

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT and REFERRAL TO THE STATE  
PERSONNEL DIRECTOR; NOTICE OF APPEAL RIGHTS

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AARON McGAHAN,  
Complainant,

v.

DEPARTMENT OF CORRECTIONS, FREMONT CORRECTIONAL FACILITY,  
Respondent.

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This matter is before the Administrative Law Judge (“ALJ”) following Respondent’s MOTION FOR SUMMARY JUDGMENT (“Respondent’s Motion”) filed January 21, 2022. Complainant had until January 31, 2022, at 5:00 p.m. to respond to Respondent’s Motion. As of the date of this order, Complainant has not filed a response to Respondent’s Motion.

**Background**

Respondent administratively discharged Complainant pursuant to Director’s Administrative Procedure 5-6 on November 10, 2021. Complainant timely filed an appeal of his administrative discharge with the State Personnel Board (“Board”) on November 16, 2021.

Prehearing statements were due January 28, 2022. Respondent timely filed a prehearing statement. Complainant failed to file a prehearing statement.

The ALJ vacated the evidentiary hearing on February 7, 2022.

**Issue Before the Board**

Was Respondent’s administrative discharge of Complainant from employment arbitrary, capricious, or contrary to rule or law?

**Standards For Summary Judgment**

“Entry of summary judgment is appropriate only where no disputed issue of material fact exists.” *Kirkmeyer v. Dep’t of Local Affairs*, 313 P.3d 562, 567 (Colo. App. 2011) (citation omitted). A summary judgment shall be entered if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c). A material fact is a fact that will “affect the outcome of the case.” *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992) (citation omitted). “Summary judgment is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue as to any material fact, and that all legal prerequisites are clearly established.” *Id.* at 375-76.

## Undisputed Facts

1. In July 2013, Respondent hired Complainant as a Correctional Officer I.
2. Complainant worked at Fremont Correctional Facility.
3. Siobhan Burtlow, Warden of Fremont Correctional Facility, was Complainant's Appointing Authority.
4. Per Complainant's Position Description, the position of Correctional Officer I exists to:

Maintain safety and security of facility and work sites...Through clear and accurate communication, trains and guides offenders and applies the proper use of controlled items, keys, tools, equipment and chemicals...Position monitors, supervises and escorts/transporters offenders according to agency policy and prepares and submits required reporting. Position promotes a safe and secure environment through conscientious observation, clear communications and adherence to agency Administrative Regulations (ARs), facility Implementation Adjustments (IAs) and the Code of Penal Discipline (COPD).
5. Per Complainant's Position Description, the position of Correctional Officer I requires the mental functions of comparing, copying, compiling, coordinating, negotiating, communicating, instructing, and interpersonal skills/behaviors.
6. In October 2020, Complainant contracted an illness. Complainant filed a workers' compensation claim related to the illness. Respondent then placed Complainant on paid administrative leave. Subsequently, Complainant reported he was unable to return to work due to issues related to the illness.
7. On April 13, 2021, Complainant provided Respondent with an Americans with Disabilities Act ("ADA") Request for Accommodation. The Request for Accommodation described Complainant's medical condition as, "Cognitive dysfunction, resulting in difficulties with short term memory, problem solving, vision, daily activities and mental health complications." It further explained that Complainant was "unable to multitask, articulate, focus and drive."
8. On the same date, Respondent acknowledged Complainant's Request for Accommodation by letter. The letter provided information about ADA, informed Complainant information was needed from his medical provider, and gave information about the interactive process.
9. In April 2021, Warden Burtlow conducted the first of three 5-6 meetings with Complainant. Warden Burtlow met with Complainant to discuss his leave status. Following the meeting, Warden Burtlow allowed Complainant to continue in an unpaid leave status.
10. In June 2021, Melissa Bellew, Respondent's ADA Coordinator, received information from Complainant's medical provider.
11. On June 15, 2021, the medical provider signed a form that provided information about Complainant's medical condition. On the form, the medical provider explained Complainant had an impairment that affected the major life activities of concentrating, interacting with others,

sleeping, learning, speaking, thinking, and working. The medical provider provided it was unknown how long Complainant's impairment would last. The medical provider suggested an accommodation of a leave of absence. The suggested length for the leave of absence was approximately three months.

12. Ms. Bellew reviewed Complainant's information and conducted a search of other positions. Ms. Bellew was unable to identify any other position for which Complainant was qualified.

13. On September 24, 2021, Ms. Bellew issued a letter to Complainant on his Request for Accommodation. Ms. Bellew wrote, "In review of your application and supporting information for your request for accommodation under the Americans with Disabilities Act (ADA), it was determined that you were unable to meet the essential functions of your position as a Correctional Officer I." Ms. Bellew further informed Complainant that Respondent determined it could not accommodate Complainant in his position or any other positions due to the severity of his restrictions.

14. Ms. Bellew informed Warden Burtlow about the ADA process, including Respondent's inability to accommodate Complainant.

15. In September 2021, Warden Burtlow conducted a second 5-6 meeting with Complainant. Warden Burtlow provided Complainant information regarding the 5-6 process and Complainant's leave. Following the meeting, Warden Burtlow allowed Complainant to continue in an unpaid leave status.

16. On November 2, 2021, Warden Burtlow sent Complainant a letter. The letter informed Complainant he exhausted sick leave, annual leave, Family/Medical Leave, and short-term disability. The letter also informed Complainant that Warden Burtlow would conduct a third 5-6 meeting on November 8, 2021.

17. The third 5-6 meeting was rescheduled to November 9, 2021.

18. Pamela Hardy, Fremont Correctional Facilities Benefits Analyst, informed Warden Burtlow that Complainant exhausted sick and annual leave on November 9, 2021, exhausted Family/Medical Leave on April 5, 2021, and exhausted short-term disability benefits on April 3, 2021.

19. On November 9, 2021, Warden Burtlow conducted a third 5-6 meeting with Complainant by telephone. Ms. Hardy and Ms. Bellew also appeared for the meeting by telephone. Warden Burtlow discussed Complainant's exhaustion of leave, and Complainant's rights related to the 5-6 process.

20. Warden Burtlow issued a letter to Complainant dated November 10, 2021. The letter administratively discharged Complainant from employment effective November 10, 2021. The letter explained:

After considering all of the information that you provided during our phone conference on November 9, 2021, I have decided to administratively separate you from employment with the Department of Corrections effective November 10, 2021, pursuant to State Personnel Rule 5-6. This rule allows an appointing authority to either grant leave without pay or administratively separate an

employee who has exhausted all paid leave and is unable to return to work after Family/Medical Leave and Short-Term Disability leave no longer apply. Your sick and annual leave was exhausted on November 9, 2021 [sic] your Family and Medical Leave (FMLA) expired on April 5, 2021 [sic] and your Short-Term Disability expired on April 3, 2021.

21. The letter informed Complainant he was entitled to be considered for reinstatement after recovering, included Complainant's appeal rights with contact information for the Board, and included information to contact PERA about retirement benefits.

22. At the time of his administrative discharge from employment, Complainant was not fully released to work without restrictions.

23. At the time of his administrative discharge from employment, Respondent could not reasonably accommodate Complainant without undue hardship.

24. On November 16, 2021, Complainant timely filed an appeal of his administrative discharge from employment.

25. During the discovery process for the above captioned matter, Complainant admitted the following in response to Respondent's Requests for admissions:

- Warden Burtlow was his appointing authority.
- Complainant had a call with Warden Burtlow on November 9, 2021.
- The call on November 9, 2021, was a good faith effort to communicate Complainant's employment status.
- On November 10, 2021, Complainant was not fully released to return to work without restrictions.
- On November 10, 2021, Complainant was disabled pursuant to the ADA, and could not be accommodated without undue hardship.
- That Complainant believed the 5-6 letter received was factually accurate.

26. In response to the following interrogatory: "If you believe DOC violated a regulation, policy or law when they administratively separated you, identify the regulation, policy or law you believe was violated and how DOC violated the regulation, policy or law," Complainant wrote, "Not applicable."

27. In response to the interrogatory requesting Complainant, "Describe in detail all the reason(s) why you believe that DOC should not have administratively separated you from your employment with DOC," Complainant wrote:

I believe that DOC should not have administratively separated me from my employment because I became ill to the point I can not work while working at the job I did well for 8 years. I got sick because state employees were not wearing state mandated masks. I believe that the effort and time to obtain hours and hours

of overtime from me should be granted to me to heal and continue my career. I am losing my career, retirement, medical benefits that I desperately need, my self-esteem, thoughts, and dreams. All I did was show up to work every day and do the job above and beyond the basic requirements, ask my superiors. I feel hurt, abandoned, and betrayed.

### **Respondent's Argument**

Respondent argues that there are no disputed issues of material fact and requests summary judgment be granted in favor of Respondent.

### **Discussion**

Complainant did not respond to Respondent's Motion for Summary Judgment. Complainant's failure to respond, in combination with the affidavits, requests for admissions responses, interrogatory responses, and other documents submitted by Respondent, demonstrate the undisputed facts as set forth by Respondent are correct and there are no genuine issues of material fact. As there are no genuine issues of material fact, Respondent is entitled to summary judgment as a matter of law as set forth below.

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

As to the first *Lawley* prong, Warden Burtlow gathered all necessary information prior to making the decision to administratively discharge Complainant from employment. The undisputed facts demonstrate that Warden Burtlow obtained information about Complainant's leave status and Respondent's ability to accommodate Complainant prior to the administrative discharge of Complainant from employment. Warden Burtlow used reasonable diligence and care to procure evidence to consider in making her determination on whether or not to administratively discharge Complainant from employment.

As to the second *Lawley* prong, the undisputed facts demonstrate Warden Burtlow gave candid and honest consideration to the information before her. Warden Burtlow began considering the possibility of administrative discharge in April 2021. Warden Burtlow conducted three 5-6 meetings. Warden Burtlow twice delayed administrative discharge, before making the final decision to administratively discharge Complainant from employment in November 2021. This demonstrates Warden Burtlow gave candid and honest consideration to the information available.

As to the third *Lawley* prong, the undisputed facts demonstrate that reasonable persons fairly and honestly considering the information available to Warden Burtlow could reach a decision to administratively discharge Complainant from employment pursuant to Director's Administrative Procedure 5-6. Complainant had exhausted leave and was unable to return to work. Therefore, the undisputed facts demonstrate that Warden Burtlow reasonably exercised her discretion in administratively discharging Complainant from employment.

The undisputed facts demonstrate Warden Burtlow complied with Director's Administrative Procedure 5-6 when she administratively discharged Complainant from employment.

Director's Administrative Procedure 5-6 states:

If an employee has exhausted all credited paid leave and is unable to return to work, unpaid leave may be granted or the employee may be administratively discharged by written notice following a good faith effort to communicate with the employee. Administrative discharge applies only to exhaustion of leave.

- A. The notice of administrative discharge shall inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.
- B. An employee cannot be administratively discharged if FML, state family medical leave, or short-term disability leave (includes the thirty (30) day waiting period) apply, or if the employee is a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship.
- C. A certified employee who has been discharged under this rule and subsequently recovers has reinstatement privileges.

At the time of his administrative discharge from employment, Complainant exhausted all credited paid leave and was unable to return to work. Respondent could not reasonably accommodate Complainant without undue hardship. Warden Burtlow made a good faith effort to communicate with Complainant by conducting multiple 5-6 meetings with Complainant and keeping Complainant apprised of his leave status. Warden Burtlow provided Complainant written notice of his administrative discharge as required. The written notice informed Complainant of his appeal rights and provided the required retirement information. Warden Burtlow complied with Director's Administrative Procedure 5-6. The undisputed facts demonstrate Warden Burtlow's decision was not contrary to rule or law.

Respondent's decision to administratively discharge Complainant from employment was not arbitrary, capricious, or contrary to rule or law.

Complainant's appeal indicates a dispute with the workers' compensation process. The Board does not have jurisdiction to review workers' compensation claims.

### **Order**

Respondent's Motion for Summary Judgment is **granted**. Complainant's appeal in case number 2022B037 is **dismissed from the State Personnel Board with prejudice**.

The State Personnel Director exercises broad discretion over treatment of individuals within the state personnel system and provides oversight for the management of the state personnel system pursuant to § 24-50-101(3)(c), C.R.S. Therefore, the ALJ refers this matter to the State Personnel Director for review of any matters within the State Personnel Director's jurisdiction.

Dated this 24th day, of  
**February, 2022**, at,  
Denver, Colorado.

*/s/ K. McCabe*

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

**CERTIFICATE OF SERVICE**

This is to certify that on the 24th day of **February, 2022**, I electronically served a true and correct copy of the foregoing **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT and REFERRAL TO THE STATE PERSONNEL DIRECTOR; NOTICE OF APPEAL RIGHTS** as follows:

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*Andrea Woods*

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## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS:**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.
4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 24-4-105(14)(a)(II), C.R.S., to review this Order Granting Motion for Summary Judgment 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. Board Rule 8-53(C). 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. 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. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at [dpa\\_state.personnelboard@state.co.us](mailto:dpa_state.personnelboard@state.co.us).

### **BRIEFS ON APPEAL**

When the Certificate of Record of Hearing Proceedings is served 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 8-54.



**ORAL ARGUMENT ON APPEAL TO THE BOARD**

In general, no oral argument is permitted. Board Rule 8-55(C).

**MOTION FOR RECONSIDERATION**

Motions for reconsideration are discouraged. See Board Rule 8-47(K).