STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2020G009**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KIRSTEN GREGG,
Complainant,

v.

DEPARTMENT OF REVENUE, GAMING DIVISION,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on July 21, 2020 through July 24, 2020. The hearing was conducted remotely through a web conference. The record was closed on August 6, 2020 upon the filing of written closing arguments. Complainant Kirsten Gregg was represented by Mark A. Schwane. Respondent Department of Revenue (DOR) was represented by Stacy L. Worthington, Senior Assistant Attorney General. Respondent's advisory witness, and Complainant's appointing authority, was Cory Amend, Senior Director, DOR's Enforcement Business Group.[1]

MATTERS APPEALED

Complainant appeals Respondent's decision to transfer her from the DOR's Division of Gaming to the Marijuana Enforcement Division. Complainant asserts that the transfer violated the Colorado State Employee Protection Act (Whistleblower Act), § 24-50.5-101, *et seq*., C.R.S., and the Colorado Anti-Discrimination Act, § 24-34-401, *et seq*., C.R.S. Complainant requests equitable and compensatory damages and all appropriate remedies available under the Whistleblower Act.

For the reasons set forth below, Respondent is found to have violated the Whistleblower Act and Complainant is awarded appropriate remedies under the Whistleblower Act. Respondent is not found to have violated the Colorado Anti-Discrimination Act.

ISSUES

1. Whether Respondent violated the Whistleblower Act;

2. What remedies are available to Complainant under the Whistleblower Act; and

3. Whether Respondent retaliated against Complainant in violation of the Colorado Anti-Discrimination Act.

[1] The DOR's Enforcement Business Group is now known as the Specialized Business Group. It will be referred to as the Enforcement Business Group in this decision.

FINDINGS OF FACT

Colorado's Gaming Background

1. Colorado voters approved constitutional amendments in 1990 and 2008 authorizing limited and extended casino gaming, respectively, in the cities of Blackhawk, Central City and Cripple Creek.

2. The constitutional amendments and subsequent statutory and regulatory provisions established the Colorado Limited Gaming Control Commission (Commission) and the Division of Gaming (Division or Division of Gaming) within the DOR.

3. The Commission, which consists of five members appointed by the Governor, is responsible for administering and regulating gaming in Colorado, including promulgating rules, issuing licenses, levying fines, and establishing fees and taxes.

4. The Division is responsible for the day-to-day regulation of gaming, including processing licenses, conducting audits, overseeing gaming technology and devices, and patrolling gaming establishments.

5. To help administer and regulate gaming, the Commission entered into interagency agreements with the Colorado Department of Public Safety's (DPS) Colorado State Patrol (CSP), Colorado Bureau of Investigation (CBI), and Division of Fire Prevention and Control, as well as the Department of Local Affairs, to help administer and regulate gaming. Each year the Commission approves funding for the agreements.

6. Revenue generated from gaming taxes, fees, and fines is used to pay for administering and regulating gaming and is distributed to beneficiaries, such as the Colorado community college system, the State Historical Fund, and the counties and cities in which gaming is permitted.

Performance Audit of the Division and the Commission by the Office of the State Auditor

7. In June 2018, the Office of the State Auditor (OSA) reported on a performance audit it conducted of the Division and the Commission, concerning the administration of intergovernmental agreements it had with other state agencies (Audit Report). (Stipulated Fact.)

8. The audit was conducted from November 2017 through May 2018 and was undertaken at the request of the legislature's Joint Budget Committee, which expressed concerns about the rising costs of administering gaming.

9. The Audit Report's key findings included the following:

- All four of the inter-agency agreements in place for Fiscal Year 2017 lacked either specific descriptions of the services the agency would provide or measures the agency would use to report on their performance and the Commission would use to monitor the agreements. The lack of specified services and measures could lead to agencies using approved funding in a different manner than intended by the Commission.

- The Commission and the Division did not enforce reporting requirements included in the interagency agreements prior to paying agencies the full amounts they had invoiced the Commission. In Fiscal Year 2017, the Commission paid one agency about $3.2 million without having specified what information the agency should report regarding its use of the funds; two other agencies were paid about $1.1 million without obtaining required reports on their activities; and the fourth agency was paid about $161,000, even though all the required reports were submitted late.

- Neither the Commission nor the Division has established written policies or procedures for monitoring compliance with the interagency agreements. Division staff did not monitor or enforce requirements in the interagency agreements because, as Division staff reported, they did not have the authority to do so.

10. The Audit Report included the OSA's following key recommendations:

- Require other state agencies to align their budget requests submitted to the Commission with those submitted to the Joint Budget Committee and ensure agreements include specific descriptions of services and measures of performance.

- Improve monitoring of the interagency agreements for compliance by assigning a staff member to serve as contract manager and developing written policies and procedures for monitoring the agreements.

11. The Commission and the Division agreed with the Audit Report's recommendations and proposed implementation dates in 2018 and 2019. (Stipulated Fact.)

12. During the OSA investigation, the auditors chose not to consult with representatives of DPS, which offended some key DPS management employees.

13. After the OSA issued its Audit Report, representatives of DPS and Division staff met to discuss performance measures on several occasions in 2018 and 2019. (Stipulated Fact.)

14. The conflict between the Division and CBI arose from the Division's insistence that CBI develop performance measures that established a gaming-nexus for all work done by CBI's gaming unit, which consisted of 7 FTEs, and CBI's insistence that it was not possible to show that all of the CBI gaming unit's work was related to gaming. The Division adopted a strict interpretation of the Audit Report's recommendations, while CBI had a much looser interpretation of those recommendations.

15. In October 2018, Division Director Donia Amick met with John Camper, the Director of CBI, to discuss CBI performance measures. Frustrated by Ms. Amick's strict interpretation of the Audit Report's recommendation and the need to establish that all of CBI's work pursuant to the interagency agreement was related to gaming, Mr. Camper walked out of the meeting and afterwards refused to work directly with Ms. Amick.

Complainant's Background

16. Complainant has a background in law enforcement, having spent many years with the Golden Police Department. Complainant was then employed by CBI from 2006 to 2008. In 2007 and 2008, she filed internal grievances and a discrimination charge with the U.S. Equal Employment Opportunity Commission (EEOC) alleging a hostile work environment and gender discrimination. Complainant entered into a settlement agreement and resigned from the CBI in 2008.

17. From April 2009 until August 1, 2019, Complainant was the Division's Deputy Director and Chief of Investigations.

18. At all times relevant to this matter, Complainant's husband, Ralph Gagliardi, was employed by CBI as an Agent-in-Charge.

December 20, 2018 Commission Work Group Meeting

19. On December 20, 2018, state agencies with interagency agreements with the Commission, including representatives of DPS, presented proposed performance measures at a Performance Measures Work Group meeting, which included members of the Commission and the Division. (Stipulated Fact.)

20. After the DPS representatives completed their presentations, they left the meeting except for one CBI agent named Ron Carscallen. (Stipulated Fact.) Mr. Carscallen was a Criminal Investigator II, assigned to the CBI gaming unit.

21. After the DPS representatives left the meeting, Division staff addressed the Commission. Ms. Amick, Complainant, and Deputy Director Kenya Collins spoke, as did several commissioners and others. (Stipulated Fact.)

22. Complainant made several statements after most of the DPS representatives left the December 20, 2018 meeting, including, but not limited to, the following:

- You have [a CBI] agent assigned to the Safe Streets Task Force who does very little gaming cases. So I think that should be a concern to the commission. Having a bank robber go to a commission -- or to a casino and play but then go back out and be arrested somewhere else, okay, maybe you could say that was gaming-related. But do we need to fund a full FTE for an agent that does very little, if anything, gaming-related? And so that's a concern, I think.

- So when they [CBI] committed to putting somebody on that task force two years ago, they said that that task force agent would do a proactive investigation in the gaming communities at least once a month and report that back to the commission. I don't think I've ever seen that in the last two years. That has not happened. So that's a concern.

- And, in fact, there hasn't been any reporting on that -- that agent until the commission specifically asked for that, and then they started reporting to that, so...

- I have a concern with the intel that they talk about, that the casinos are playgrounds of criminals; that's where the outlaw motorcycle clubs go. We're not getting any of that intel from them. It's really a one-way street. It's information from us to them, it's very rarely from them to us. If they have intel that there's criminals in the casinos, I have 18 FTEs that are working in Central City, and I have another 15 in Cripple Creek. I think we should be the ones that should know that if there's intel that needs --

- The -- I think the question about can we get some specifics … with the arrests and, you know, what is the performance measure? I don't know. I mean, he says -- Tim[2] says there's 400-and-some arrest warrants and we're going to do -- we're going to make four arrests out of 400. Pretty low number.

- But I think you've seen in the past where there has been things in the packet[3] where that analyst is used for other non-gaming things. And you saw that in the packet this time as well, that there was -- actually, Tim was referring to it as well -- the lumen database and facial recognition and assisting other agencies in non-gaming cases.

- So that's kind of how you have to look at that is that something that you want to fund. I do remember last month there was discussion about a sexual assault case that they were assisting with in Teller County. Is that gaming-related? Do you want to say that's gaming-related? Do you want to say that you're okay with funding that? I'll tell you that CBI has regional offices in general, and they have a CBI office in Pueblo who is tasked to assist those agencies with things like that, sex assaults and so forth. They're just small agencies. It doesn't have to be the gaming unit that assists with that.

23. While Complainant and other staff members of the Division were making these comments to the Commission, Mr. Carscallen became visibly upset and stated his displeasure with those comments, including those made by Complainant.

24. When Mr. Carscallen returned to his office, he confronted Ralph Gagliardi, Complainant's husband. Mr. Carscallen was visibly angry and asked Mr. Gagliardi, "Why does your wife hate CBI?" Mr. Carscallen said that Complainant had said many, many bad things about CBI at the Commission meeting. Mr. Carscallen went on to say that Complainant was not a good cop while at the Golden Police Department, and was not a good agent while employed at CBI. He added that Complainant was now where she belonged because the Division was where those who could not succeed at police work belonged. He told Mr. Gagliardi, "Tell your wife I am very unhappy with her." He added words to the effect that "your wife is going to be sorry … she is going to be in trouble."

25. CBI Director Camper called Mr. Amend after the December 20, 2018 meeting, expressing his concerns about how comments were handled at the meeting. Mr. Camper requested a copy of the recording of the December 20, 2018 Commission meeting.

26. On December 21, 2018, Mr. Amend sent an email to Complainant and Ms. Collins thanking them for their comments at the Commission meeting the day before, as follows: "I wanted

[2] Refers to Tim Martinez, Agent-in-Charge of the CBI gaming Unit.
[3] Refers to material prepared prior to apprehending an individual with an outstanding arrest warrant.

to reach out and thank you both for saying what you said at yesterday's commission meeting. You both had critical information and a wonderful perspective. I realize it may have been uncomfortable at times, but the commissioners needed to hear what you had to tell them. I appreciated your words and your passion. Please keep up the great work."

27. CBI was concerned that CBI agents could not show that 100% of CBI's gaming unit work was gaming related. CBI was also concerned about any potential reduction in the CBI gaming unit's budget, which might necessitate a reduction in FTEs.

28. On January 11, 2019, Ms. Amick exchanged emails with Mr. Camper. Ms. Amick wrote, "We had a good working relationship in the past and I would like to move forward and have a good working relationship again. If you would like to meet I will make myself available." Later that day, Mr. Camper replied as follows:

> Thanks Donia, I appreciate that. I too would like to try to figure out a path forward, but I'll admit it seems like a heavy lift at this point.
>
> I had occasion to listen to the tape, and in addition to my obvious disappointment in how that discussion took place, I must tell you that the contempt that your team has for CBI was palpable, and I'm at a loss as to how we get past that. It seems historically based on some very personal anger that has, in my view, been encouraged, validated, and assumed accurate by leadership.
>
> If it's the preference of the Div. of Gaming and the Commission to dissolve the CBI Gaming Unit, let's tackle that with more honesty and see if there's a way to make that transition in a sensible manner. If that's not the desire, then I would hope for a higher level of support from you ... and from your staff (although based on the hostility and mistrust that I listened to on the tape, I think you're going to have your work cut out for you).
>
> I've got a couple internal meetings set up early next week to try to figure this out, and I'll get in touch with you sometime after that to see if you'd still like to meet. Thank you for reaching out; I do appreciate it.

29. There was no further direct contact between Ms. Amick and Mr. Amend.

30. On January 21, 2019, Complainant provided a statement to Ms. Amick, who forwarded the statement to Jannine Mohr, the Commission's Chair:

> On December 20, 2018, the Division hosted a Colorado Limited Gaming Control Commission monthly meeting as well as a follow up working group session (open to the public and audio recorded) to discuss performance measures of agencies (Colorado State Patrol, Division of Fire Prevention and Control, and the Colorado Bureau of Investigation) contracted by the Commission via intergovernmental agreements. This working group was assembled in an effort to address the recommendations made by the Colorado Office of the State Auditor.
>
> During the working group, Division Director Amick asked Division staff if they had information/comments they would like to relay to the Commission

reference [sic] the proposed performance measures. Division Director Amick, Division Director of Administration Kenya Collins and I all spoke to the Commission reference [sic] our concerns with the proposed performance measures. During our discussion, CBI Agent Ron Carscallen who was still present during the public working group became visibly agitated and commented that he was not happy with comments made by Director Amick and I and implied that the Division waited until the other agencies left before bringing up concerns. Ron Carscallen was asked to join in on the discussion but refused to do so. Commission Chair Jannine Mohr expressed support for the discussion and commented that no one should be angry with the staff for speaking up. After the working group session, I received thanks and gratitude from several people (Commissioners and Senior Director) for participating in the discussion.

Later in the afternoon that same day at approximately 4pm, I spoke (on the phone) with my husband, CBI Agent in Charge Ralph Gagliardi. Ralph was upset and asked what happened earlier in the day with CBI. He went on to explain that CBI Agent Ron Carscallen had just confronted him in his (Ralph's) office.

Ralph said that Ron Carscallen was visibly angry and proceeded to speak negatively about me for about 10 minutes. Ralph said that during this whole incident, Carscallen would continually repeat his comments and would also only refer me as "your wife", never by title/rank or even by name. Ron Carscallen knows me personally as we worked together at CBI- at the very least, he can refer to me by name. Carscallen's reference to me by "wife" is obviously a display of gender discrimination and micro aggression implying that the husband has to control his wife.

Carscallen asked Ralph, "why does your wife hate CBI?" Carscallen also spoke about comments made by me referring to the issue of number of arrests and the issue of CBI Agent Tolman being in the task force. Carscallen also said that the Division manipulated the meeting to purposely exclude CBI.

Carscallen also berated and insulted me by saying that I was not a good cop while at the Golden Police Department and not a good agent while at CBI, and that I never made four arrests while at Golden or CBI. Carscallen proceeded to say that I could not make it at Golden PD or CBI and that I was now where I belonged (the Division of Gaming) where everyone goes who can't make it in police work.

Ralph said that Carscallen continually and incessantly instructed him to, "Tell your wife I am very unhappy with her." Carscallen also warned Ralph by saying that he was going to get the audio recording and then his wife would be in trouble.

Ralph immediately went to his supervisor, Deputy Director Schaefer to report the incident with Ron Carscallen. Schaefer told Ralph that AIC Tim Martinez would handle it.

> Tim Martinez never initiated contact with Ralph about the incident. More than two weeks later, on January 4, 2019, Ralph had to initiate a discussion with Martinez who was reluctant to talk about it. Ralph said that Martinez became visibly upset when asked to discuss what happened with Ron Carscallen. Martinez did admit that Ron Carscallen's behavior was inappropriate and went on to say that after Carscallen's incessant CBI Gaming Unit (right after the working group) luncheon comments, he had specifically instructed Carscallen to not talk to Ralph about what happened in the working group. Martinez told Ralph that the situation would be handled with Carscallen; however, Ralph has not been asked to give a statement (verbal or otherwise) or as an Agent in Charge, provide feedback or a recommendation on the incident. Carscallen felt emboldened by CBI management to defy Martinez's direction and proceeded to confront and harass Ralph Gagliardi and in turn intimidate and bully me.
>
> This Commission working group was a public meeting and was audio recorded. Ron Carscallen's accusation of manipulating the meeting to exclude other agencies is insulting. There was no expectation that participating agencies should leave the meeting, and their choice to leave was their choice alone.
>
> Ron Carscallen's unacceptable behavior both at the meeting and later with AIC Gagliardi are supported and condoned by CBI management as demonstrated in their lack of investigation into the incident.
>
> Agent Carscallen's harassment of my husband AIC Gagliardi reflects actions to intimidate, bully, and to influence my work, decisions, and recommendations to the Commission. Agent Carscallen and CBI management are retaliating and punishing AIC Gagliardi for the simple fact that he is my husband.
>
> I refuse to work with someone who blatantly disrespected and insulted me as well as the staff of the Division of Gaming. Nor would I expect any of the Division staff to work with Agent Carscallen who thinks so poorly of them. Agent Carscallen needs to be removed from the CBI Gaming Unit and provide an apology to the Division of Gaming, Ralph Gagliardi, and myself.

31. On February 25, 2019, Heidi Humphreys, DOR's Deputy Executive Director, sent the following email message to Mr. Amend and Ms. Amick regarding the OSA Audit Report's next steps:

> I've been thinking about this a lot as I'm sure you have been too. I respect the work of the state auditors and I am not suggesting we ignore their recommendations in any way. It is my hope that we can continue to have a successful partnership with DPS because I believe it is in the best interest of the State. If we don't get there, I want to know we did everything we could to make this partnership work. I would like to propose the following next steps:
>
> 1. Finalize performance measures with each unit. I suspect this will take some back and forth negotiations - let's stay focused on getting to a good outcome.

2. Finalize and share budgeting process asap. Please provide all tools available to help these units be successful in the budget request process.

3. Finalize reporting format timeline - quarterly reports?

I cannot think of a way to ensure that every dollar they receive is spent on limited gaming related activities. One possibility that I have considered is setting a threshold for which gaming funds will be spent. For example, if CSP has 20 troopers on payroll each month, perhaps they commit that 80% or 90% of their time is directly tied to gaming and they cover the remaining amount. I think we could discuss such options with the auditors to see if that is a reasonable approach.

Let me know if you'd like to discuss. Please let me know your thoughts on the steps outlined above.

Complainant's 2018-2019 Performance Evaluation

32. In April 2019, Complainant was given her performance evaluation for the review period of April 1, 2018 through March 31, 2019, drafted by Ms. Amick. Complainant was rated at Level III (Exceptional), the highest possible rating. Mr. Amend reviewed the evaluation and approved it.

Events in April 2019

33. On April 18, 2019, Lu Cordova became DOR's Executive Director.

34. Stan Hilkey, DPS' Executive Director, contacted Tony Gheradini, who was then the Governor's Director of Operations and Cabinet Affairs, and brought the OSA Audit Report to Mr. Gheradini's attention.

35. On April 19, 2019, Mr. Gherardini sent an email to Ms. Amick, and wrote, in pertinent part, "It sounds like we are still in a challenging place with the commission on funding for public safety so, my one ask is that you help drive your Division in supporting Public Safety in coming to a meaningful compromise with the commission that also ensures funding to gaming enforcement is not cut. I expect Lu and Stan will have continued discussion around this, so any help you can provide in the process would be greatly appreciated."

May 9, 2019 Commission Meeting

36. The Commission held a meeting on May 9, 2019. The minutes of the executive session indicated the following, in pertinent part:

The meeting was convened to discuss the Division of Gaming audit findings and budget requests from the Department of Public Safety. Chair Mohr explained that she asked Executive Director Cordova to attend as she had been involved in discussions with herself and Executive Director Hilkey from the Department of Public Safety (CDPS) to work on possible resolutions in regard to CDPS budget issues.

> Chair Mohr began the discussion by sharing her thoughts about the responses submitted by CDPS to the written questions posed by the Commission. Each Commissioner shared their thoughts and all agreed that the answers did not fully provide the requested information and felt that each Division should be able to provide more specific measurements and metrics.
>
> Chair Mohr explained that John Lizza, Eric Meyer, Lu Cordova and Heidi Humphreys met and all agreed that there were not sufficient metrics to enable the Commission to answer the audit recommendations. Mr. Lizza, brought up his legal concerns and offered recommendations to assist in receiving required data. He stated there are two issues; the first being the audit by the Office of the State Auditor (OSA) and their recommendations. The OSA has now followed up asking what steps had been taken to address the audit concerns. Mr. Lizza explained that this audit is directed to the Commission and not the Division and made allegations that the Commission is not properly accounting for funds distributed to the three state agencies within CDPS: Colorado State Patrol, Colorado Bureau of Investigation and Division of Fire Prevention and Control. His concern is that OSA will continue with this audit until they are satisfied that funds are being appropriated correctly.
>
> Also, this could potentially lead to litigation by the recipients. The next concern is that the audit requires clear and measurable metrics from the three agencies and their services must be related to limited gaming within Colorado. This statement is in the constitution and in statute.

37. On May 29, 2019, Ms. Cordova emailed Mr. Amend, and wrote, in pertinent part, "It is extremely important to Tony [Gheradini] that the 'Commission funded 100%,' but is reserving 20% of that allocation until the communities, Commission, DOR and DPS all arrive at a mutual agreement as to appropriate measures of how the communities are served."

38. On June 12, 2019, Christopher Beall, a Deputy Attorney General, issued a memorandum in which he addressed the issue of which agency, the Commission or DPS, has the discretion under the Colorado Limited Gaming Act to determine whether an activity undertaken by DPS is "related to limited gaming" and therefore potentially eligible for payment from the Limited Gaming Fund. Mr. Beall concluded that the "Gaming Commission, as the agency charged with implementation and enforcement of the Act, is the department with discretion to determine whether an activity for which payment is sought is 'related to limited gaming.'"

39. The Commission, Division staff, and the Department of Public Safety continued to meet and discuss performance measures through July 2019. (Stipulated Fact.)

Transfer Plan and Implementation

40. In late June or early July 2019, Mr. Amend began formulating a plan to transfer Complainant and Ms. Amick out of the Division and into other divisions within the Enforcement Business Group.

41. Prior to the formulation of the transfer plan, Dan Hartman, who was Director of Racing, had expressed significant interest in sports betting, which was about to become part of the Division. In addition, Matt Heap, who was Deputy Director and Chief of Investigations for the Marijuana Enforcement Division, had complained to Mr. Amend that work at the Marijuana

Enforcement Division was a grind and that he was "burned out," or close to being burned out. Previously, Mr. Heap had unsuccessfully applied for the positon of Director of the Division.

42. Without consulting with either Ms. Amick or Complainant, Mr. Amend made the decision to transfer Complainant and Ms. Amick out of the Division.

43. Mr. Amend chose July 16, 2019 as the day he would inform everyone in the Enforcement Business Group of the staff transfers. First he met with Jim Burack, the Director of the Marijuana Enforcement Division, and informed him that Complainant would transfer from the Division to the Marijuana Enforcement Division and replace Matt Heap, who would assume Complainant's position in the Division. Mr. Burack was very surprised at the news and said he understood the transfer of Ms. Amick, but did not understand the exchange of Complainant for Mr. Heap, who he did not want to lose. According to Mr. Amend, Mr. Burack "wanted to push back the deputy director changes after everyone has met and talking through all of this. I said that wasn't likely."

44. Later on July 16, 2019, Mr. Amend met with Ms. Amick and informed her that she was being transferred. Mr. Amend handed Ms. Amick a memo to give to Complainant, which informed Complainant that she was being transferred to the Marijuana Enforcement Division.

45. Complainant received notice on July 16, 2019, that she was being transferred from her position in Gaming to a position in the Marijuana Enforcement Division. (Stipulated Fact.)

46. Complainant's transfer was effective August 1, 2019. (Stipulated Fact.)

47. On July 16, 2019, Mr. Amend sent an email to the Enforcement Business Group staff, announcing the position changes.

48. In a meeting between Mr. Amend and Complainant on July 16, 2019, after Complainant was informed of her transfer, surreptitiously recorded by Complainant, Mr. Amend said that Complainant's comments at the December 20, 2018 Commission meeting "are a lot of what got us here. . . . Some other people out there have a lot of heartburn over that." He also told Complainant that many people went to bat for Complainant and urged that she remain at the Division of Gaming, but added that staying at the Division of Gaming "was not in the cards."

49. In response to Mr. Amend's notice of staff changes, Ms. Cordova sent him an email on July 16, 2019, in which she wrote:

> I admire your courage and am grateful we got the right guy in your position!
>
> We will need talking points around this:
>
> - Building bench strength
> - Finding talent and cross-training
> - Giving our own best folks an opportunity to grow and develop to bring more value to them and the department
>
> Let me know what you think
>
> What else do you need in terms of support from me or the leadership?

50. The transfers Mr. Amend initiated on July 16, 2019 were the only transfers made among the five divisions within the Enforcement Business Group to date, other than transfers precipitated from retirements and promotions.

51. Mr. Amend forwarded his email regarding Enforcement Business Group staff changes to Mr. Hilkey of the CBI the next day, July 17, 2019, and simply added, "FYI."

52. After the transfers of Ms. Amick and Complainant from the Division, Mr. Hartman and Mr. Heap engaged with representatives of DPS and CBI and substantially rewrote the performance measures for CBI to the latter's liking. These changes were adopted by the Commission in January 2020.

Complainant at Marijuana Enforcement DIvision

53. Promptly after being notified of her transfer, even before the effective date of the transfer, Complainant contacted Mr. Burack and asked for her position description.

54. Complainant has been marginalized at the Marijuana Enforcement Division. She did not receive a position description until October 2019. She was not introduced to staff and industry representatives by Mr. Burack, and she has not received cross-training.

DISCUSSION

A. Respondent Violated the Whistleblower Act

Complainant alleges that Respondent violated the Whistleblower Act by transferring her from her position in Gaming to a position in the Marijuana Enforcement Division.

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

In determining whether there has been a violation of the Whistleblower Act, "[i]t must be initially determined whether the claimant's disclosures fell within the protection of the 'whistleblower' statute and that they were a substantial or motivating factor in the [action taken by the agency]. If the claimant's evidence establishes that his [or her] expression was protected by the 'whistleblower' statute, then the [reviewing adjudicator] must determine whether [the agency's] evidence established, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968 (adopting the procedure outlined in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

1. Disclosures

The first question is whether Complainant has proven by a preponderance of the evidence that her disclosures "fell within the protection of the whistle-blower statute" and that her

disclosures "were a substantial or motivating factor" in Respondent's decision to transfer Complainant out of the Division of Gaming. *See Ward*, 699 P.2d at 968.

In order to show that her disclosures fall within the protection of the Whistleblower Act, Complainant must establish that: 1) she made a disclosure of information, as that term is defined in § 24-50.5-102(2), C.R.S., and applicable case law; and 2) that she Complainant has made a "good faith effort to provide to her supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." § 24-50.5-103(2), C.R.S. Additionally, in order for Complainant's disclosures to be protected, the disclosures must not be exempted from the Act's protections, pursuant to § 24-50.5-103(1)(a)-(c), C.R.S., which include an employee who discloses information that he or she knows to be false or who discloses information with disregard for the truth or falsity of the information; information from public records that are closed to public inspection pursuant to § 24-72-204, C.R.S.; or without lawful authority, information that is confidential under any other provision of law or closed to public inspection under § 24-72-204(2)(a)(I)and (2)(a)(VIII), C.R.S.

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

First Amendment protections also depend, in part, upon the analysis as to whether statements were of "public concern." First Amendment precedent, therefore, is helpful in understanding the contours of such a requirement. See *Ward*, 699 P.2d at 968 (adopting the First Amendment allocations of burden of proof in *Mt. Healthy* as the template for a whistleblower analysis). The Supreme Court has characterized a matter of "public concern" as one "fairly considered as relating to any matter of political, social, or other concern of the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id*. at 147-48. "While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests." *Gardetto v. Mason*, 100 F.3d 803, 812 (l0th Cir. 1996) (internal citations and quotation omitted).

In this matter, Complainant's comments at the December 20, 2018 Commission meeting addressed the potential waste of state funds, the possibility that statutory provisions were being violated, and the need to implement the recommendations of the OSA's audit. Undoubtedly, these are matters of public concern.

Respondent argues that "the information Complainant allegedly 'disclosed' was information that had already been publicly disclosed and acted upon." Respondent adds that "[m]any courts in many cases have held that disclosure of information that is already widely known is not a protected disclosure." In support of this last proposition, Respondent relies on federal cases; none of these case are from the Tenth Circuit. Respondent also cites state cases from Kentucky and Georgia.

Respondent's argument is unpersuasive. The case law cited by Respondent is not Colorado law and therefore is not controlling for this case. The cases cited by Respondent interpret other states' statutes, not Colorado's. Colorado's Whistleblower Act enumerates exceptions to its protections, but makes no mention about any exception to those protections if the information has already been publicly disclosed. Respondent's interpretation of the Whistleblower Act finds no support in Colorado case law.

In addition, Mr. Amend's December 21, 2018 email to Complainant and Ms. Collins, which characterized their comments at the December 20, 2018 Commission meeting as "critical information" that "the commissioners needed to hear" strongly implies that Complainant's comments addressed issues that were not widely and publicly known, even among the commissioners. It is such comments, addressing the need to implement recommendations of the OSA after its audit, the waste of public funds, and the potential violation of statutory requirements of inter-agency agreements, that were contemplated by the legislature in passing the Whistleblower Act. Accordingly, Complainant has established by a preponderance of the evidence that her comments at the December 20, 2018 Commission meeting constituted disclosures protected by the Whistleblower Act.

The Whistleblower Act requires that an employee who wishes to disclose information must "make a good faith effort to provide to his supervisor or appointing authority, or member of the general assembly the information to be disclosed prior to the time of its disclosure." C.R.S. § 24-50.5-103(2). This requirement, as well as the requirement for a disclosure of information, has been met when an employee discloses information meeting the test for a disclosure of information under the Whistleblower Act to her supervisor, and does not necessarily require two separate disclosures of information. *Gansert v. Colorado*, 348 F. Supp.2d 1215, 1226-28 (D. Colo. 2004). Pursuant to the Whistleblower Act, "supervisor" includes "any board, commission, department head, division head, or other person who supervises or is responsible for the work of one or more employees." § 24-50.5-102(5), C.R.S.

Complainant made her comments to the Commission on December 20, 2018, in front of her supervisor, Ms. Amick, and Mr. Amend. Thus, these disclosures were provided to Complainant's "supervisor or appointing authority or member of the general assembly." § 24-50.5-103(2), C.R.S. Therefore, Complainant's disclosures of information meet this statutory requirement. *See Gansert*, 348 F. Supp. 2d at 1226-28.

2. Adverse Action

The Whistleblower Act prohibits the imposition of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S. "Disciplinary action" is construed broadly in the Whistleblower Act, and includes "any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, *transfer*, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty." § 24-50.5-102(1), C.R.S. (Emphasis added.)

Complainant was transferred from the Division of Gaming to the Marijuana Enforcement Division under circumstances that appeared to be punitive in nature. Transfer is explicitly listed as an example of a disciplinary action under the Whistleblower Act. Complainant has met this element of the test for Whistleblower Act protection.

3. Substantial or Motivating Factor

Once it is established that a protected disclosure occurred, the employee must demonstrate that the adverse action was taken "on account of the employee's disclosure of information." § 24-50-103(1), C.RS. Employers may violate the Whistleblower Act if they had both legitimate and retaliatory motives in issuing the discipline. *Taylor v. Regents of the Univ. of Colo.*, 179 P.3d 246, 249-50 (Colo. 2007). Under *Ward,* Complainant must demonstrate that her protected disclosure was a substantial or motivating factor for the action taken against her. In other words, she must demonstrate a causal connection between her protected conduct and the adverse action. If she sustains this burden, Respondent then has an opportunity to prove, by a preponderance of the evidence, that it would have made the same decision in the absence of Complainant's disclosure. *Ward,* 699 P.2d at 968. This allocation of the burden of proof assures that employees do not abuse the Whistleblower Act to evade appropriate consequences for poor job performance. *Taylor,* 179 P.3d at 249.

The Colorado case law implementing the Whistleblower Act fails to define the standard by which the causal connection is established. Therefore, case law implementing the anti-retaliation provisions of the Colorado Anti-Discrimination Act (CADA) and Title VII provides useful guidance. Under this long line of cases, in anti-discrimination cases involving retaliation claims, the causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Love v. RE/MAX of America, Inc.,* 738 F.2d 383, 386 (10th Cir. 1984); *Anderson v. Coors Brewing Co.,* 181 F.3d 1171, 1179 (10th Cir. 1999). The inference of retaliation based on temporal proximity generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action. *Marx v. Schnuck Markets, Inc.,* 76 F.3d 324, 329 (10th Cir. 1996). Generally, unless the adverse action is *"very closely* connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." *Id.* at 328 (citations omitted; emphasis in original). *See, Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 (10th Cir. 2006). Generally speaking, a time period between the protected activity and the adverse action of three months or more cannot support an inference of a causal connection. *See Richmond v. ONEOK, Inc.,* 120 F.3d 205, 209 (10th Cir. 1997) (a period of three months between the protected activity and the adverse action, standing alone, is not sufficient to establish causation); *Piercy v. Maketa,* 480 F.3d 1192, 1198 (10th Cir. 2007) (acknowledging that an adverse employment action occurring three months after the protected activity cannot, standing alone, demonstrate causation).

If there is not “very close temporal proximity between the protected activity and the retaliatory conduct, the plaintiff must offer additional evidence to establish causation.” *O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001). Therefore, “[o]ther evidence in the record could establish an adverse employment action taken after a lengthy period of time was still in response to the earlier, protected activity[.]” *Piercy,* 480 F.3d at 1199.

In this case, Complainant’s protected disclosures were made on December 20, 2018 and she was transferred to the Marijuana Enforcement Division beginning August 1, 2019. Seven months between the protected activity and the adverse action does not constitute “close temporal proximity” sufficient to permit an inference of protected activity.

However, Complainant established causation by introducing into evidence a recording of her July 16, 2019 meeting with Mr. Amend, during which he made certain admissions demonstrating the causal connection between Complainant’s December 20, 2018 comments to the Commission and her transfer. During that meeting, on the day that Mr. Amend informed

Complainant of her transfer, Mr. Amend told Complainant that her comments at the Commission meeting "are a lot of what got us here." According to the Merriam Webster Dictionary, "a lot" means "to a considerable degree of extent." In other words, Mr. Amend admitted that Complainant's comments, her protected disclosures at the Commission meeting, were a substantial or motivating factor in her transfer, which was an adverse action. Therefore, Complainant has established, by a preponderance of the evidence, that her disclosures were a substantial or motivating factor in the adverse action of transferring her from the Division Gaming to the Marijuana Enforcement Division.

Additional evidence supports this conclusion. It is clear that a conflict arose between CBI and Ms. Amick as the Division Director and Complainant, concerning CBI's performance measures and the need for CBI to establish that its gaming unit's activities had a gaming nexus. The evidence established that Ms. Amick and Complainant were viewed by CBI and DPS generally as obstacles to full funding for the CBI gaming unit, and Complainant's comments made at the December 2018 Commission meeting were a substantial factor in that perception. After Ms. Amick and Complainant were removed from the Division of Gaming, CBI was permitted to make revisions to the inter-agency agreement that were more to its liking, and these changes were eventually approved by the Commission. Although no "smoking gun" was offered at the hearing of this matter, circumstantial evidence establishes that Complainant's disclosures to the Commission in December 2018 played a significant role in a push to remove her, as well as Ms. Amick, from the Division of Gaming.

At hearing, Mr. Amend testified that it was his understanding that CBI's displeasure with Complainant's comments at the December 20, 2018 Commission meeting was based primarily on the timing of those comments, made after all but one DPS representative left the meeting. This interpretation of the reason for CBI's displeasure is given little weight. Mr. Carscallen's statements to Mr. Gagliardi right after the December 20, 2018 Commission meeting indicate that it was the substance of Complainant's comments at the meeting that were the primary cause of his anger. Furthermore, Mr. Camper's January 11, 2019 email to Ms. Amick reveals that he was highly offended by the substance of the comments made at the December 20, 2018 Commission meeting, referring to the Division's staff as contemptuous of CBI and evincing a high level of hostility and mistrust. Clearly, what Complainant said, rather than when she said it, was the principal reason CBI was displeased with Complainant.

Respondent attempted to justify Complainant's transfer as part of a directive to break down silos and cross-train good employees. This appears to be a justification after the fact. Ms. Amick and Complainant were the only employees who have been transferred, other than their replacements, since this directive was allegedly circulated. Clearly, it is not a directive that has been made a high priority for the Enforcement Business Group. The ostensible reasons for such a transfer – cross-training and breaking down silos – has not occurred for Complainant after her transfer to the Marijuana Enforcement Division. It is difficult to see how Complainant's marginalization at the Marijuana Enforcement Division has benefitted her career. On the other hand, Ms. Amick's and Complainant's replacements appear to have benefitted from their transfers into the Division of Gaming. Mr. Hartman was very interested in sports betting and Mr. Heap wanted out of what he characterized as the "grind" at the Marijuana Enforcement Division, and had previously applied for a position with the Division of Gaming.

Finally, it makes little sense to transfer both the Director and the Deputy Director of the Division of Gaming at the same time, especially when knowledge and expertise concerning such things as the implementation of the Audit Report's recommendations was still being hotly

discussed and negotiated. As several Enforcement Business Group staff told Mr. Amend, they did not see the rationale for transferring Complainant, and argued against it. Nonetheless, Mr. Amend stated that Complainant remaining in the Division of Gaming was "not in the cards," as if he had no choice but to transfer her out of the Division.

To reiterate, Complainant has established, by a preponderance of the evidence, that her disclosures were a substantial or motivating factor in the adverse action of transferring her from the Division of Gaming to the Marijuana Enforcement Division.

4. Respondent did not prove that it would have transferred Complainant in the absence of Complainant's protected disclosures

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

The ultimate question, therefore, is whether Respondent has established, by a preponderance of the evidence, that it would have transferred Complainant even in the absence of her protected disclosures.

Respondent argued that part of Ms. Cordova's agenda was to "break down silos" and recommended the transfer of Enforcement Business Division staff among enforcement divisions as a means of cross-training. Respondent relies on this agenda as the reason Complainant was transferred. However, the evidence demonstrated that this aspect of Ms. Cordova's was not a directive, and that the only Division of Gaming staff members transferred were Complainant and her supervisor, Ms. Amick. Coupled with Mr. Amend's admission to Complainant that her comments were "a lot of what got us here," Respondent has not established by a preponderance of the evidence that it would have transferred Complainant out of the Division of Gaming absent her comments at the December 20, 2018 Commission meeting.

5. **Remedies**

Section 24-50.5-104(2), C.R.S., provides, in pertinent part:

> If the state personnel board after hearing determines that a violation of section 24-50.5-103 has occurred, the state personnel board shall order, within forty-five days after such hearing, the appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, and expungement of the records of the employee who disclosed information, and, in addition, the state personnel board shall order that the employee filing the complaint be reimbursed for any costs, including any court costs and attorney fees, if any, incurred in the proceeding. Such reimbursement shall be made out of moneys appropriated to the agency that employs such employee.

Complainant is entitled to the following relief: (A) reimbursement for any costs, including all court costs and attorney fees incurred in the proceeding before the Board; and (B) reinstatement to her former position within the Division of Gaming.

Complainant argues that she is entitled to compensatory damages. There is no authority for compensatory damages in the Whistleblower Act or in the case law interpreting the Whistleblower Act. Accordingly, an award of compensatory damages is not warranted.

B. Respondent Did Not Retaliate Against Complainant in Violation of CADA

Under CADA, it is a "discriminatory or unfair employment practice … [f]or any person, whether or not an employer … [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because he has filed a charge with the [Colorado Civil Rights] commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article." § 24-34-402(1)(e)(IV), C.R.S. The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1964. CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. *See, e.g., George v. Ute Water Conservancy Dist*., 950 P.2d 1195, 1198 (Colo. App. 1997). Under Board Rule 9-4, "[s]tandards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

"Colorado has adopted the following approach [for analyzing discrimination claims based on circumstantial evidence], modeled on the [U.S.] Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for proving an inference of discriminatory intent." *St. Croix v. Univ. of Colo. Health Scis. Ctr*., 166 P .3d 230, 236 (Colo. App. 2007). "Initially, [the complainant] must establish a prima facie case of discrimination by showing (1) he or she belongs to a protected class; (2) he or she was qualified for the job at issue; (3) he or she suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination." *Id*. (citing *Colo. Civil Rights Comm'n v. Big O Tires*, *Inc.*, 940 P.2d 397, 400 (Colo. 1997)).

"If the complainant establishes a prima facie case of discrimination, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. Once the employer meets its burden, the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." *Big O Tires*, 940 P.2d at 401. *See also Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 298 (Colo. 2000) (if the employer produces evidence of a legitimate, nondiscriminatory reason for its action, the factfinder "giving full and fair consideration to the evidence offered by both sides, proceeds to decide the ultimate question: whether, in light of all the evidence in the record, the employee has proved that the employer intentionally and unlawfully discriminated against the employee").

Complainant established the first and second prongs of a *prima facie* case of retaliation in violation of CADA: as a woman, she belongs to a protected class, and she was qualified for the positon from which she was transferred.

The third prong of a prima facie case of requires that Complainant establish that she suffered an adverse employment decision. An adverse action under Title VII and the CADA is defined as an action that would dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68-70 (2006). *See also McGowan v. City of Eufala*, 472 F.3d 736, 742 (10th Cir. 2006). *Burlington* involved the reassignment of an employee from forklift duty to standard laborer tasks, both of which were within the employee's job description. Rejecting the argument that such an action is

not materially adverse under Title VII, the Supreme Court stated, "We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable." *Id*. at 70. The Court classified retaliatory work assignments as a widely recognized example of forbidden retaliation.

Here, Complainant was involuntarily transferred from Gaming, where she was an exemplary employee with a solid reputation, to the Marijuana Enforcement Division, where she felt, not without reason, marginalized. Therefore, she has established the third prong of a *prima facie* case of retaliation in violation of CADA.

Complainant, however, failed to establish the fourth prong of a *prima facie* case, which requires that the circumstances give rise to an inference of unlawful retaliation for CADA-protected activity. Complainant alleges that the gender discrimination complaint she lodged against CBI in 2008 was the protected activity that resulted in CBI's campaign to get her transferred out of Gaming eleven years later. Not only is the temporal connection between the two events significantly attenuated, no evidence supports the conclusion that Complainant's appointing authority, Mr. Amend, even knew about Complainant's prior allegations of gender discrimination. On the contrary, Mr. Amend testified at hearing that he first learned of Complainant's gender discrimination claims at CBI during this proceeding. Furthermore, no evidence indicates that CBI, even if it pressured DOR and the Division of Gaming management to transfer Complainant, did so because of her prior CBI complaint. Rather, the evidence shows that the adverse action here resulted from Complainant's disclosures at the December 20, 2018 Commission meeting.

Complainant did not establish a *prima facie* case of retaliation in violation of CADA. Accordingly, her CADA retaliation claim fails.

CONCLUSIONS OF LAW

1. Respondent violated the Colorado State Employee Protection Act;

2. Complainant is entitled to the remedies mandated by the Colorado State Employee Protection Act.

3. Respondent did not violate the Colorado Anti-Discrimination Act.

ORDER

1. Respondent shall reimburse Complainant for any costs, including all court costs and attorney fees, incurred in the proceeding before the Board. This includes costs pursuant to both the preliminary review process and the subsequent litigation culminating in the hearing of this matter.

2. Complainant shall be reinstated to her former position within the Division of Gaming.

3. Complainant's request for an award of compensatory damages is denied.

Dated this 21st day
of September 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 _____ day of September 2020, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

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

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

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 Rules 8-62 and 8-63, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

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

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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