophy that should be infused throughout Fort Logan, rather than a separate department. During that same meeting, Dr. Kent was tasked with checking with Complainant "to see if she would be willing to write an article about the TIC program for the OBH Newsletter for Mental Health Month."

153. During the August 8, 2019 HMG meeting, it was reported that nine people were currently attending TIC training in preparation for "the new TIC model."

154. During the September 26, 2019 HMG meeting, Mr. Polunas expressed his desire that the nurse managers and the social workers who had not yet attended TIC training do so.

155. During the November 21, 2019 HMG meeting, Mr. Shaklee asked Mr. Tessean how the TIC budget would be distributed. Mr. Tessean stated that it would be transferred to the social work and psychology budgets.

156. During the January 2, 2020 HMG meeting, it was noted that the Fort Logan Patient Assessment /Reassessment Process would need to be revised to remove the "Trauma Informed Care Staff" section.

157. During the January 16, 2020 HMG meeting, "the psychologists expressed that the psychology interns applied to our hospital based on the fact that there was a TIC Department. TIC no longer exists as a separate Department in the hospital; it is now a hospital-wide philosophy." Mr. Polunas was tasked with addressing this change with the University of Denver.

158. The Fort Logan psychologists were not consulted before the TIC unit was disbanded. It was the consensus of the psychologists that the TIC unit, and Complainant specifically, provided a valuable service, and that Fort Logan patients were negatively impacted by the disbanding of the TIC unit.

Mr. Polunas' Decision to Demote Complainant

159. Complainant was notified that her administrative leave ended and that she should report back to work on November 19, 2019.

160. On November 19, 2019, Mr. Polunas notified Complainant that he was demoting her from a Psychologist II to a Psychologist I. The disciplinary letter states as follows:

> This disciplinary action is taken under the authorization of the State Personnel Board Rules, chapter six. For the reasons set forth below, I have decided to demote you from a Psychologist II to Psychologist I, with a 5% pay reduction in your current base salary ($96912 to $92066 annually) effective December 1, 2019.
>
> On June 6, 2019 [sic] and August 7, 2019, we met to conduct informal, information-gathering meetings pursuant to State Personnel Board Rule 6-10. You attended the first 6-10 meeting with employee Janet Dodd as your representative, and you attended the second 6-10 meeting with Pamela Cress from Colorado WINS as your representative. I was present at both meetings with my representative, Human Resources Business Partner Cynthia Nunez. The purpose of the meetings was to discuss information concerning a letter

you wrote on April 5, 2019 on CDHS letterhead to the Pueblo County Courts supporting visitation for CMHIFL patient HW with her child, and a peer review conducted by a psychologist at CMHIP, and to give you an opportunity to provide me with any explanation or mitigating information.

At the meeting, we discussed the following. This patient has been prohibited from visitation with her child since 2014, when a permanent protective order was issued against the patient. This patient has a long history of mental illness, psychiatric hospitalization, including stays at CMHIP and CMHIFL, pages of legal charges against her, and numerous restraining orders against her. You wrote the letter and gave it directly to the patient, without receiving the attending psychiatrist's approval, and without documenting this activity in the patient's medical record. The patient subsequently sent your letter, along with a rambling and seemingly delusional handwritten note, to the CDHS Executive Director, who forwarded it to the OBH Director. An investigation at CMHIFL revealed that you never contacted the clinicians at CMHIP regarding this patient, who had been in treatment at CMHIP, and who have described this patient as highly manipulative. We also discussed a peer review that I asked CMHIP licensed psychologist Dr. Michelle Arriaga to conduct into your documentation and treatment methods.

In response, you admitted that you had not contacted CMHIP clinical staff regarding this patient's history and you were not aware that staff had a restraining order against this patient.

You stated that you felt that you had done nothing wrong or unethical in providing this letter directly to the patient, and described your role as an advocate for the patient. You admitted that you had not reviewed CMHIP documentation on this patient prior to writing this support letter.

You questioned the credentials of the CMHIP licensed psychologist who reviewed this case. You admitted that you had not spoken to the patient's child's therapist or any staff at CMHIP regarding the patient's history. When I questioned why there was no documentation of you writing and providing this letter to the patient, you said you do not always document patient interventions immediately following your meetings with patients.

At the meetings, we also discussed whether the letter that you wrote to the Pueblo County Court in support of your patient's right to visitation with her child was standard practice, the impact of the letter and the follow-up, the potential impact that this could have on the child, and if you had taken the time to review the court documents regarding the child. You defended your decisions as standard practice as an advocate for your patient and that you were only speaking on behalf of the patient and had not reviewed any court documents regarding the child nor were you speaking on behalf of the child. We discussed the potential impacts that this kind of recommendation could have on the child and you said that you were not recommending anything for the child, just providing a service and that you are aware of child custody laws. We discussed that APA Ethics Code states that psychologists will not make any evaluative statement or recommendation without adequate evidence or support and you stated that you were not recommending anything for the child.

We discussed whether you consulted with Dr. Hernandez, the treating psychiatrist, prior to writing the letter. You stated that Dr. Hernandez was on vacation and you did not share the letter with him because you are very busy. You also stated that you did not ever attend a treatment planning meeting to discuss your recommendation and intentions, and that you were aware that the treating psychiatrist is the legally responsible party who leads the treatment team.

We also discussed that writing this letter on CDHS stationery could be construed that CDHS is making these recommendations, and that it is inappropriate to document the full name of victims and others in the patient's record, and you responded that you thought it would be redacted.

On August 7, 2019 we discussed the APA Record Keeping Guidelines and what is expected to be included in a psychologist's notes and whether you believed that your documentation of your clinical work for this patient met those guidelines, and you replied, yes.

We also discussed boundaries with this patient and others, and you stated that you did not see any concerns with your boundaries with this patient.

You were given until August 15, 2019 to provide me with additional oral/written information. On August 15, 2019 you provided me with a letter stating, in effect: you described the theoretical basis for trauma informed care, and disputed Dr. Arriaga's qualifications to peer review your medical records. You also addressed your reasoning behind your continued treatment of another patient discussed during the 6-10 meeting. You also discussed your perception of the referral process for your trauma based therapy of patients on the Ft Logan's treatment units.

Based upon all the information I have received, including your statements at the meeting and the additional information you provided, I have reached the following conclusions. I find that your conduct violates the following regulations, CMHIP policy, and APA guidelines:

CCR 502-1; 21.190.2 CONTENT OF RECORDS states that records must contain progress notes, legal and court paperwork, service plan, etc.

CCR 21.280.93 states that "Records shall contain ... correspondence to and from relevant agencies and individuals; A summary of the activity for the session and progress toward specific treatment goals to be completed with minimum frequency of: Daily for inpatient and intensive residential services."

• You did not document having written a letter addressed to the courts on CDHS stationery and then giving it to the client. This is a significant clinical action that was not documented. Further, a letter to the court could certainly be considered "legal and court paperwork" which was not included in the record. Further, you did not document the fact that you gave the letter directly to the patient.

CRS § 12-43-222 Title 12, Professions and Occupations Health Care Article 43 – Mental Health Part 2 - General Provisions states:

(1) A person licensed, registered, or certified under this article violates this article if the person:
(g) (I) Has acted or failed to act in a manner that does not meet the generally accepted standards of the professional discipline under which the person practices. Generally accepted standards may include, at the board's discretion, the standards of practice generally recognized by state and national associations of practitioners in the field of the person's professional discipline.

• The clinical actions taken in this situation were confidentially reviewed with members of the American Board of Professional Psychology's Ethics Committee as well as the Ethics Office of the APA and the Executive Director of the National Register of Health Service Psychologists. Representatives of all of these bodies agreed that the actions taken are not "standard practice" as you referred to them. All consultants agreed that the actions do not meet the generally accepted standards of the professional discipline.

APA Ethical Code of Ethics 9.0l(a)(b) Bases for Assessments states:

(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings.

(b) Except as noted in 9.0lc, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions.

• You never examined this child and had no information on the child's status. Yet you wrote a letter on CDHS stationery addressed to the court stating "I believe contact could be beneficial to strengthening the parent-child bond." You did not have an adequate basis for making this statement and therefore appear to have violated this principle.

APA Ethical Code of Ethics 6.0l(a)(b) Documentation of Professional and Scientific Work and Maintenance of Records states: Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain, and dispose of records and data relating to their professional and scientific work in order to facilitate provision of services later by them or by other professionals ... and meet institutional requirements.
APA Record Keeping Guidelines, Guideline 2 on Content of Records states: A psychologist strives to maintain accurate, current, and pertinent records of professional services as appropriate to the circumstances and as may be required by the psychologist's jurisdiction. Records include information such as the nature, delivery, progress, and results of psychological services, and related fees. The guidelines also include the following specifications of what is to be included for each substantive contact with a client:

Date of service and duration of session;

Types of services (e.g., consultation, assessment, treatment, training);

Nature of professional intervention or contact (e.g., treatment modalities, referral, letters, email, phone contacts);

Formal or informal assessment of client status.

• You made a significant clinical decision to write a letter of support for visitation, addressed to the court on CDHS stationery, yet did not document that action nor provide a copy of the letter in the record. This did not adhere to the above principles.

• You made an assessment that "contact could be beneficial to the parent-child bond" but did not document it in the record for other members of the treatment team to see.

• You did not document the "nature of professional intervention" with this client and made no entry to reflect that you gave her a letter addressed to the court. You clearly violated this guideline and Ethical standard.

APA Guidelines for Child Custody Evaluations in Family Law Proceedings state:

In addition, the guidelines acknowledge a clear distinction between the forensic evaluations described in this document and the advice and support that psychologists provide to families, children and adults in the normal course of psychotherapy and counseling.
…

"Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the psychological best interests of the child." Further, the Guidelines state that "if parties are unable to reach such an agreement (on parenting issues), the court must intervene in order to allocate decision making, caretaking and access, typically applying a "best interests of the child" standard in determining this restructuring of rights and responsibilities.

The guidelines identify three key points regarding any recommendations:

1. The purpose of the evaluation is to assist in determining the psychological best interests of the child.
2. The child's welfare is paramount.
3. The evaluation focuses upon parenting attributes, the child's psychological needs and the resulting fit.

• Although you did not conduct a formal evaluation of the child, your letter addressed to the Pueblo Courts on CDHS stationery made a recommendation on "restructuring of rights and responsibilities" regarding visitation. You had no information regarding what is in the best interest of the child. You based your recommendation solely on your individual meetings with your client and had no information about the status and wellbeing of the child. While you were advocating for the best interests of your client, you clearly violated the Guideline ensuring that your recommendation was impartial and in the best interest of the child.

CMHIFL Policy 36.01- Medical Record Documentation:

36.01 2(b) states that "Entries must be prompt, significant, accurate, concise, and complete."

36.01 3(b) states that "When references to contacts with family, friends, and staff are made, the individual's name should be limited to his/her first name and the initial of his/her last name.

• Your documentation regarding this case violated both of the above CMHIFL policies. Your progress note of 5/15/19 mentions non-clients by their full names, including the name of an alleged stalking victim of the client. Further, you omitted very significant information about your clinical actions, making your documentation incomplete.

Your actions constitute violations of Board Rule 6-12(1) failure to perform competently, and (2) willful misconduct or violation of agency rules or laws that affect the ability to perform the job.

As a result, I have decided to take the following action.

DISCIPLINARY ACTION

I have decided to demote you from the position of Psychologist II to Psychologist I, effective December 1, 2019. This demotion will include a reduction in your base pay from $96912 to $92066 annually. In deciding to take this action I considered the factors identified in State Personnel Board Rule 6-9:

The nature. extent, seriousness and effect of the act: Your actions are very serious. Failing to inform yourself of the patient's lengthy and concerning history, failing to consult with others who had treated this patient, and failing to document a significant event in your treatment of the patient cause me to question your clinical judgment, diligence, and transparency as a treatment provider.

Your decision to write a letter to the courts on CDHS letterhead in a child custody dispute was ill informed and a violation of professional boundaries, and an inappropriate and inaccurate representation of this agency's position.

Previous unsatisfactory conduct or performance, prior corrective or disciplinary action: I considered that you do not have prior corrective or disciplinary action and I weighed this in your favor, but I nonetheless find that your actions are so flagrant and serious that immediate discipline is proper pursuant to Board Rule 6-2.

Performance evaluations: I considered your prior performance evaluations over your years of service with CDHS. While your evaluations are satisfactory and I considered this in your favor, it does not outweigh the seriousness of your misconduct and the lack of persuasive mitigating information.

Information presented by you and others/mitigating information: I considered your explanation that you believe your treatment of this patient and writing the

letter was ethical and appropriate, but I disagree with your self-assessment. I find that you have not taken any responsibility for your failure to learn this patient's history from available records and clinicians and failure to document your treatment of her. Most strikingly, I am gravely concerned that you have not even acknowledged the possibility that your decision to write a letter to the courts in a patient's custody dispute is outside the bounds of your role as a therapist and reflects poorly on CDHS.

I considered less serious disciplinary action and corrective action, but rejected these alternatives. I believe a demotion appropriately reflects the seriousness of the situation and my evaluation of the totality of the circumstances. As you will no longer be supervising peer specialists, this is a more appropriate job status for your current responsibilities.

161. No announcement of the abolishment of the TIC unit at Fort Logan was made until December 11, 2019.

162. On December 11, 2019, Mr. Polunas sent an email to the Fort Logan staff about Trauma Informed Care:

> I'd like to take this opportunity to address an important issue to all of us: the provision of clinical services within a trauma informed culture at Ft Logan. In particular, I want to clarify and address concerns about the existence of trauma informed care and trauma informed treatment at the Institute. First, a bit of background is in order. Following the tragic Aurora Theater shooting, Gov. Ritter[8] directed CDHS and the Colorado mental health Institutes to develop programming that reflected the latest trends in recognizing the role of trauma in the development of mental illness. In addition, monies were allocated to hire specially trained therapists to assist in the development of trauma informed treatment at Ft Logan. Importantly, there was no attempt to define or differentiate between the terms Trauma Informed Care, Trauma Informed Culture or Trauma Informed Therapy. These terms are often lumped together to describe the same thing, but they are not necessarily interchangeable. Ft Logan's leadership at that time chose to focus on providing trauma informed therapy services only. The original three year mandate has expired and Ft Logan's current leadership has determined that, while trauma informed therapy is important, the original plan was lacking in scope. We strongly believe that the original plan was overly narrow and limited and we researched ways to develop an overall trauma informed culture throughout Ft Logan, while incorporating trauma treatment as part of, but not limited to, a trauma informed culture. As part of this redesign, the trauma therapists were incorporated into the social work and psychology departments. The hospital arranged for all of the psychologists and the lead social workers to be trained in trauma informed treatment. It's important to note that this is a first step in expanding the trauma informed culture at Ft Logan; we are developing plans to train other therapists and nursing in trauma informed care. I realize that there is a perception that Ft Logan has abandoned trauma informed culture is an integration of these concepts into everything that we do with our patients. We've made a good start, but we're not there yet, as this is an ongoing process, and not an isolated onetime event.

[8] It was actually Governor Hickenlooper.

I realize that there are rumors focusing on what we have lost, and unfounded accusations that Ft Logan's remarkably low levels of seclusions and restrains have now dramatically increased as a result of this refocus on developing an Institute wide trauma informed culture. This is simply not accurate; our S&R metrics remain very low, partly as a result of our continued emphasis on achieving a recovery focused approach to treatment; which predates the trauma informed mandate. The Hospital Management Group is always available to discuss this critical initiative, and to address any concerns or questions during the transition period. I look forward to further discussions with you as we move forward on this journey. Thank you for your good work and your interest in this matter.

Complainant Returns, Has No Defined Role, Resigns

163. Upon Complainant's return to Fort Logan in November 2019, she had no defined role as a Psychologist I. There was no TIC unit. She was told not to form long-term relationships with patients. No Position Description was provided for her. She was asked to be patient.

Economic Damages

164. Complainant resigned in early January 2020, effective January 16, 2020.

165. Complainant's rate of pay prior to the November 2019 disciplinary action was $8,076 per month. (Stipulated fact.)

166. The disciplinary action included a 5% reduction in base pay to $7,672 per month, a $404 per month reduction. Per the disciplinary action the reduction was to be effective December 2019. Due to a delay in processing the reduction was not made to Complainant's December 2019 paycheck. (Stipulated fact.)

167. Complainant was paid $8,076 in December 2019. This was a $404 overpayment. (Stipulated fact.)

168. Complainant worked through January 16, 2020, or 96 hours of work time. January 2020 had a total of 184 workable hours. Respondent initially processed this payment at the $8,076 rate but caught and cancelled the payment. Respondent recalculated the payment at the reduced base pay amount. Based on the $7,672 rate, Complainant was paid $4,002.78 for the hours worked in January. This is $210.79 reduction from her pre-disciplinary rate of pay. (Stipulated fact.)

169. The January payroll payment was reduced by $404 to capture the December's overpayment. (Stipulated fact.)

170. The disciplinary reduction in pay reduced Complainant's pay a total of $614.79. (Stipulated fact.)

171. At the time of her resignation, Complainant received the following benefits, per month:

a. Kaiser Co-Pay Employee & Spouse plan: employee contribution of $298.02 and employer contribution of $1,083.32;
b. Delta Dental Basic Employee & Spouse plan: employee contribution of $16.98 and employer contribution of $45.84;
c. Life Insurance: employee contribution of $13.00;

d. Life Dependent: employee contribution of $1.00;
e. Long term disability: employee contribution of $107.41.

(Stipulated fact.)

172. Complainant had gross wages from the Colorado Coalition for the Homeless in the amount of $6,959.75 in calendar year 2020. (Stipulated fact.)

DISCUSSION

I. Respondent's Decision to Demote Complainant was Arbitrary, Capricious, and Contrary to Rule or Law

A. General

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

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

Burden of Proof

In this *de novo*[9] proceeding, "the scales are not weighted in any way by the appointing authority's initial decision to discipline." *Kinchen*, 886 P.2d at 706. Respondent has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Id.* at 707-8. The ALJ is required to make "an independent finding of whether the evidence presented justifies a dismissal for cause." *Id.* at 706.

The Board may reverse or modify Respondent's disciplinary decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. This applies not only to the decision to impose a disciplinary action, but also to the propriety of the particular discipline that is imposed.

B. Complainant Did Not Commit All the Acts for Which She Was Disciplined

The first question to be determined is whether Complainant committed the acts for which she was disciplined.

Respondent decided to demote Complainant from a Psychologist II to a Psychologist I because Mr. Polunas, following the list of alleged violations and rationale provided by Dr. Kent,

[9] A *de novo* hearing is one in which the ALJ renders a decision based solely on evidence admitted at the hearing, and any prior determination by the appointing authority is not given any precedential deference. *See B.C., Ltd. v. Krinhop*, 815 P.2d 1016, 1018 (Colo. App. 1991).

concluded that Complainant violated the following regulations, statutory provisions, APA guidelines and Fort Logan policies: (1) CCR 502-1; 21.190.2 and CCR 21.280.93; (2) § 12-43-222(1)(g)(I), C.R.S.; (3) APA Code of Ethics 9.0I(a) and (b); (4) APA Code of Ethics 6.0I(a) and (b) and APA Record Keeping Guidelines, Guideline 2; (5) APA Guidelines for Child Custody Evaluations in Family Law Proceedings; and (6) CMHIFL Policy 36.01.

Respondent failed to establish by a preponderance of evidence that Complainant committed all the acts for which she was disciplined. At the hearing, Respondent established only that Complainant was not sufficiently diligent in keeping her progress notes up to date and ensuring that the April 5, 2019 letter was scanned into the electronic health record, although there is some disagreement about whether that letter, and the writing of it, was a significant clinical intervention.

1. CCR 502-1; 21.190.2 and CCR 21.280.93

CCR 502-1; 21.190.2, which addresses the contents of records, provides that records must contain progress notes, legal and court paperwork, service plan, and the like. etc.

CCR 21.280.93 provides, in pertinent part, that "Records shall contain ... correspondence to and from relevant agencies and individuals; A summary of the activity for the session and progress toward specific treatment goals to be completed with minimum frequency of: Daily for inpatient and intensive residential services."

Dr. Kent and Mr. Polunas criticized Complainant for not documenting her April 2019 Letter to the court, and not documenting that she gave it to H.W. Although there was some evidence that Complainant may have taken steps to have the Letter scanned into the electronic health record, and that the Letter itself was not significant enough absent some change in H.W.'s visitation rights with her child to mandate its inclusion in the heath record, Complainant should have been more proactive in ensuring that this action was properly documented.

2. Section 12-43-222(1)(g)(I), C.R.S.[10]

This provision provides, in pertinent part:

> (1) A person licensed, registered, or certified under this article violates this article if the person:
> (g) (I) Has acted or failed to act in a manner that does not meet the generally accepted standards of the professional discipline under which the person practices. Generally accepted standards may include, at the board's discretion, the standards of practice generally recognized by state and national associations of practitioners in the field of the person's professional discipline.

Dr. Kent and Mr. Polunas alleged that Complainant violated this statutory provision and supported their conclusion by writing:

> The clinical actions taken in this situation were confidentially reviewed with members of the American Board of Professional Psychology's Ethics Committee as well as the Ethics Office of the APA and the Executive Director of the National Register of Health Service Psychologists. Representatives of

[10] This provision was repealed and relocated effective October 1, 2019. As of October 1, 2019, the correct citation is Section 12-245-224(1)(g)(I).

> all of these bodies agreed that the actions taken are not 'standard practice' as you referred to them. All consultants agreed that the actions do not meet the generally accepted standards of the professional discipline.

These consultants – who did not testify at hearing and whose knowledge and understanding of this matter is unknown -- knew only what Dr. Kent told them. Given the distinct possibility, if not probability, that because of Dr. Kent's bias as evidenced by his other actions in this matter, Dr. Kent misrepresented the nature of the issue, the opinions of these consultants is highly questionable and is afforded little weight.

Whether Dr. Kent seriously considered that Complainant violated this provision is questionable. As Dr. Kent indicated to Mr. Polunas and as he testified at hearing, had Dr. Hernandez told him that he was aware of what Complainant was doing and approved it, that would have satisfied Dr. Kent and he would have terminated his investigation. Dr. Kent also represented that if Complainant had admitted that she erred in writing the Letter, he would not have written his June 7, 2019 report to Mr. Polunas the way he did, he would not have submitted his complainant against Complainant to DORA, and there would not have been a disciplinary proceeding against Complainant. These statements by Dr. Kent establish that his perception of Complainant's alleged violation of this statutory provision was conditional, and not definitive. Complainant either violated this provision or she did not. That determination would not be affected by Dr. Hernandez's view or whether Complainant later admitted that she made a mistake.

Dr. Kent and Mr. Polunas' determination that Complainant failed to meet generally accepted standards professional standards is further undermined by Dr. Hernandez's actions, or lack thereof, after Dr. Kent informed him on June 3, 2019 about Complainant's actions. Dr. Hernandez did nothing. Had Complainant's actions been a violation of generally accepted standards, a serious matter, Dr. Hernandez would surely have conferred with Complainant and indicated why he viewed her actions as unacceptable. Apparently, he did not view the situation in that way. At hearing, Dr. Hernandez tried to explain his failure to speak with Complainant about this matter by testifying that the April 6, 2019 Letter had already been written and that Complainant was no longer acting in her role as the TIC psychologist. Dr. Kent told Dr. Hernandez about the Letter on June 3, 2019. Complainant was not placed on administrative leave until July 1, 2019. Dr. Hernandez's explanation for his inaction does not stand scrutiny, and is not credible. Either Dr. Hernandez did not care that Complainant was not conducting herself in accord with applicable professional standards or he did not actually believe that she was failing to meet such standards. The latter appears more likely.

Furthermore, the preponderance of the evidence at hearing establishes that Complainant's actions were known by H.W.'s treatment team, and were supported and encouraged by the team, including Dr. Hernandez. The November letter to DORA supporting Complainant indicates Dr. Hernandez's support of Complainant's challenged actions. At hearing, Dr. Hernandez attempted to distance himself from the substance of that letter by alleging that he did not read it carefully. That testimony is not credible, because he read it carefully enough to request that an additional sentence be added before he would agree to sign the letter. If there were material misrepresentations in the Letter, it is doubtful that Dr. Hernandez would have agreed to sign the letter without further revisions.

Respondent failed to establish by a preponderance of the evidence that Complainant violated this statutory provision.

3. APA Ethics Code 9.01(a) and (b), Bases for Assessments

APA Ethics Code 9.01 provides:

(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

Dr. Kent characterized Complainant's statement, "Unless there are issues of risk or harm to the minor child that I am unaware of I believe contact could be beneficial in strengthening the parent-child bond" as a recommendation and an assessment of H.W.'s child. However, it is plainly not a recommendation nor an assessment. The Letter Complainant drafted and signed to the court clearly indicates that Complainant is H.W.'s psychologist, writing on behalf of H.W. Complainant highlights that she is unaware of the child's status ("Unless there are issues of risk of harm to the minor child that I am unaware of"). Complainant merely raises the possibility ("could be beneficial') that contact might strengthen the parent-child bond. As Complainant repeatedly told Dr. Kent during his investigation, and Mr. Polunas in the Rule 6-10 meetings, there was no "assessment" of the child, and there was no "recommendation" of the efficacy of parent-child contact. Complainant's experience establishes that she is very experienced and knowledgeable about how courts determine issues of visitation and custody. Complainant knew that the court would not view her Letter as an "assessment" or a "recommendation," and that the child's interests would be protected by a Guardian Ad Litem (GAL) or an attorney or psychologist who would act in the best interests of the child.

Dr. Kent and Mr. Polunas knew, or should have known as mental health professionals, that APA Ethics Code 9.01 is not applicable to the April 5, 2019 Letter. Dr. Kent's representation that the alleged experts with whom he communicated indicated that Complainant had violated APA Ethics Code 9.01 raises the possibility that Dr. Kent misrepresented the contents of the Letter and its context to those purported experts. It is apparent that both Dr. Kent and Mr. Polunas discounted the information provided by Complainant and others. Dr. Dodd, for example, stated unequivocally during the June 26, 2019 Rule 6-10 meeting that Complainant did not make an assessment. Dr. Kent and Mr. Polunas chose to misinterpret the plain language of the April 5, 2019 Letter to the court.

Finally, Complainant's Letter does not provide an opinion about the "psychological characteristics" of H.W.'s child, rendering 9.01 irrelevant.

The New Hampshire Supreme Court's decision in *In Re Kelly*, 969 A.2d 443 (N.H. 2009) is instructive. In that case, a divorced father seeking overnight visitation with his minor daughter retained the services of a psychologist, who performed a full psychological evaluation of the father, submitted a report to the court, and testified at a court hearing on visitation. In his report and a letter he submitted to the trial judge outlining his observations and recommendations

regarding visitation, the psychologist recommended that the father be granted increased visitation with his daughter, and stated that both the father and his daughter would grow from increased interaction. The mother filed a complaint against the psychologist with the New Hampshire Board of Mental Health Practice, alleging that the psychologist's opinion that both father and daughter would grow from the interaction was a statement "regarding [the daughter with whom] he has had …[no] contact" and that it was made without knowledge of the issues involved in the visitation dispute. *Id.* at 445-46. The Board investigated and concluded that the psychologist's "opinion that the child would benefit from increased visitation with her father without further investigation of the child" violated the APA Ethical Principles of Psychologists and Code of Conduct , Standard 9.01(a) and 9.01(b). The Board sanctioned the psychologist.

On appeal, the New Hampshire Supreme Court reversed the Board's decision, holding, *inter alia*, that APA Standard 9.01(b) "applies only if Dr. Kelly provided an opinion of a psychological characteristics of an individual other than" the father. *Id.* at 450. The Court, noting that the psychologist's opinions were limited to the father and that "references to the child were intended in the global sense that children benefit from having an involved father," found that the Board had failed to "address how this recommendation constituted an opinion as to the daughter . . . ." *Id.* *See also, Spring v. Board of Psychology*, 2015 WL 2265459 (Cal. App. 2015) (unpublished) (psychologist's recommendation that divorcing parents be granted equal custody of their minor child, made without contact with the child, did not constitute an opinion on the child's "psychological characteristics" and thus not a violation of APA Ethical Code Standard 9.01).

Here, Complainant explained to both Mr. Polunas and Dr. Kent that her opinion that visitation between H.W. and her daughter may strengthen the parent/child bond was based on her awareness that children and parents have an inherent bond and that children tend to want to have some relationship with parents. Complainant's statement that it is possible that visitation "could" strengthen that bond is much less definite than the recommendation the psychologist made in *Kelly*, and did not provide an opinion of the psychological characteristics of H.W.'s minor child.

In short, Respondent failed to establish by a preponderance of the evidence that Complainant violated APA Ethics Code 9.01.

4. APA Ethics Code 6.0l(a) and (b) and APA Record Keeping Guidelines, Guideline 2

APA Ethical Code of Ethics 6.0l(a)(b), which addresses documentation of professional and scientific work and maintenance of records provides, in pertinent part, "Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain, and dispose of records and data relating to their professional and scientific work in order to … facilitate provision of services later by them or by other professionals ... and meet institutional requirements."

APA Record Keeping Guidelines, Guideline 2 on Content of Records provides, in pertinent part, "A psychologist strives to maintain accurate, current, and pertinent records of professional services as appropriate to the circumstances and as may be required by the psychologist's jurisdiction. Records include information such as the nature, delivery, progress, and results of psychological services, and related fees."

Complainant can be faulted for not documenting her April 5, 2019 Letter to the court in H.W.'s electronic health record. Complainant did acknowledge that this was an error.

5. APA Guidelines for Child Custody Evaluations in Family Law Proceedings

> APA Guidelines for Child Custody Evaluations in Family Law Proceedings provide, in part:
>
> In addition, the guidelines acknowledge a clear distinction between the forensic evaluations described in this document and the advice and support that psychologists provide to families, children and adults in the normal course of psychotherapy and counseling.
>
> …
>
> "Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the psychological best interests of the child." Further, the Guidelines state that "if parties are unable to reach such an agreement (on parenting issues), the court must intervene in order to allocate decision making, caretaking and access, typically applying a "best interests of the child" standard in determining this restructuring of rights and responsibilities.
>
> The guidelines identify three key points regarding any recommendations:
>
> 1. The purpose of the evaluation is to assist in determining the psychological best interests of the child.
> 2. The child's welfare is paramount.
> 3. The evaluation focuses upon parenting attributes, the child's psychological needs and the resulting fit.

Dr. Kent and Mr. Polunas chose to consider Complainant's April 5, 2019 Letter to the court as a child custody "evaluation," which it clearly was not. Complainant made no forensic evaluation as that term is understood in family law proceedings. In representing the contents of these Guidelines, Dr. Kent and Mr. Polunas chose not to quote the following from the Introduction to the Guidelines: "[T]he guidelines acknowledge a clear distinction between the forensic evaluations described in this document and the advice and support that psychologists provide to families, children and adults in the normal course of psychotherapy and counseling." The April 5, 2019 Letter constitutes advice and support in the normal course of psychotherapy and counseling, not a "forensic evaluation." Thus, these Guidelines are not relevant to Complainant's actions in this matter and Respondent failed to establish by a preponderance of the evidence that Complainant violated these Guidelines.

6. CMHIFL Policy 36.01

Fort Logan Policy 36.01 addresses medical record documentation. Policy 36.01 2(b) provides that "Entries must be prompt, significant, accurate, concise, and complete." Policy 36.01 3(b) provides that "When references to contacts with family, friends, and staff are made, the individual's name should be limited to his/her first name and the initial of his/her last name."

Dr. Kent and Mr. Polunas concluded that Complainant's documentation violated these policies, noting that a progress note of May 15, 2019 mentions non-clients by their full names and alleging that Complainant omitted "very significant information" about her clinical action, rendering her documentation incomplete. Again, Complainant's documentation is not without some issues, but Dr. Kent and Mr. Polunas exaggerated the significance of Complainant's documentation in this matter.

In summary, Respondent established that Complainant violated regulations related to proper documentation only. Respondent failed to establish by a preponderance of the evidence that Complainant violated any of the much more serious regulations related to the propriety of Complainant writing the Letter.

C. The Appointing Authority's Action was Arbitrary, Capricious, or Contrary to Rule or Law

The second question to be determined is whether the decision to demote Complainant was arbitrary, capricious, or contrary to rule or law. In determining whether an agency's decision is arbitrary or capricious, the ALJ must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.,* 36 P.3d 1239, 1252 (Colo. 2001).

1. Respondent's Decision to Impose Discipline was Arbitrary and Capricious

a. Mr. Polunas neglected or refused to use reasonable diligence and care to procure such evidence as he was by law authorized to consider in exercising the discretion vested in him

There was material information that Mr. Polunas should have used reasonable diligence to procure. Mr. Polunas was not only authorized, but required, to consider this evidence pursuant to Board Rule 6-9, prior to exercising the discretion vested in him when he decided to demote Complainant. Mr. Polunas was not reasonably diligent in procuring that evidence, to Complainant's detriment.

First, and foremost, Mr. Polunas effectively delegated the investigation of Complainant's actions, and the conclusions arising therefrom, to Dr. Kent. Although it is not necessarily a dereliction of duty to delegate the initial investigation to Dr. Kent, Mr. Polunas failed to exercise any degree of independent judgment and critical analysis of the information Dr. Kent funneled to him. Dr. Kent was not the appointing authority. The questions Mr. Polunas asked Complainant in the two Rule 6-10 meetings were provided by Dr. Kent. Mr. Polunas' disciplinary letter and the list of alleged violations contained therein are virtually identical to the list of violations Mr. Polunas solicited from Dr. Kent. There is no evidence that Mr. Polunas conducted any independent investigation into this matter prior to demoting Complainant. Mr. Polunas failed to review Dr. Kent's contributions with any degree of critical analysis. He failed to perceive the problems with Dr. Kent's June 7, 2019 report. Dr. Kent's problematic relationship with Complainant rendered his investigations and conclusions suspect.

The investigation of Complainant's actions with respect to the April 5, 2019 Letter was left in the hands of her supervisor, Dr. Kent, with whom Complainant had an adversarial relationship. Dr. Kent misinterpreted the nature and intent of the Letter, misapplied certain professional standards, failed to record conversations with alleged experts at the APA and the National Register resulting in a lack of transparency about how he characterized Complainant's actions, and misrepresented Complainant's actions to others. Despite representations that his investigation, conducted over just five business days, was thorough and objective, Dr. Kent failed to interview several members of H.W.'s treatment team, who could have confirmed Complainant's position that the treatment team was aware of, and supported, Complainant's actions. Dr. Kent

categorically rejected Complainant's explanations as well as Dr. Gutjahr's report to him that she was aware of and supported Complainant's action. Dr. Kent cherry-picked information he obtained during his investigation and left out material facts in his June 7, 2019 report to Mr. Polunas, such as Dr. Gutjahr's statements to him on June 3, 2019, and certain of Dr. Hernandez's statements to him on that same day, indicating knowledge of discussions concerning supporting H.W.'s contact with her child.

Mr. Polunas failed to recognize the problematic nature of assigning Dr. Kent to conduct the investigation into Complainant's actions. Mr. Polunas was well aware of the nature and scope of the dysfunctional relationship between Dr. Kent and Complainant, and was well aware of Dr. Kent's strong feelings of being harassed by and discriminated against by the females in the Psychology department at Fort Logan, especially Complainant. Mr. Polunas knew that Dr. Kent and Complainant were pursuing mediation together in an effort to overcome their interpersonal difficulties, and also knew that the mediation had not been successful as of the time Dr. Kent began his investigation of Complainant's actions. Several individuals raised the issue of Dr. Kent's conflict of interest, including Complainant, Mr. Fields, and Drs. Dodd, Gutjahr, and Luckman, to no avail.

Mr. Polunas justified permitting Dr. Kent to conduct the investigation by referring to Mr. Tessean's directive to him to have Complainant's supervisor look into the matter, by maintaining that Dr. Kent was the subject matter expert who could best determine the propriety of Complainant's actions, and because Mr. Polunas trusted Dr. Kent. However, no evidence was presented to indicate that Mr. Tessean had any knowledge of Dr. Kent's conflict of interest, or that either Mr. Polunas or Dr. Kent informed Mr. Tessean that Dr. Kent could be an inappropriate investigator in this matter. In a matter that required careful, thorough, and definitive determinations untainted by any appearance of bias or impropriety, Mr. Polunas should have made Mr. Tessean aware of Dr. Kent's conflict of interest and insisted that an unbiased, neutral third party conduct the investigation.

Mr. Polunas should have obtained the expert opinion of someone other than Dr. Kent to review Complainant's actions, but he failed to do so. Mr. Polunas viewed Dr. Kent's June 7, 2019 report, and his list of Complainant's alleged regulatory violations, uncritically, and at face value. He failed to conduct his own, independent investigation into any aspect of this matter. The questions he asked during both Rule 6-10 meetings were the questions drafted by Dr. Kent. Listening to the audio recordings of these Rule 6-10 meetings, one is struck by the distinct impression that Mr. Polunas was simply going through the motions of asking the questions. He provided no follow-up questions, and if he asked a compound question to which Complainant answered only part of the question, he failed to obtain an answer to the unanswered question. It appears as if Mr. Polunas had already made up his mind about his conclusions, and was just conducting the Rule 6-10 meeting because it was required.

In addition to the conflict of interest Mr. Polunas ignored, the evidence established that Mr. Tessean signaled to Dr. Kent that Mr. Tessean wanted Dr. Kent to find that Complainant was guilty of malfeasance. Dr. Kent took Dr. Hernandez's word about his knowledge of Complainant's actions, despite evidence to the contrary provided to Dr. Kent by Dr. Gutjahr and that would have been provided by others involved in H.W.'s treatment had they been asked, such as Donna Trowbridge and Miriam Taylor. Dr. Kent cherry-picked information to put in his report to Mr. Polunas at the same time he represented that he was being thorough and objective. Mr. Polunas also failed to follow up with any of the purported expert consultants which whom Dr. Kent spoke.

Mr. Polunas also failed to follow up on Complainant's assertions that H.W.'s treatment team was aware of her actions and approved them. He did not speak with any member of the treatment team about the issue. After Complainant sent him an email on June 27, 2019 that

indicated that Dr. Hernandez may have been misinformed about the nature of Complainant's April 6, 2019 Letter and that the treatment team approved of Complainant's actions, Mr. Polunas took no action to investigate further. After he reviewed the November 2019 DORA letter supporting Complainant, he failed to ask Dr. Hernandez any question other than why he had signed the letter. That letter clearly stated that the treatment team – including Dr. Hernandez -- knew about, and supported, Complainant's actions.

Mr. Polunas neglected or refused to use reasonable diligence and care to procure such evidence as he was by law authorized to consider in exercising the discretion vested in him. Accordingly, his decision to demote Complainant was arbitrary and capricious.

b. Mr. Polunas failed to give candid and honest consideration of the evidence before him on which he was authorized to act in exercising his discretion

(1) Mr. Polunas' reliance on Dr. Kent's report, questions, list of violations

As discussed above, Mr. Polunas relied unquestionably on Dr. Kent's report, the questions he generated for the Rule 6-10 meeting, and Dr. Kent's list of Complainant's purported violations. Mr. Polunas failed to exercise independent judgment about the information provided by Dr. Kent, failed to question any aspect of Dr. Kent's perspective on Complainant's conduct, and failed to candidly and honestly consider the information provided to him by Complainant in the Rule 6-10 meetings and in the additional information she provided to him following those meetings. A plain reading of the April 5, 2019 Letter indicates that Complainant was not making an assessment or a recommendation, and was not opining about the psychological characteristics of H.W.'s minor child. Complainant was merely suggesting that contact may contribute to the strengthening of the parent/child bond. Merely raising a possibility, with the knowledge that the court would make a determination about the advisability of visitation following a procedure that would include an assessment of the impact on the child of potential visitation, could not reasonably be considered a recommendation or an assessment.

(2) Several of Mr. Polunas' Conclusions Were Incorrect or Inaccurate

As discussed above, Mr. Polunas' conclusions enumerating the alleged violations committed by Complainant – conclusions generated by Dr. Kent and repeated virtually verbatim by Mr. Polunas in his disciplinary letter – were incorrect or inaccurate, with the possible exception of issues related to proper documentation.

(3) Mr. Polunas Discounted the Mitigating Information He was Provided

Mr. Polunas was provided with substantial mitigating information, which he categorically discounted or disregarded. For example, when asked at hearing whether Complainant provided any mitigating information during the June 26, 2019 Rule 6-10 meeting, Mr. Polunas said, "No." He discounted information that the April 5, 2019 was benign, did not include an assessment or a recommendation, and provided no assessment of the psychological characteristics of H.W.'s child. Mr. Polunas ignored the implications about Dr. Hernandez's awareness and support of Complainant's actions included in the Rule 6-10 meetings, Complainant's June 27, 2019 email to him, and the November DORA letter supporting Complainant. It is apparent that Mr. Polunas bought into the narrative offered by Dr. Kent, and discounted any information that conflicted with that narrative.

Therefore, a preponderance of the evidence established that Mr. Polunas failed to give candid and honest consideration of the evidence before him on which he was authorized to act in exercising his discretion in deciding to demote Complainant.

2. Respondent's Action was Contrary to Rule or Law

a. Board Rule 6-2

Board Rule 6-2 provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." The purpose of this rule is to require that an employee be warned and corrected about improper conduct before any formal discipline is implemented, unless the activity is sufficiently troubling to warrant an immediate disciplinary action.

The arguably objectionable actions that Complainant did commit regarding proper documentation were not so flagrant or serious to warrant immediate discipline without a prior corrective action. Complainant did not receive a prior corrective action addressing the kinds of conduct investigated by Dr. Kent and addressed by Mr. Polunas in the Rule 6-10 meetings. There was no indication that Complainant would not have been more diligent in keeping her clients' records up to date if spoken to about it or given a corrective action. Mr. Polunas' justification for imposing a disciplinary action instead of a corrective action -- that Complainant did not perceive that she had done anything wrong in the manner in which she handled the issues raised in the Rule 6-10 meeting – is ultimately unwarranted, given that Complainant's writing of the April 6, 2019 Letter was justified.

In short, Complainant's acts were not so flagrant or serious that immediate disciplinary action was warranted.

b. Board Rule 6-9

Board Rule 6-9 requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose. Board Rule 6-9 provides that "[t]he decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Although Mr. Polunas paid lip service to his consideration of the Rule 6-9 factors, there is little evidence that he actually did so. For example, when asked at hearing if Complainant offered any mitigating information during the first Rule 6-10 meeting, Mr. Polunas said, "No." He failed to give proper weight to all the Rule 6-9 factors. He misinterpreted the "nature, extent, seriousness, and effect of Complainant's actions," and did not properly weigh Complainant's exemplary job performance and all the mitigating information that did not comport with the narrative handed to him by Dr. Kent.

c. Board Rule 6-10

Board Rule 6-10 is designed to be an exchange of information. Reviewing the recordings of the two Rule 6-10 meetings reveals that Mr. Polunas failed to serious engage with what Complainant was telling him, the information she was providing. The meetings proved to be a pro forma exercise that failed to accomplish its essential function.

II. The Discipline Imposed Was Not Within the Range of Reasonable Alternatives

The third issue to be determined is whether demotion was within the range of reasonable alternatives available to Respondent.

Board Rule 6-9 requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose. These factors are applicable not only to the decision to take disciplinary action, but also to the specific disciplinary action taken once it has been decided that a disciplinary action is warranted. These considerations, as applied to the facts of this matter, are discussed immediately below.

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

Dr. Kent and Mr. Polunas characterized Complainant's alleged violations as serious errors in judgment. As discussed above, the only error made by Complainant was the failure to ensure that certain information and the April 5, 2019 Letter were entered into H.W.'s electronic health record. The seriousness of that omission is highly questionable. The evidence at hearing established that much of the information about Fort Logan patients and their care was communicated informally, in brief discussions. Every Fort Logan health care provider who opined about the quality of Complainant's documentation generally – other than Dr. Kent -- testified that her documentation was thorough, concise, helpful, and unassailable.

B. Effect of the Act, Error or Omission

Complainant's writing the Letter on CDHS letterhead and giving it to H.W. had no negative effect on anyone. Despite Dr. Hernandez's alleged concern that the Letter could destabilize H.W., the evidence indicates that the Letter had no negative impact on H.W. CDHS was not pulled into a contentious custody battle. Those who were responsible for H.W.'s care knew about Complainant's actions.

C. Type and Frequency of Previous Unsatisfactory Behavior or Acts

There is no evidence of previous unsatisfactory behavior or acts.

D. Prior Corrective or Disciplinary Actions

Complainant had no prior corrective or disciplinary actions.

E. Period of Time Since a Prior Offense

Complainant had no prior offense.

F. Previous Performance Evaluations

Complainant's previous performance evaluations were all satisfactory.

G. Mitigating Circumstances

Complainant wrote the Letter with the knowledge and approval of H.W.'s treatment team, including Dr. Hernandez. She did not violate any significant statutes, APA standards or Fort Logan policies other than possibly those relating to appropriate and prompt documentation, and that itself is questionable.

Given the Rule 6-9 factors, Respondent's decision to demote Complainant was not within the range of reasonable alternatives. At most, Respondent could have given Complainant a corrective action based on documentation issues.

III. Complainant Was Constructively Discharged

Complainant claims that she was constructively discharged. Complainant bears the burden of proving this claim. *Harris v. State Bd. of Agric.*, 968 P.2d 148, 151 (Colo. App. 1998). To prove an allegation of constructive discharge, an employee "must present sufficient evidence establishing deliberate action on the part of an employer that makes or allows the employee's working conditions to become so difficult or intolerable that a reasonable person in the employee's position would have no other choice but to resign." *Wilson v. Bd. of Cty. Comm'rs*, 703 P.2d 1257, 1259 (Colo. 1985); *Koinis v. Colo. Dep't of Pub. Safety*, 97 P.3d 193, 196 (Colo. App. 2003). The determination of whether there has been a constructive discharge requires an objective evaluation of the employer's actions and the effects of those actions on the employee instead of the employee's subjective view. *Christie v. San Miguel Cty. Sch. Dist. R-2(J)*, 759 P.2d 779, 782 (Colo. App. 1988).[11]

The evidence establishes that Respondent either deliberately made Complainant's working conditions so intolerable, or permitted Complainant's working conditions to become so intolerable, that Complainant had no reasonable choice but to resign.

Respondent subjected Complainant to an investigation, two Rule 6-10 meetings, an administrative leave lasting over four and a half months, and a demotion, all on what the preponderance of the evidence establishes were trumped-up charges of malfeasance. When Mr. Polunas placed Complainant on administrative leave on July 1, 2019, he indicated to her that the investigation would be completed within the next 2-4 weeks. Instead, she remained on administrative leave for a total of over 20 weeks.

While Complainant was on administrative leave, her program, the TIC unit, was *de facto* disbanded. When she returned, she did not have a Position Description, she had no clear role to play at Fort Logan, she was prohibited from continuing to practice trauma informed services, or to establish any long-term relationships with patients. Those circumstances continued until she resigned in January 2020.

As an experienced and highly effective TIC psychologist, whose role at Fort Logan had always been the provision of TIC services, it was intolerable to be without a role, without a Position Description, prohibited from providing services she specialized in, and with no resolution of these issues in the foreseeable future. According to her testimony, members of the HMG shunned her, and her patients could not understand why she was unable to continue to provide the essential and unique psychological treatment that she had previously provided. A reasonable person in

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[11] Based on applicable Colorado case law, Colorado Civil Jury Instruction 31:9 (June 2020 update) defines constructive discharge as follows:

> A constructive discharge occurs when an employer deliberately (makes an employee's working conditions) (or) (allows an employee's working conditions to become) so intolerable that the employee has no reasonable choice but to quit or resign and the employee does quit or resign because of those conditions. However, a constructive discharge does not occur unless a reasonable person would consider those *working* conditions to be intolerable.

Complainant's position, with Complainant's background and history at Fort Logan, would find the situation Complainant found herself in after her return in November 2019 intolerable. Complainant has established, by a preponderance of the evidence, that she was constructively discharged.

At the hearing, Respondent argued that Complainant should have waited until the resolution of her State Personnel Board case before she determined that she had no alternative but to resign. Under the circumstances, that was not a viable alternative. It has been a year since her demotion and her return to a facility in which she could no longer practice her specialty and had no definable role, with no end in sight. A reasonable person in Complainant's position would not find a year's wait for a resolution of her claims to be tolerable.

IV. Complainant Established a Basis for Entitlement to Attorney Fees and Costs.

As part of her requested remedy, Complainant seeks her attorney's fees and costs incurred in this litigation.

Board Rule 8-33 provides:

> Pursuant to § 24-50-125.5, C.R.S., attorney fees and costs may be assessed against an applicant, employee, or department, upon final resolution of a proceeding against a party if the Board finds that the personnel action from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, was a means of harassment, or was otherwise groundless.
>
> A. Frivolous means that no rational argument based on the evidence or law was presented;
>
> B. In bad faith, malicious, or as a means of harassment means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth;
>
> C. Groundless means despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.

Respondent's decision to place Complainant on administrative leave from July 1, 2019 until November 19, 2019, a period of four and a half months, and the decision to demote her from her Psychologist II position to a Psychologist I, was unwarranted and unjustified. As discussed above, Dr. Kent's report and list of regulatory violations were fundamentally flawed and suspect, and disrespectful of the truth.

Mr. Polunas ignored any evidence that did not comport with the narrative conveyed to him by Dr. Kent. There is no evidence in the disciplinary letter given to Complainant on November 19. 2019 that Mr. Polunas gave any weight to anything Complainant said during the Rule 6-10 meetings. He failed to follow-up on the information Complainant provided to him on June 27, 2019, that H.W.'s treatment team, including Dr. Hernandez, was in favor of the goal sought by the April 5, 2019 Letter. Mr. Polunas also failed to give any weight to the November 6, 2019 letter to DORA on behalf of Complainant, signed by Dr. Hernandez and several other professionals on H.W.'s treatment team. This letter stated that the information Dr. Kent provided to DORA was "incomplete and inaccurate," and that

> the treatment team agreed that offering to supervise phone calls (if the court felt it was in the best interest of the child) was something we were comfortable

> doing. The team had briefly discussed various possible routes by which the letter could reach the court. Knowing that this client continued to be quite guarded about signing release of information forms, the team left the decision on how to best proceed up to Dr. Cappello and the client.

While Complainant was out on administrative leave, the TIC unit was effectively disbanded, without a formal announcement to the Fort Logan staff, which did not come until Mr. Polunas' December 11, 2019 email to the Fort Logan staff. At hearing, when questioned about the questionable timing of the TIC unit dissolution, Mr. Polunas testified that the decision to disband the TIC unit was discussed informally a dozen times in HMG meetings. However, a review of the minutes of HMG meetings in 2018 and 2019 belies that testimony, as indicated above. There is virtually no mention in the HMG minutes of plans to disband the TIC unit, other than an oblique mention of a "new TIC model" during the August 8, 2019 meeting, which was during the time that Complainant was on administrative leave. On the other hand, evidence presented at the hearing established that the disbanding of the TIC unit was significantly disruptive to both the Fort Logan patients and the professional staff, who now had obtain TIC training, and the psychologist staff, who now had increased patient responsibilities and who were now placed in roles that conflicted with their other roles regarding certifications, as well as interns who had applied for positions at Fort Logan specifically because there was a TIC program there. Furthermore, the disbanding of the TIC department left Complainant with no cognizable role to play at Fort Logan. It is also noteworthy that as of September 2019, the Trauma Informed Care Department at CMHIP was still operational and was recruiting staff.

The preponderance of the evidence presented at hearing establishes that the dissolution of the TIC department at Fort Logan was retaliatory, and the retaliation was aimed at Complainant. As such, the manner in which Complainant was treated that constitutes a constructive discharge was conducted in bad faith as a means of harassment, and requires the award of attorney's fees and costs as well.

V. Remedies

As relief, Complainant requests back pay and benefits, and reasonable attorney fees and costs. In addition, Complainant seeks front pay in lieu of reinstatement because Fort Logan's TIC unit no longer exists and Complainant is a TIC psychologist.

The Board may only provide remedies authorized by its enabling statute. *See, e.g., Colo. Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1371 (Colo. 1988) ("the Commission may only provide remedies authorized by the Commission's enabling statute"). The Board may affirm, modify, or reverse a disciplinary action. Section 24-50-125(4), C.R.S. An award may include all rights, salaries, and benefits. *See, e.g.,* Section 24-50-125(7), C.R.S.

"Where a legal injury is of an economic character . . . legal redress in the form of compensation should be equal to the injury." *See Dep't of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984). "Any remedy fashioned . . . should equal, to the extent practicable, the wrong actually sustained by [Complainant]." *Id.* Even if successful, a Complainant "is not entitled to an award that bestows an economic windfall vastly disproportionate to the legal wrong that he has sustained." *Beardsley v. Colorado State Univ.*, 746 P.2d 1350, 1352 (Colo. App. 1987).

A. Back Pay and Benefits

Back pay is determined by measuring the difference between a complainant's actual earnings and the earnings that would have been received, but for discrimination, to the date of judgment. *Black v. Waterman*, 83 P.3d 1130, 1133 (Colo. App. 2003). "A calculation of back pay

should include the employee's base salary amount and pay raises the employee reasonably expected to receive, as well as sick leave, vacation pay, and other fringe benefits, during the back pay period." *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 232 P.3d 277, 283 (Colo. App. 2010).

The parties have stipulated to the following:

1. Complainant's rate of pay prior to the November 2019 disciplinary action was $8,076 per month.

2. The disciplinary action included a 5% reduction in base pay to $7,672 per month, a $404 per month reduction. Per the disciplinary action the reduction was to be effective December 2019. Due to a delay in processing the reduction was not made to Complainant's December 2019 paycheck.

3. Complainant was paid $8,076 in December 2019. This was a $404 overpayment.

4. Complainant worked through January 16, 2020, or 96 hours of work time. January 2020 had a total of 184 workable hours. Respondent initially processed this payment at the $8,076 rate but caught and cancelled the payment. Respondent recalculated the payment at the reduced base pay amount. Based on the $7,672 rate, Complainant was paid $4,002.78 for the hours worked in January. This is $210.79 reduction from her pre-disciplinary rate of pay.

5. The January payroll payment was reduced by $404 to capture the December's overpayment.

6. The disciplinary reduction in pay reduced Complainant's pay a total of $614.79.

7. At the time of her resignation, Complainant received the following benefits, per month:

   a. Kaiser Co-Pay Employee & Spouse plan: employee contribution of $298.02 and employer contribution of $1,083.32;
   b. Delta Dental Basic Employee & Spouse plan: employee contribution of $16.98 and employer contribution of $45.84;
   c. Life Insurance: employee contribution of $13.00;
   d. Life Dependent: employee contribution of $1.00;
   e. Long term disability: employee contribution of $107.41.

8. Complainant had gross wages from the Colorado Coalition for the Homeless in the amount of $6959.75 in calendar year 2020.

Accordingly, Complainant's gross back pay through November 30, 2020 amounts to $85.237.54. Lost benefits through November 30, 2020 amounts to $11,291.60. Total back pay and benefits amounts to $96,529.14. Complainant earned $6,959.75 in mitigation. Therefore, Complainant is owed $89,569.39 in net back pay and benefits through November 30, 2020.[12]

[12] Back pay at $8,076 per month from February 1 through November 30, 2020 equals $80,760. For the hours she worked in January, Complainant was underpaid $210.79. She worked 52.17% of the total hours she would have worked in January 2020 had she not been constructively discharged. Accordingly, 47.83% of $8,076 equals $3,862.75. Complainant's January payroll was reduced by $404. Total back pay, therefore, equals $85,237.54. Benefits from Kaiser and Delta Dental for the period February 1 through November 30, 2020 equals $11,291.60

B. The Board is Not Authorized to Award Front Pay in this Matter

Complainant has requested front pay in lieu of reinstatement due to the fact that, if reinstated, she will no longer be permitted to practice her specialty – Trauma Informed Care. However, the Board lacks the authority to award front pay as a remedy for the claims in this matter, and also lacks the authority to mandate a resurrection of the TIC unit at Fort Logan. Accordingly, all the Board can do is reinstate Complainant to a Psychologist II position at Fort Logan and award back pay and benefits, along with attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant did not commit all the acts for which she was disciplined.

2. Respondent's actions were arbitrary, capricious, and contrary to rule or law.

3. The discipline imposed was not within the range of reasonable alternatives.

4. Complainant was constructively discharged.

5. Complainant is entitled to attorney's fees and costs.

ORDER

1. Respondent's November 2019 disciplinary action is **rescinded**.

2. Respondent shall **reinstate** Complainant to her former position as a Psychologist II at the Colorado Mental Health Institute at Fort Logan, at the compensation level she would now hold had Complainant not been demoted and constructively discharged.

3. Respondent shall compensate Complainant with her lost back pay and benefits, offset by the substitute earnings received by Complainant during this period of time, for a total of **$89,569.39 through November 30, 2020**. This amount is subject to employer PERA contributions, as well as statutory interest of 8% per annum to the date of reinstatement.

4. Respondent shall credit Complainant with sick leave and vacation time for the period from July 1, 2019 to the date of reinstatement.

5. Complainant is awarded reasonable attorney's fees and costs attributable to this litigation. Complainant shall file a Bill of Attorney's Fees and Costs no later than **December 7, 2020**. Respondent shall file a response to the Bill of Attorney's Fees and Costs within 10 days after receipt of the Bill of Attorney's Fees and Costs.

Dated this 23rd day
of November 2020,
at Denver, Colorado

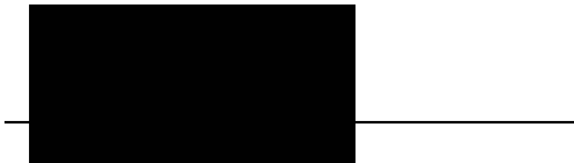
/s/ Keith A. Shandalow
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the UG day of November 2020, I electronically served a true and correct copy of the foregoing **AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Mark A. Schwane, Esq.
501 South Cherry Street, 11th Floor
Denver, CO 80246
mark@schwanelaw.com

Eric W. Freund, Esq.
Senior Assistant Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Eric.Freund@coag.gov



APPENDIX A: Exhibits stipulated to or admitted at hearing

Respondent's Exhibits: 1, 2, 3, 4, 5,6,7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 56, 57, 58, 59, 60, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

Complainant's Exhibits: A, B, C, E, F, G, H, I, J, K, L, N, O, P, U, V, X, Z, AA, BB, CC, II, JJ, KK, LL, MM, NN, OO, QQ, RR, UU, VV, WW, ZZ, AAA, DDD, HHH, III, JJJ, KKK, MMM

APPENDIX B: Witnesses Who Testified at Hearing

Dr. Alan Kent

Dr. Robert Hernandez

Dr. Michelle Arriaga

Rae Rutt

David Polunas

Dr. David Iverson

Miriam Taylor

Dr. Angela Gutjahr

Donna Trowbridge

Dr. Holly Cappello

Dr. Diana Luckman

Dr. Janet Dodd

Chad Shaklee

Dr. Laurie Risley

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-63, 4 CCR 801.

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-67, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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

Due to concerns about the Novel Coronavirus, the parties may file by email to: dpa_state.personnelboard@state.co.us. Instructions for filing by email can be found at: https://spb.colorado.gov/forms-and-filing.