STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2022B008**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ALBERT SPAID,
Complainant,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on December 16, 2021, January 12, 2022, and January 20, 2022. The hearing was conducted remotely by web conference. The record was closed on January 20, 2022. Complainant Albert "Ted" Spaid was represented by Lilly G. Lentz, Esq. Respondent Colorado Department of Transportation (Respondent or CDOT) was represented by Eric W. Freund, Senior Assistant Attorney General, and Robyn R. Lundt, Assistant Attorney General. Respondent's advisory witness, and Complainant's appointing authority, was San Lee, CDOT's State Traffic Engineer.

A list of exhibits offered and admitted into evidence is attached hereto as Appendix A. A list of witnesses who testified at hearing is attached hereto as Appendix B.

MATTERS APPEALED

After CDOT required its employees to return to the office for two days a week starting in June 2021, Complainant sought an accommodation that would allow him to work exclusively from home. Complainant sought this accommodation because Complainant's daughter suffered from a variety of serious illnesses that required virtual around-the-clock supervision. After Respondent denied such an accommodation, Complainant resigned, alleging that he was forced or coerced into resigning. He has brought this appeal to the State Personnel Board (Board) alleging claims of unlawful discrimination in employment on the basis of Complainant's close relationship with a person with a disability, and constructive discharge.

For the reasons discussed below, Complainant's claims of unlawful associational discrimination in employment and constructive discharge are unfounded and are hereby **dismissed** with prejudice.

Both parties seek their attorneys' fees and costs. Both parties' requests for attorneys' fees and costs are **denied**.

ISSUES

I. Is associational discrimination in employment cognizable under Colorado law?

II. If associational discrimination in employment is cognizable under Colorado law, did Respondent discriminate against Complainant on the basis of disability association in violation of the Colorado Anti-Discrimination Act?

III. Was Complainant constructively discharged?

IV. Is either party entitled to an award of attorneys' fees and costs?

FINDINGS OF FACT

Background

1. At the time Complainant resigned he was employed as an Engineering/Physical Sciences Technician III (EPS Tech III). He held this position from 2008 and was a certified employee in the class. (Stipulated fact.)[1]

2. Ben Acimovic, Project Engineer II, was Complainant's first level supervisor from August 1, 2019 through August 2, 2021. (Stipulated fact.)

3. San Lee, CDOT's State Traffic Engineer, was Complainant's appointing authority from August 2019 through August 2, 2021. (Stipulated fact.)

Complainant's Work Unit

4. At the time Complainant resigned, the work unit was made up of Mr. Acimovic, two leads (Complainant and Diane Leitch, Project Manager I), one staff member (Brooke Podhajsky, Engineer-in-Training III) and Kelsey Hankins, consultant. (Stipulated fact.)

5. The primary role of Complainant's work unit was to complete Field Regulatory Operations (Field Ops) Studies. (Stipulated fact.)

6. Complainant's primary duty was to complete Field Ops Studies. (Stipulated fact.)

7. Field Op Studies are divided into 3 phases: pre-field work, field work, and office work. (Stipulated fact.)

8. Pre-fieldwork reviews are completed to ensure safety, obtain and review relevant information necessary to conduct the fieldwork, determine when to conduct field work, and ensure all necessary equipment, forms, tools are prepared and ready to conduct fieldwork. (Stipulated fact.)

9. Field work is data collection and observational work done at the study location site. Field work can include, but is not limited to: field log inventory; recording videologs; determining curve advisory speeds (also known as running curves); vehicle speed data collection; student, pedestrian and bicyclist activity observation; traffic volume and circulation observation; loss of sight determinations (for vertical and horizontal curves), as well as any other data that needs to be collected to make signing and striping recommendations for stripmap updates, speed studies, school studies and passing/no-passing zone studies. (Stipulated fact.)

10. Field work requires two people, a driver and a recorder. In some instances, speed checks can be obtained by one person, but only on rare occasions, as it is preferred that two people go together for safety and efficiency. (Stipulated fact.)

[1] The parties have stipulated to several facts.

11. Office work encompasses processing and analyzing the data that was collected in the field work phase, research, completing study documentation and reports, and making recommendations within the Field Regulatory Operations extents. (Stipulated fact.)

12. Field work is primarily conducted during the non-winter months and comprised a significant proportion of work time during those months for those actually performing field work, which included Complainant.

Complainant's Work Unit Under the COVID Pandemic

13. As a result of COVID-19, CDOT moved to remote work on or about March 16, 2020, for all positions that could be performed remotely. (Stipulated fact.)

14. Complainant's entire work unit, Complainant included, worked remotely from March 2020 through May 2021. (Stipulated fact.)

15. Complainant's work unit suspended field work from March 2020 until June 2021, with very limited exceptions. (Stipulated fact.)

16. During this time, the number of Field Ops Studies piled up without being completed due to the COVID pandemic restrictions.

Complainant's Daughter's Medical Challenges

17. Complainant's daughter suffers from a variety of chronic and serious medical conditions. She would be considered to have a disability under both the Americans with Disabilities Act and the Colorado Anti-Discrimination Act. (Stipulated fact.)[2]

18. Respondent granted Complainant leave under the Family Medical Leave Act to tend to his daughter's medical conditions in November of 2019-July of 2021. (Stipulated fact.)

19. Complainant's daughter developed seizures in February or March 2020.

20. Due to her multiple medical conditions, Complainant's daughter had to be monitored constantly, especially after she developed her seizure disorder.

21. During the pandemic, Complainant, rather than his wife, was primarily responsible for monitoring his daughter because he was working from home and his wife could not work from home.

Complainant's Work Unit Called Back to Work

22. On May 20, 2021, CDOT sent a company-wide email regarding the "Masks and Return to the Office 2021" wherein CDOT provided guidance to employees and supervisors. (Stipulated fact.) The email stated that employees would not be required to be vaccinated and "if

[2] Although the parties have stipulated to Complainant's daughter's specific medical conditions, disclosure of those conditions appears to violate the protective order entered in this matter. In an excess of caution, the ALJ has decided to refer only generally to Complainant's daughter's various significant medical conditions, with the exception of her seizure disorder. The terms of the protective order also provide that Complainant's daughter's name not be disclosed.

a CDOT employee has a family member or child with a pre-existing medical condition and the employee believes coming back to work might increase exposure risk, we expect supervisors to take this into consideration."

23. In June 2021, CDOT started transitioning employees back to work in the office. (Stipulated fact.)

24. Complainant's work unit was instructed to social distance and wear masks in all common areas in the office and when meeting with one or more employees. Employees were instructed that they could remove masks in their cubicles if alone. (Stipulated fact.)

25. In June 2021 Complainant's work unit was instructed to return to work in the office two days a week unless they had an agreement with the supervisor to come in one day a week. Complainant was allowed to work in the office one day a week in June under agreement with his supervisor. Complainant chose to work in the office on Thursdays. (Stipulated fact.)

26. Complainant's unit resumed field work in June 2021. (Stipulated fact.)

Complainant Explores Options Other Than Returning to the Office

27. Beginning in late March 2021, Complainant began exploring ways that he could continue to work from home. His concern was that he needed to monitor and care for his daughter due to her medical conditions.

28. On March 22, 2021, Complainant emailed Christine Andersen, CDOT's Manager of Employee and Labor Relations, as follows:

> My supervisor, Ben Acimovic, and I discussed my daughter's chronic medical circumstances that will likely affect my current job duties following COVID restrictions being lifted. She still suffers from seizures and other debilitating neurological ailments, and my being able to work from home since March has allowed me to care for her as needed. Her medical issues require me to be nearby in order to attend to her and administer aid to her when necessary. What do you need me to do to begin the process of helping Ben to accommodate my situation? If you're not the right person to ask, please let me know.

29. Later on March 22, 2021, Complainant emailed Ms. Andersen and elaborated on his earlier email as follows:

> During part of my PMP discussion yesterday, I mentioned to Ben that I was very concerned about not being able to leave my house in order to do fieldwork (after COVID restrictions were lifted) for my unit due to my daughter's medical condition. Ben told me that based on my statement that he needed to discuss options for accommodations with his supervisor (San Lee), and how those accommodations could best suit the broader job duties under San. Ben said to begin finding out what documents might be needed, such as my daughters [sic] medical records, and to start with you.

30. From March 2021 until his resignation, Complainant investigated the possibility of obtaining another position within CDOT that would permit him to continue to work from home. He was not successful in identifying and obtaining such a position.

31. Ms. Andersen also suggested that Complainant could seek a Flex Place agreement that would allow him to work from home.

32. On May 13, 2021, Complainant emailed Ms. Andersen and wrote, "In the agreement, it says, 'Flexplace is not an avenue for the employee to provide primary elder/child care during work hours.' My daughter's chronic medical condition is why I am requesting Flex Place, and if medical documentation is not needed, how will my supervisor be able to grant it?"

33. On May 18, 2021, Complainant emailed Ms. Andersen as follows:

> Follow up to my previous email: My supervisor (Ben) wants me to submit my plan before June 7, the day we all start coming back to the office. He wants to accommodate me, and has proposed the possibility of moving me to a different position within the branch that would allow me to work from home at least most of the time if he's allowed to. He's not sure if he is.

34. Ms. Andersen responded that it was her understanding that Complainant's supervisor could approve a FlexPlace agreement that would allow Complainant to continue to work from home.

35. On May 25, 2021, Complainant sent the following email to Ms. Andersen:

> I submitted my Flexplace agreement to my supervisor, Ben Acimovic. According to Ben, he was told by San Lee, the appointing authority, that it was out of his hands and to let him (San) take care of it. San is on vacation until June 4.
>
> Ben told me he wouldn't approve it because it says it can't be used for primary care, so it looks like I was able to skip the appeal part of this anyway. He knows I can't leave my daughter for more than a few hours (with supervision), but he said he still needs me to be away from home for days and asked if I was good with it. I'm glad San is handling it.
>
> I told him I was open to transferring, and had heard that there were positions in Access or Permits under Kirk Allen that might be available soon. I also cross trained in Engineering Research just before COVID hit, and there was an EPST III spot held by someone (Skip?) in that unit who retired at that time. These positions were ones that I knew of that required much less or no fieldwork, if that would help. Ben said his hands were tied.
>
> Is there anything I can do to make this easier?

36. After discussing Complainant's proposal to work from home with Mr. Acimovic, Mr. Lee decided that Complainant's proposal was not feasible because Complainant needed to conduct field work, which would require Complainant to often travel away from home.

37. On June 30, 2021, Complainant emailed Ms. Andersen as follows:

> I am unfortunately going to need to retire on the 15th of this month. The new Workplace Agreement PD won't be effective for months, and we have to return to the office at 50% strength after July 15th. This schedule prevents me from meeting the medical obligations I have toward my daughter.
>
> Do I have to fill out a resignation form or a Retirement Form? I understand these must be filled out at least 14 days prior to the date of retirement.

38. Complainant mentioned on July 2 and 7, 2021 to Human Resources staff that his daughter was immunocompromised. (Stipulated fact.) Complainant expressed concerns that there were unvaccinated employees in the office, and his exposure to those employees might be a threat to his immunocompromised daughter.

Resignation

39. Complainant initiated the resignation process on June 30, 2021, by contacting Human Resources for assistance in the process. (Stipulated fact.)

40. Complainant filled out and electronically signed resignation and retirement forms on July 13, 2021. (Stipulated fact.)

41. Complainant submitted his written notice of resignation on July 15, 2021, with his last day of work as August 2, 2021. (Stipulated fact.)

Complainant's Salary

42. At the time of Complainant's separation from employment, his base salary was $6,027.00/month. (Stipulated fact.)

DISCUSSION

A. Burden of Proof

Complainant brings claims of associational discrimination in employment based on disability in violation of the Colorado Anti-Discrimination Act (CADA), and constructive discharge.

Complainant has the burden of proof for both his unlawful associational discrimination in violation of CADA claim and his constructive discharge claim. *See Bodaghi v. Dep't of Nat. Resources*, 995 P.2d 288, 297 (Colo. 2000) (CADA); *Harris v. State Bd. of Agric.*, 968 P.2d 148, 151 (Colo. App. 1998) (constructive discharge).

B. A Claim for Associational Discrimination in Employment Based on Disability is Not Cognizable under CADA

Complainant alleges that Respondent discriminated against him based on his association with a person with a disability, namely his daughter. Complainant argues that associational discrimination in employment based on disability is a viable claim under CADA. Respondent disagrees.

The determination of this issue begins with the statutory language of CADA. Section 24-34-402(1)(a), C.R.S. provides, in pertinent part:

> It shall be a discriminatory or unfair employment practice . . . [f]or an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry; but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job.

When interpreting this statutory provision, or any statute, a court's "primary aim is to effectuate the legislature's intent." *Nieto v. Clark's Market*, *Inc.,* 488 P.3d 1140, 1143 (Colo. 2021). To do so, the undersigned ALJ is required to apply the statute's words and phrases "in accordance with their plain and ordinary meanings." *Bill Barrett Corp. v. Lembke,* 474 P.3d 46, 49 (Colo. 2020).

If the statute's language is unambiguous, the ALJ is required to apply it as written. *Delta Air Lines, Inc. v. Scholle,* 484 P.3d 695, 699 (Colo. 2021). In addition, the ALJ has to "look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts." *Nieto,* 488 P.3d at 1143 (citation omitted). *See also*, *Swieckowski by Swieckowski v. City of Ft. Collins,* 934 P.2d 1380, 1387 (Colo. 1997) ("[W]e are constrained by limiting principles of judicial review to interpret statutory language consistently with the intent of the General Assembly and with the plain meaning of the words chosen by this body when it enacts a statute. We may not substitute our view of public policy for that of the General Assembly").

The plain meaning of § 24-34-402(1)(a), C.R.S. provides employment discrimination protection for various protected classes, but does not extend that protection to employees who allege that they were discriminated against because of their relationship or association with a person with a disability. It stretches the clear meaning of the statutory language to allege that the statute is ambiguous.

This conclusion is supported by a review of the history of CADA revisions after the federal Americans with Disabilities Act (ADA), which went into effect in 1990, extended employment discrimination protection to those employees known to have a relationship or association with a person with a disability.

ADA, section 102(b)(4), 42 U.S.C. § 12112(b)(4) provided protection to those employees who were discriminated against because of a relationship or association with an individual with a disability. Since then, the Colorado legislature has amended CADA at least seven times, and has not added protection for victims of associational discrimination in employment. As Respondent notes, the legislature amended the fair housing provision of CADA to include associational discrimination as actionable,[3] but has failed to include such a provision in the employment discrimination provisions of CADA. "[W]hen the [General Assembly] includes a provision in one

[3] *See* Colorado's Fair Housing Act, § 24-34-502.2, C.R.S.

statute, but omits that provision from another similar statute, the omission is evidence of its intent." *Deutsch v. Kalcevic,* 140 P.3d 340, 342 (Colo. App. 2006).

In conclusion, the evidence of the legislature's intent demonstrates that Complainant's claim of associational discrimination in employment based on disability is not cognizable under Colorado law. Consequently, Complainant's claim of associational discrimination must be dismissed.

In support of his contention that associational discrimination in employment is cognizable under Colorado law, Complainant offers an alternative interpretation of § 24-34-402(1)(a), C.R.S., and a policy argument. In his Trial Brief addressing the issue of whether associational discrimination in employment on the basis of disability is cognizable under Colorado law, Complainant alleges that, "The legislative intent behind CADA, its parallel provisions to the Americans with Disabilities Act of 1990 ('ADA'), and the plain language of CADA, demonstrate that CADA is intended to liberally protect against discrimination based on disability, and that association discrimination is cognizable under Colorado law."

Without addressing the issue of whether CADA is ambiguous, Complainant proceeds to assume that it is ambiguous and discusses those subjects to be reviewed when a statute is ambiguous. Complainant may be correct in his discussion of those considerations when a statute is deemed ambiguous, but such a discussion is irrelevant if the statute is in fact unambiguous. The statutory provision at issue here is unambiguous.

Complainant also asserts that associational discrimination in employment based on disability should be recognized on policy grounds. Complainant contends that the intent behind CADA and its targeting of discrimination in employment generally, is evidence of a legislative intent to include associational discrimination in employment based on disability in CADA. While that policy argument is not without emotional appeal – and certainly, one cannot feel anything but sympathy for the difficult position in which Complainant finds himself -- the Board is not a policy-making body. *Swieckowski,* 934 P.2d at 1387 (Colo. 1997) ("We may not substitute our view of public policy for that of the General Assembly"); *People in the Interest of D.R.W.,* 91 P.3d 453, 458 (Colo. App. 2004) ("We reject policy considerations in favor of the plain language of the statute"). It is for the Colorado legislature to include associational discrimination in employment based on disability in the protections afforded by CADA, an action that the legislature has not yet taken.

C. Even if Colorado Law Permitted Associational Discrimination Claims in Employment, Complainant Did Not Establish a *Prima Facie* Case of Associational Discrimination

Even if an associational discrimination claim was cognizable under Colorado law, Complainant could not establish a *prima facie* case of associational discrimination as articulated by the Tenth Circuit Court of Appeals.[4]

[4] There are no published cases addressing associational discrimination in employment under Colorado law, for the obvious reason that no such cause of action exists under Colorado law. Therefore, for this analysis of whether Complainant could demonstrate a *prima facie* case of associational discrimination in employment if such a claim was cognizable under Colorado law, it is best to cite to federal case law on the subject issued by the Tenth Circuit Court of Appeals.

To establish a *prima facie* case of associational discrimination in employment under the ADA, § 102(b)(4), 42 U.S.C. § 12112(b)(4), Complainant must establish that he: (1) was "qualified" for the job at the time of the adverse employment action; (2) was subjected to an adverse employment action; (3) was known by his employer at the time to have a relative or associate with a disability; (4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1085 (10th Cir. 1997).

Although Complainant can establish that he was qualified for his job and that his employer knew of Complainant's daughter's disability, he did not establish that he was subjected to an adverse employment action and therefore he is unable to establish the fourth prong of a *prima facie* case. As the discussion below addressing Complainant's constructive discharge claim establishes, Complainant was not constructively discharged and therefore Complainant was not subjected to an adverse employment action.

Furthermore, the circumstances do not raise a reasonable inference that Complainant's daughter's disability was a determining factor in CDOT's decision to require CDOT employees to report back to their offices at least two times a week. Complainant offered no evidence that the fact of Complainant's daughter's disability played any role in CDOT's back to work decision. On the other hand, CDOT established that its decision was made without regard to Complainant's daughter's disability.

In conclusion, even if Complainant's claim for associational discrimination based on disability was cognizable under Colorado law, Complainant failed to establish a *prima facie* case to support that claim.

D. Respondent Did Not Constructively Discharge Complainant

Complainant claims that he was constructively discharged. Complainant bears the burden of proving that he was constructively discharged. *Harris,* 968 P.2d at 151.

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, 782-83 (Colo. App. 1988). As the Colorado Supreme Court noted in *Wilson*: "The First Circuit Court of Appeals has recognized that, unless the actions of the employer constitute, in effect, a discharge, the employee has no right simply to walk out; he must accept the orders of his superior, even if felt to be unjust, until relieved of them by judicial or administrative action. Were this not so, a public employee would be encouraged to set himself up as the judge of every grievance; and the public taxpayer would end up paying for periods of idleness while the grievance was being adjudicated." *Wilson*, 703 P.2d at 1259 (citation omitted). If the employee establishes a discharge, "then . . . it will be the appointing authority's burden to prove that the termination imposed was justified by the factual circumstances." *Harris*, 968 P.2d at 152 (citation omitted).

Here, Complainant has not met his burden of establishing deliberate action on the part of Respondent causing or permitting Complainant's working conditions to become so difficult or intolerable that a reasonable person in his position would have no other choice but to resign.

Complainant contends that CDOT's requirement that he return to his office at least two days a week starting in July 2021 made his working conditions so intolerable that he had no choice but to resign. Complainant bases this contention on his daughter immunocompromised condition, and that Complainant's co-workers may not have been vaccinated against the COVID-19 virus and did not consistently wear masks in the office.

There are several reasons why Complainant's assertion of constructive discharge is unpersuasive. First, CDOT's policy requiring employees to return to the office on a limited basis applied to all CDOT employees, and did not target Complainant with the intent to prompt Complainant to resign. Second, Complainant admitted that his primary concern was the need to monitor his daughter's medical condition, virtually around the clock. When, in March 2021, Complainant first expressed his need to continue to work from home in the face of an imminent return-to-work directive, he based that need on his responsibility to closely monitor his daughter's medical condition. That need to constantly monitor his daughter's condition would serve to preclude Complainant from leaving his home and working in the office for multiple days each week. Third, Complainant had a choice: either Complainant or his wife could have resigned their positions to take care of their daughter. They decided that Complainant would be the one to resign, for reasons that included his ability to collect a pension that would allow his family to meet their financial needs. Accordingly, it was not CDOT's actions that led to Complainant's resignation, but his need to stay at home to monitor his daughter's medical condition and the decision he and his wife made that he would be the one to quit his job. In addition, Complainant failed to establish that his working conditions were such that a reasonable person in his situation would have no choice but to resign. In other words, Complainant did not did not establish that the working conditions at his office were objectively intolerable.

Furthermore, Complainant had other options other than resignation that he could have, but did not, explore. For example, he could have requested an unpaid leave of absence, but did not make that request. At hearing, Complainant explained that he did not make that request because it was not financially appropriate, but did not explain how resignation was a more financially appropriate decision.

Under these circumstances, Complainant's claim of a constructive discharge cannot be sustained.

E. Neither Party is Entitled to an Award of Attorneys' Fees and Costs

Both parties have requested their attorneys' fees and costs incurred in this litigation.

Board Rule 8-51(B) provides:

> Upon final resolution of a proceeding under this Chapter 8, Resolution of Appeals and Disputes, Part A, attorney fees and costs may be assessed 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, a means of harassment, or was otherwise groundless.

1. Frivolous means that no rational argument based on the evidence or law was presented.

2. In bad faith, malicious, or as a means of harassment means that the appeal or defense was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.

3. Groundless means that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support the theory.

Complainant did not prevail in this matter. There was no showing that Respondent's actions were frivolous, in bad faith, malicious, a means of harassment, or were otherwise groundless. Accordingly, Complainant is not entitled to an award of attorneys' fees and costs.

Although Complainant did not prevail, his claims were not frivolous, nor were they advanced in bad faith, malicious, a means of harassment or otherwise groundless. Complainant's claims were based on an interpretation of the facts and the law that was not without some merit, although not ultimately successful. Accordingly, Respondent is not entitled to an award of attorneys' fees and costs.

CONCLUSIONS OF LAW

1. Associational discrimination in employment is not cognizable under Colorado law.

2. Because associational discrimination in employment is not cognizable under Colorado Law, and because Complainant was not subjected to an adverse employment action, Complainant claim for associational discrimination is without merit.

3. Respondent did not constructively discharge Complainant.

4. Neither party is entitled to an award of attorneys' fees and costs.

ORDER

Complainant's appeal is **dismissed** with prejudice. Both parties' requests for an award of attorneys' fees and costs are **denied**.

Dated this 3rd day of March 2022**,** at Denver, Colorado

/s/ [redacted]

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 3rd day of March 2022, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Lily G. Lentz, Esq.
LLentz@fncslaw.com

Eric W. Freund, Esq.
Senior Assistant Attorney General
Robyn R. Lundt, Esq.
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[redacted]

APPENDIX A

ADMITTED EXHIBITS

Complainant's Exhibits: A, A1, A2, A3, A4, A6, A7, A9, A12 (417-19), A13, A14, A15, A16, A17, A18, A19, A20, A24, A25, A26, A27.1 (54-55), A27.2, A27.3, A27.4, A29, A32, A33, A34, A45

Respondent's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

APPENDIX B

WITNESSES WHO TESTIFIED AT HEARING

Alison Percowycz

Albert “Ted” Spaid

Christine Andersen

Ben Acimovic

San Lee

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.

The parties may file by email to: dpa_state.personnelboard@state.co.us. Instructions for filing by email can be found at Board Rule 8-6(C).