

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2007B073(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANNMARIE MAYNARD,

Complainant,

vs.

DEPARTMENT OF HEALTH CARE POLICY AND FINANCING,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on September 16, 17, 18, and 23, and October 8, 9, and 22, 2008, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case was commenced on the record on September 9, 2008. First Assistant Attorney General Vincent E. Morscher and Assistant Attorney General Willow Arnold represented Respondent. Respondent's advisory witness was Jennifer Evans, Deputy Director of the Colorado Department of Health Care Policy and Financing (HCPF). William S. Finger and Tamara J. Wayland, of Frank & Finger, P.C., represented Complainant.

MATTERS APPEALED

Complainant, Anmarie Maynard (Complainant) appeals the following actions of Respondent:

- March 28, 2007 disciplinary demotion;
- November 26, 2007 Corrective Action;
- May 23, 2008 Step I denial of one portion of her May 9, 2008 grievance;
- June 4, 2008 Step II denial of the other portion of her May 9, 2008 grievance;
- June 30, 2008 disciplinary termination.

For the reasons set forth below, Respondent's actions are **rescinded**.

ISSUES

1. Whether Respondent's delegation of appointing authority was valid;

2. Whether Complainant committed the actions upon which the disciplinary actions were based;
3. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;
4. Whether Respondent engaged in intentional race or sex discrimination;
5. Whether Respondent retaliated against Complainant for filing charges of discrimination;
6. Whether Respondent violated the whistleblower act;
7. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant was hired on a contract basis to work as an accountant in the Controller's Division of HCPF in the Fall of 2003. Complainant has a college degree in public accounting. Prior to her employment at HCPF, she served as the Controller in several private companies, with supervisory authority over several accountants and administrative staff.
2. HCPF is the second largest state agency in Colorado. It administers Medicaid, Medicare, the Children's Basic Health Plan (CBHP), and other partially federally funded programs.
3. HCPF is divided into six divisions, referred to on its organizational chart as "offices." The six divisions consist of: Medical and Children's Health Administration; Human Resources; Administration & Operations; Protect Management; Budget; and Client & Community Relations.
4. The Administration & Operations division has three subdivisions: Legal; Controller; and Information Technology. The Controller section handles all financial transactions and reporting thereof for the programs administered by HCPF. The section also exercises financial oversight over all financial statements issued by the Department.
5. The Controller section works in tandem with the Budget section in several ways. The Budget section is responsible for drafting the agency's budgets and for defending bills with a fiscal note. The Controller section prepares fiscal notes utilized by Budget staff for legislative review of bills considered and passed into law. The Controller section also reviews the implementation of fiscal notes of those bills passed into law.

6. The Controller section has had low employee morale for at least five years. At the time Complainant came to the unit, the staff turnover rate had been high; the staff shortage was severe; and the stress level in the Section was very high.
7. Phil Reed was the Controller at the time Complainant was hired on a contract basis. He was so impressed by Complainant's ability to learn government accounting quickly, her intellect, and her work ethic, that he asked her to apply for the Controller II position when it became vacant. She did so.
8. Reed established an open competitive process for the Controller II position. He interviewed the three top candidates and hired Complainant.
9. Reed understood at the time he hired Complainant that some employees who had worked in the Accounting section for several years might carry a grudge against her for being hired over them. Nonetheless, Reed believed that Complainant had the skills to handle this sensitive situation.
10. As Controller II, also known as Assistant Controller, Complainant trained and supervised six or seven accountants. She was responsible for the daily transactions of the unit, assuring that they comported with generally accepted accounting principles.
11. Complainant has a direct manner of communicating with others.
12. For the first eighteen months as Controller II, Complainant was the audit coordinator for all financial audits conducted in the Department. She met with state and federal auditors regularly and assured they had access to the information they needed.
13. Reed viewed Complainant as an effective manager. He noted that she often brought food for the unit and performed many tasks designed to keep employee morale high.
14. In May 2005, Reed gave Complainant her first annual performance evaluation in the Controller II position, for the period May 2004 through April 2005. Her overall rating was "Above Standard." He noted, "when Annmarie is stressed, tired or not feeling well, her oral communications can be overly blunt and appear to be harsh or rude." Under "Interpersonal Skills," he noted, "when under pressure, etc., her interactions with others become rough" and "she needs to work on recognizing when she is about to have a problem interaction and either delay the situation or gather her thoughts before she proceeds."

15. Reed also noted on this evaluation, under "Management/Supervision," that "This area has presented some challenges." It also stated, "This has been an area of some struggle."
16. Reed left HCPF in mid-August 2005.
17. Complainant assumed the Controller duties in addition to her own duties during the period August 2005 through November 2005. Complainant's performance of two jobs simultaneously when the unit was already very short of staff was stressful for her.

Soliman's Appointment; Complainant's Report to HR Director

18. On December 1, 2005, Adel Soliman was hired as the new Controller. Reed had spoken highly of Soliman to Complainant. Complainant trusted Reed's judgment and was positive about Soliman's appointment.
19. Soliman soon learned that the staff level was approximately one half of what it should have been, and that the stress level was high.
20. Approximately six weeks into Soliman's tenure, Soliman became short with Complainant. He yelled at her with some regularity.
21. In February 2006, Soliman informed Complainant that she was not to call herself the Assistant Controller of the Department, but must call herself the Accounting Manager. The manner in which Soliman said this was upsetting to Complainant. Assistant Controller was her appropriate title, and had been the title of her predecessor. Complainant informed him of this.
22. In March 2006, Complainant went to see the Human Resources Director for HCPF, Janice Smuda, about Soliman's treatment of her. Complainant informed Smuda that Soliman had yelled at her on several occasions, and that she was upset about it. Complainant cried while in Smuda's office and asked for advice on how to handle the situation.
23. Smuda responded by advising Complainant to try to avoid having conversations with Soliman alone. This was impossible, given the closeness with which Complainant needed to work with Soliman in order to perform the work of the unit.
24. Complainant did not ask Smuda to investigate her complaints about Soliman, because she sought to avoid escalating the situation.
25. In April 2006, Soliman gave Complainant an annual evaluation, rating her at an overall "Above Standard." He made several written comments about her need to "work on resolving issues and conflicts while preserving relationship

with supervisor, peers and staff." Complainant refused to sign this evaluation on grounds she disagreed with it.

Pat Yoder

26. Pat Yoder started to work as an Accountant I under Complainant's supervision in January 2006. Yoder reported directly to Complainant and they had a good working relationship. Complainant helped Yoder with her work whenever she had time. Yoder found her to be very knowledgeable about the accounting work they did. She never observed Complainant being rude or demeaning to any other staff at HCPF.
27. In approximately August 2006, Yoder was sitting in Complainant's cubicle with her. Complainant and Yoder were reviewing spreadsheets together and Complainant was explaining the purpose of the task Yoder was doing. During this meeting, Soliman called Complainant on the phone from his office. He spoke so loudly to Complainant that Yoder was able to hear him through the handset. Yoder observed that Soliman used chopped words, and that he loudly and adamantly demanded a piece of work from Complainant immediately. Yoder also observed that during the conversation, Complainant tried to speak but could not get a word in.
28. Yoder perceived this experience as a repetition of the behavior she had observed previously in other state agencies. Yoder felt bad for Complainant because she appeared to be embarrassed.
29. During the period June 1999 through 2005, Yoder worked two levels under Soliman at the Department of Human Services (DHS). During this time, she had a good working relationship with Soliman.
30. Yoder's supervisor, Sandy Klein, reported directly to Soliman. During the period 1999 through 2005, Yoder observed that Soliman was often "very very short" with Klein, often raised his voice at her, and appeared always to be exasperated by her.
31. Yoder observed that Soliman stomped around Klein's office and stomped out of her office, on a regular basis.
32. During the five year period Yoder worked under Soliman at DHS, Yoder observed Soliman treating the women accountants under his supervision differently than the men accountants under his supervision. Soliman was very cordial to and informal with the male accountants. Yoder observed that Soliman was very cordial to the women above him on the chain of command, and that some of the women below his rank had to "really stand their ground with him." Yoder observed that none of the men had to stand their ground with Soliman.

33. In May or June 2006, Yoder observed Soliman's conduct with a subordinate, Kathy McCorrison. The two were in his office with the door closed. Yoder heard Soliman yell at McCorrison in a loud and agitated voice, "You will do your job, it is your job, and you will not question me."
34. Yoder was at HCPF for seven months. When she started there, she reported directly to Complainant. After several months, Yoder's supervisor was changed to Pacheco. Pacheco was generally unable to provide instruction, guidance, or supervision to Yoder. Having worked with Soliman for several years, Yoder informed Soliman of the fact Pacheco never provided guidance or answers to her questions about the accounting work being performed in the office.
35. Soliman responded that he knew Pacheco lacked knowledge about her job and said, "Hang in there, I'm training her." Yoder observed that Pacheco always addressed Soliman as "Sir."

CBHP Issue

36. In 2004, a Budget Analyst, Steven Hensley, discovered that HCPF may have been overdrawing federal funds for the CBHP program. CBHP was a new program under which state agencies were permitted to bill the federal government at a rate of 10% of the overall program expenditures. If administrative expenditures exceed 10%, the extra amount may be rolled over to future quarters, so long as the expenditures in future quarters does not exceed 10%.
37. Hensley discovered that an Accounting staff member had created a spreadsheet which erroneously calculated the 10% administrative costs. Instead of drawing down the money the state could appropriately claim, the program actually caused the number of eligible federal funds to go up. This accounting error had occurred for seven years.
38. Hensley feared that if the agency continued to use the spreadsheet, the agency would ultimately be liable for reimbursing the federal government.
39. In September 2005, Hensley informed Lisa Esgar, the Deputy Director of HCPF who oversaw Budgeting and Accounting, of the problem. Esgar asked Hensley to work on it with Accounting staff.
40. Hensley and Complainant worked together on the CBHP issue. Hensley attempted to get a written approval from the federal agency with oversight over CBHP for a waiver of any claim to the overdrawn funds. He was not able to obtain it.

41. Esgar educated Soliman about the CBHP 10% cap issue when he started as Controller in December 2005. Soliman assigned Complainant to continue to work on the CBHP reconciliation.

August 2006 incident

42. In August 2006, Complainant met with Soliman in his office to discuss the CBHP 10% cap issue. They discussed the need to obtain additional information from the CBHP Director, Bill Heller, for the auditors. Complainant indicated that she would be at Heller's office that afternoon, and offered to call Soliman from Heller's office. Soliman agreed.

43. After obtaining information from Heller, Complainant called Soliman from Heller's office to report out. She was on the phone discussing the 10% cap issue with Soliman, while Heller sat at the table on the other side of his own office.

44. The speaker phone was not on. Heller overheard Soliman, whose voice became very elevated and loud, so loud that Heller could hear it from the other side of his office. Heller observed that it was not a friendly conversation, it was one-sided, and that Complainant was unable to get more than one word answers in. Heller found the experience to be very uncomfortable and he felt embarrassed for Complainant.

45. Heller said to Complainant, "Is he yelling at you? Why is he yelling at you?"

46. Heller and Complainant had a good working relationship. Complainant had informed Heller previously that her working relationship with Soliman was difficult.

47. A few days later, Complainant asked Soliman to stop raising his voice at her. She told Soliman that Heller had heard him yelling at her through the telephone. Soliman responded by raising his voice at Complainant and calling her a "liar."

October 30, 2006 Incident

48. On October 30, 2006, Complainant met with Soliman in his office to discuss the 10% cap issue. She sat across from him in front of his desk. The meeting lasted approximately 45 minutes.

49. Soliman did not agree with the methodology Complainant was using to conduct her reconciliation. During the meeting, Soliman became frustrated about the length of time the project had taken. He stated to Complainant, "I do not understand why this is taking so long. Just leave everything and go back to your office," or words to that effect. Complainant raised her hand to

the side of her head, as if indicating that she had a question. Soliman responded to her by raising his voice loudly and stating, "Stop raising your hand at me. Don't you point your finger at me."

50. Complainant responded that he needed to stop raising his voice at her. Soliman responded by yelling at Complainant, "You may leave my office now." Soliman's secretary, Rachel Carmen, who sat outside Soliman's office in a cubicle, heard Soliman raise his voice first.

51. Complainant was shocked by the situation she suddenly found herself in. She sat in her chair, assessing what to do next.

52. Complainant then yelled back at Soliman even louder, telling him she would not leave his office and that he couldn't order her to leave his office. Soliman repeated his order for Complainant to leave his office.

53. Complainant then left Soliman's office.

November 2006 Corrective Action

54. On November 8, 2006, Soliman issued Complainant a Corrective Action for raising her voice during the October 30 meeting. The letter stated in part:

"This corrective action is being given to you based on your violent behavior during our meeting on Monday October 30, 2006. . . . During the meeting you started to speak loudly, yelling and waving your hands and arms because we did not agree on the methodology to prepare the reconciliation. These actions are considered verbal and physical threat to me. I asked you to go back to your office and continue working on the reconciliation, but you ignored my request and continued to yell and wave your hands and arms. One employee came to my office after you left and said "this is not acceptable behavior, this is really bad."

55. The Corrective Action referred to the language in Complainant's prior evaluations, which discussed her problems with interpersonal contacts. Soliman noted that he had received complaints from others about her behavior, anger, and not being responsive to their needs or issues.

56. He directed Complainant to "relate to others in a courteous, respectful manner, contribute to a positive work environment through interactions with others including your own employees and co-workers. You must demonstrate tact and diplomacy when resolving conflicts; accept criticism and be open to new ideas."

57. Complainant grieved the corrective action. In her grievance, she detailed several times Soliman had yelled at her at work, noting that she had reported Soliman's conduct to the HR Director in March 2006.
58. On December 4, 2006, Lisa Esgar, Senior Director of Operations and Finance Office, denied Complainant's grievance at the Step 1 level. Esgar noted in the denial of the grievance that while she found Complainant to be "an extremely competent and dedicated State employee, whom I do value in this Department," Esgar had seen her act with "disrespect in meetings, at times with little sense of diplomacy." Esgar also noted that staff had complained to her about Complainant's lack of constructive leadership.
59. Esgar closed her grievance decision by encouraging Complainant and Soliman to seek mediation. Complainant appealed the denial of her grievance to Steve Tool, then the Executive Director of HCPF. She noted that Esgar had not addressed her allegations that Soliman had violated the workplace violence policy, and stated that the policy required HCPF to conduct an investigation into her allegations.
60. Complainant's grievance was denied. The allegations against Soliman were not investigated. Complainant pursued the mediation option with Soliman, but he refused to participate. Complainant appealed the denial of her grievance to the State Personnel Board. The matter was dismissed.
61. On November 17, 2006, Complainant emailed Soliman, attaching her summary spreadsheets on the CBHP issue. She explained that she had hoped the overdrawn amounts would dissipate over time, but had found they had not. She concluded, "I believe that we are going to have to go in and do a more thorough review to see if we can figure out what these differences are and maybe get a better idea of whether there really was an overdraw condition."
62. In December 2006, Complainant emailed Soliman and John Bartholomew, Budget Director for HCPF, informing them she had completed the reconciliation on the 10% cap issue up to June 2006. She stated she needed to talk to one more staff person to get a final estimate of the overdrawn amount. Soliman responded by asking the amount of overdrawn funds. Complainant estimated it to be around \$3.5 million.
63. On December 11, 2006, Soliman emailed Complainant, Pacheco, an Accountant IV, and Sung Hong, another accountant, regarding his reconciliation of the CBHP issue. His calculations resulted in an overdrawn amount of \$1,481,896.

Henneberry's Tenure Begins

64. On January 1, 2007, Joan Henneberry was appointed to be the new Executive Director of HCPF. Henneberry had been a former Colorado state employee, and she understood prior to her appointment that HCPF had a reputation for low employee morale.
65. Henneberry spent much of her first six months addressing the morale issue in her Department. She attended staff and division meetings; held weekly brown bag lunches that were open to any staff; reinvigorated the employee counsel; arranged for focus groups with employees; and gave the entire HCPF workforce the opportunity to send anonymous letters to the employee council. Henneberry also removed any barriers to communicating directly with her by providing employees with her direct telephone line and eliminating the authority of her executive assistant to review her email.

February 8, 2007

66. On February 8, 2007, Yohannes Teshineh, one of Complainant's subordinates, took a request for rebilling of a Medicaid payment to Terri Davis, Information Security Administrator, Security Section, IT Division.
67. The rebill was from a former Medicaid provider that had terminated its participation in the Medicaid program. The provider was still listed on the Medical Management Information System (MMIS) database, because it was still eligible to receive payments for bills submitted during its active period.
68. The rebill was for payment for services provided during the period of active participation in Medicaid. Davis had already sent a "rebill letter" to this provider, informing it that it could rebill for the claim.
69. After Teshineh gave Davis the rebill, Davis entered the COFRS (Colorado Financial Reporting System) database in order to process the bill. However, she found that the provider was no longer in the COFRS system, due to its termination from the Medicaid program.
70. Davis informed Teshineh that she could not process the rebill because the provider was no longer listed on the COFRS database.
71. Teshineh believed that Complainant, his direct supervisor, could provide him with assistance on this matter. He went to Complainant and asked for her help.
72. Complainant went onto the MMIS site and learned that the provider had submitted the bill prior to its termination from MMIS. She therefore determined that the payment was appropriate and required.

73. In order to be sure that her understanding was correct, Complainant then went to see Tim Malone in the Contracts Monitoring unit of the Information Technology section, to clear it with him. Malone was in Davis's section. He confirmed that the provider was eligible for the payment and that Davis needed to add the provider back to the COFRS system in order to enable the payment to occur.
74. Complainant then brought the rebill, a W-9 for the provider, and all necessary documentation, to Davis. Her intention was to provide Davis with everything she needed to add the provider to the COFRS system.
75. Davis was the only individual who had authority to add providers to the COFRS database. Neither Complainant nor any other staff in Accounting had this authority.
76. By way of background, for the two-year period preceding February 2007, the IT Division had been in the process of trying to resolve who was actually responsible for the overall handling of COFRS, including updates and information. There had been so much change in management and supervision in the Division that no consensus had been reached regarding where Accounting's responsibilities ended and IT's responsibilities started.
77. For nearly two years, Davis had received conflicting directives about procedures to be utilized in processing information and payments governing COFRS. The staff shortage in Accounting had resulted in Davis having to perform many tasks that should actually have been performed by Accounting. Davis's frustration level was high. For example, on August 25, 2006, Davis had sent an email to Complainant stating, "Annmarie, the reason for the vendor add does not affect the requirements to add. And again I do not believe that I as the Security Administrator of the Provider Payment Resolution Administrator should have to remind the accounting office staff the requirements for adding vendors to COFRS. Please forgive me if this comes across harsh, but I am not an accountant."
78. Complainant returned to Teshineh and asked him if he wanted to return to Davis with the information. He declined.
79. Complainant walked over to Davis's cubicle. Teshineh soon followed her, although she had not asked him to.
80. Complainant leaned over Davis's cubicle wall and handed Davis the rebill and accompanying paperwork. Complainant began to explain that it was okay for Davis to add the provider to COFRS.

81. Davis responded to Complainant by becoming upset and interrupting Complainant. Davis stated that Accounting had not done its job, that it was Accounting's problem, and that Accounting needed to get their processes straight with IT.
82. Davis did not permit Complainant to explain that she had confirmed the provider's appropriateness with IT. She refused to look at the W-9 or accompanying paperwork. Davis never learned that Complainant had gone to IT prior to coming to her cubicle on February 8, and was still unaware of this at the time of hearing.
83. Complainant continued to try to explain her solution to the problem to Davis. Davis talked over Complainant and did not allow her to complete her explanation. Complainant told Davis that she was trying to explain why it was okay. She asked Davis if she could change the way she was talking to her.
84. Davis told Complainant that she could take the issue to Davis's supervisor, Liz Sanchez. Complainant responded that it was up to Davis to take the matter to Sanchez if she felt that was necessary. Complainant and her staff did not have access to COFRS; she therefore felt that there was nothing remaining for Accounting to do in the situation.
85. During this discussion, Complainant asked Davis to change the way that she was talking to her, and said that the way she was talking to her was "borderline insubordinate."
86. In the end, Complainant concluded that any further attempts to discuss the issue with Davis would be futile. Davis told Complainant to take the paperwork with her. Complainant refused, leaving it with Davis.
87. Davis was so upset about this encounter that she went home early. When she described the conversation to Sanchez, she cried, and indicated she was afraid she might lose her job because of Complainant's statement about being borderline insubordinate.
88. The next day, on February 9, Complainant stated to Juanita Pacheco, one of her subordinates, that she had said things to Davis she shouldn't have said, including a statement about her being borderline insubordinate.

Davis's Complaint

89. Davis emailed John Wagner, Division Director of the IT Division, and copied her supervisor, Elizabeth Sanchez, at 3:38 p.m. on February 8.
90. Davis stated in her email, in part:

John, I am request[ing] a meeting to discuss the issues that are going on between myself, the Accounting Section and ITCONMON [Contracts Monitoring]. There has been one thing after another regarding accounting duties. They are taking advantage of the fact Liz [Sanchez] is new and are asking me to do things that I have not been requested to do before. . . I am currently dropping everything to make sure the Security line is not backed up, because that will cause problems with ITCONMON.

There has been meetings after meetings concerning the accounting duties and nothing has been resolved.

Anne Marie just left my cube and accused me being insubordinate to her, because a step in the rebilling process was not done by her personnel before giving the document to me. Why should a manager of another section be allowed to walk up on me and tell me what I am going to do? Liz could not do that to one of her staff.

I asked her to speak with ITCONMON and develop a process so that I will know what to do when a provider has been termed in the MMIS, there is an outstanding payment, and the provider is not in COFRS. She told me to speak with Liz. I told her Liz is not MMIS; this is a decision that should be discussed between Accounting and ITCONMON.

91. Davis wrote a statement on February 9, 2007, in which she accused Complainant of being loud with her. Davis also stated, "Annmarie approaching me with one of her staff with her was totally inappropriate. She should have spoken to my manager before speaking to me, if she did not agree with me returning the document to Yonannes."

HCPF's Workplace Violence Policy

92. HCPF Policy Number PER-011, "Workplace Violence" policy, has as its purpose "to ensure that every Department employee, contractor and temporary employee has the right to expect this Department to take necessary steps to provide a violence-free environment and an opportunity to address issues concerning violence. Acts or threats of violence will not be tolerated."
93. The policy defines "Violent Behavior" as follows: "Any act or threat of physical, verbal or psychological aggression (which may or not include the use of profanity) or the destruction or abuse of property by any individual at any level. Disruptive behavior is defined as behavior that disturbs or interferes with or prevents normal work functions and includes yelling, using profanity, verbally abusing others and making inappropriate demands."

94. The policy states, "Threats: May include, but are not limited to veiled, conditional or direct threats in verbal or written form, resulting in intimidation, harassment, harm or endangerment to the safety of another person or property."

Smuda Investigation into February 8, 2007 Incident

95. Wagner asked HR Director Smuda to investigate Davis's complaint. Smuda arranged to conduct interviews of all those who had knowledge of February 8, 2007 conversation and background information relating to the COFRS payment issue.

96. It was Smuda's normal practice to tape record each interview, have a written transcript prepared, and then ask the interviewee to review the transcript, make corrections, and sign it. These transcripts were admitted into evidence at hearing.

97. Smuda interviewed Wagner. He provided background information as to why Davis was upset on February 8, 2007. He informed Smuda that his IT Division had been struggling for two years with the issue of who would handle, and what procedures would govern, handling of provider payment-related issues on COFRS. In addition, due to the staff shortages and changes in management, for the last two years his division had been "in the process of trying to resolve who is actually responsible, whether it's IT or IT in the security area, which is where Terri [Davis] is currently located. We've been working on issues around this for over two years now. Accounting has, in some cases, been unable to staff to meet some of these needs. We've been trying to document exactly how they're done, because we tend to step on each other's toes with COFRS. . . [W]e've had a change of management, supervisors and whatnot that have gone on. It has created a – some stress between accounting and IT as to who handles a provider's call, who . . . modifies the accounting system, things of that nature. So the duties and responsibilities have definitely been in flux for quite some time now."

98. Wagner also stated that his Division had been putting in some new procedures, one of which was to have an individual send an email that documents the need to add a provider to COFRS. Wagner explained that because Davis would have probably anticipated needing to have an email to verify the reason to add the provider to COFRS, Davis would likely have requested such an email from Teshineh on February 8.

99. Wagner indicated that on February 8, the situation was "not something that necessarily requires management direction. I mean, if we've got to pay a provider, Yohannes can just say, Please add the provider so we can pay them. Very simple. But the situation did not proceed along that as the plan. When Terri made the request, Yohannes went to his boss believing that

perhaps he did need a supervisor approval to do this, which then involved Annmarie back into the discussion. So that's kind of how it moved around."

100. Wagner characterized the process between Teshineh and Davis on February 8 as: "Not complex, not enormous, but just something that says, Yes, please add a provider back in [to COFRS] for purposes of paying a two-year-old bill or whatever."
101. Smuda interviewed Carol Reinboldt, Sanchez's supervisor in the IT division. Reinhardt explained that the procedure for handling rebills was to obtain an updated W-9 form from the provider, to confirm the data entered into COFRS was correct.
102. Smuda also interviewed Teshineh, the only other participant in the discussion. She asked him the question, "Did you hear anyone yell or speak loudly to any person on that occasion or to you?" Teshineh responded that he had witnessed a "normal tone" used and had not witnessed any loud voices used.
103. Smuda asked Teshineh if he had seen anyone make degrading remarks. He responded that he had not. He stated that Davis and Complainant had had a little disagreement.
104. Smuda asked Teshineh if the situation was a hostile work environment. He stated, "I don't think it is hostile, but there is a better way to handle it, but it's not hostile."
105. Smuda interviewed Complainant for the investigation. Complainant explained the fact that Teshineh had come to her after Davis had rejected a rebill request. She stated that she had immediately accessed MMIS, established the provider had been terminated after submitting the bill, had confirmed with IT that it was okay to process the bill and re-enter the provider into the COFRS table, and had then taken the paperwork to Davis.
106. Complainant informed Smuda that Davis was the only person that updates COFRS at the Department. Smuda asked if either Davis or Complainant had raised their voices and yelled. Complainant stated that Davis did not yell or raise her voice; she said Davis became upset. Complainant denied yelling or raising her voice towards Davis.
107. Complainant also explained that she had not anticipated that this issue was something that would be upsetting to Davis.
108. Smuda interviewed Dan Rodriguez, who had a cubicle located twenty feet from Davis's cubicle. Rodriguez stated, "I heard the volume increase" to the

point where it caught his attention. He said that the other person talking to Davis kept making the same statement repeatedly.

109. Smuda interviewed Liz Sanchez, who did not witness the discussion but talked to Davis afterwards on February 8. Sanchez reported to Smuda that on February 8, Davis was "stressed and frustrated."
110. Smuda asked Sanchez if she believed Complainant's conduct had caused a hostile work environment for Davis. Sanchez responded yes, because Davis had "handled herself appropriately, given her level."
111. Smuda interviewed Diane Zandin, whose cubicle was next to Davis's. Zandin was in her cube during the February 8 interaction. She reported that the discussion was loud, that Davis repeatedly stated to Complainant she would not do what she was asking, that Complainant needed to talk to Sanchez, and Complainant repeatedly responded that she was not going to talk to Davis's boss. Smuda asked, "Did you witness or hear anyone use intimidating tactics such as threats in order to make you or the other person get their job done, and act inappropriately?" Zandin responded that Complainant's tone and the phrase, "you're being insubordinate," was intimidating and threatening in a workplace, especially if it was not in one's chain of command.
112. Smuda interviewed Juanita Pacheco, who was not present for the February 8 conversation. During this interview, Smuda asked Pacheco if Complainant had used intimidating tactics to get Terri to get her job done. Pacheco responded, "I'm not aware of any, no, but . . ." Smuda then responded, "The insubordination." Pacheco then said, "Right. I mean, I would think most people would become fearful at that point, when a manager said you're being insubordinate. I would."

Smuda Report

113. Smuda issued her final report on Davis's complaint on March 1, 2007. The report contains the following findings:
- "All of the employees did feel the Accounting Manager threatened Terri Davis by her actions, tone of voice, and using the word insubordinate."
 - "The Information Technology Director [Wagner] stated that the Accounting Manager, Annmarie Maynard, has an aggressive behavior and that several meetings have occurred in which the audit requirements have been discussed."
 - "The Information Technology division stated they have had many disputes with Annmarie and would like to see this behavior rectified."

114. According to the complete transcript of Wagner's interview with Complainant, Wagner did not state that Complainant had aggressive behavior.
115. According to the complete transcripts of the IT division staff interviews, none of them stated they have had many disputes with Complainant.
116. Smuda's March 1, 2007 investigative report omitted critical information that was mitigating to Complainant.

Delegation of Appointing Authority

117. Henneberry was the sole appointing authority for HCPF and informed all of her subordinate, mid-level managers of this fact. Her stated policy was to preserve all appointing authority over all personnel matters unless she explicitly delegated appointing authority to another individual.
118. On February 28, 2007, Smuda emailed her investigative report to Esgar, and Henneberry.
119. On March 1, 2007, Esgar responded to Henneberry and copied Smuda. Esgar stated that she would share a hard copy with Soliman, who reported to Esgar. "Adel and I will meet to discuss the appropriate disciplinary action, then recommend it to you. Do we have your authorization to proceed with appointing authority delegation for disciplinary action and an R-6-10?"
120. Henneberry responded, "Yes, you have my authorization to proceed. Jh"

March 5, 2007 Draft Demotion Letter

121. On March 5, 2007, Soliman emailed two letters to Esgar and Smuda for their review. The first was the notice of pre-disciplinary meeting on March 9, 2008. The second was the disciplinary action letter, demoting Complainant to Accountant III. Soliman stated, "The second letter is describing the incident and the disciplinary action. I will need to change the letter based on any new information that comes from the meeting."
122. Esgar noted in her response email that she had offered some preliminary suggestions to the demotion letter, "attached, should the R-6-10 not reveal additional information."

March 9, 2007 Pre-Disciplinary Meeting

123. On March 9, 2007, Complainant attended the pre-disciplinary meeting with her attorney.

124. Soliman was ill at the time of the pre-disciplinary meeting. He attended, but asked Smuda to conduct the meeting, and she did so. At the outset of the meeting, Smuda reviewed State Personnel Board Rule 6-10. She also stated, "at the meeting we will be discussing the incident that happened on February 8th, 2007, between you and Terri Davis discussing the rebill of Medicaid claims. Understandably, you were trying to resolve an issue, but you created a hostile environment. . . The findings of the investigation did, in fact, disclose a hostile work environment created by you, and that Terri Davis was, indeed, a victim of your action."
125. Smuda then read the entire narrative of her investigative report, and the workplace violence policy.
126. At the pre-disciplinary meeting, Smuda informed Complainant that Sanchez said she had emailed Complainant about discussing the rebill issue at a January 25, 2007 meeting. Complainant confirmed receipt of the email but stated that Sanchez had opted not to discuss the rebill issue at that meeting.
127. Complainant explained the background issues surrounding IT and Accounting. She indicated that the problem of establishing set procedures for Terri Davis's job had been ongoing for years, and that she had had many conversations with Wagner, Soliman, and others about it.
128. Complainant informed Smuda and Soliman that Davis had accused Complainant in her February 9 statement of refusing to go to IT Contracts Monitoring during their exchange. Complainant told them that she had in fact done so immediately prior to going to see Davis.
129. Complainant also addressed Davis's claim that she had approached Davis with one of her staff in order to intimidate Davis. She stated that Teshineh had followed Complainant on his own volition.
130. Complainant made it clear that Davis had refused to permit Complainant to talk to her during the encounter, had interrupted her, and had become hostile as soon as it became clear that Complainant was discussing the rebill. Complainant indicated that Davis had refused to listen to her, had stated that it wasn't her problem, that it was Accounting's problem, and that they needed to get their processes straight.
131. Smuda spent a lot of time during the meeting inquiring about whether an employee could be insubordinate to a higher level manager that was not in his or her chain of command. Complainant responded with examples and stated that she thought it was possible because a manager has more authority in the agency.

132. Complainant's attorney made several points during the meeting. She pointed out that Complainant was attempting to solve a problem on February 8. In addition, she stated that Complainant had no intent to create a hostile work environment, as required by the policy. She also indicated that Davis had equal or more responsibility in creating a conflict on February 8.
133. Complainant's attorney also pointed out that no attempt had been made to get Davis and Complainant together to discuss the incident, in an effort to create a smooth working relationship for the future. The attorney stated that Complainant was very interested in doing that.
134. During the meeting, Smuda stated, "I'm asking questions because . . . if I don't have enough information, how can I make a determination?"

March 19, 2007 Demotion

135. Soliman did not discuss the February 8, 2007 incident with any witnesses prior to sending the demotion letter.
136. Soliman did not review the interview transcripts or listen to the tape recordings of the interviews prior to making his decision to demote Complainant.
137. Soliman did not ask Complainant if she had brought the required W-9 form to Davis on February 8, 2008.
138. On March 19, 2007, Soliman demoted Complainant. The letter stated, "I have decided that you created a hostile environment and threatened Terri with insubordination which was taken by Terri to equate to a possible termination. I also decided that a disciplinary action is necessary due to the fact that you have violated the Corrective Action issued to you on November 8, 2006. The Corrective Action . . . specifically outlined that this type of behavior was not acceptable and would not be tolerated."
139. Henneberry approved the demotion of Complainant.
140. Complainant was demoted three levels, from Controller II to Accountant III, MMIS/Medicaid Accountant, with a monthly salary of \$6,508.00. The salary range for Accountant III was \$4,496.00 to \$6,508.00. Soliman had originally sought to decrease Complainant's salary to \$5502.00.
141. In March 2007, Complainant appealed the demotion to the State Personnel Board, alleging sex and race discrimination.

142. After Complainant was demoted, Soliman directed her to complete the annual performance evaluations for four of her subordinates, including Pacheco. Complainant was aware of several performance errors committed by Pacheco during the evaluation period. Pacheco had committed a coding error in the agency reporting system, in the amount of \$130 million; Complainant had corrected the error and reported it to Soliman, who took no action against Pacheco. Pacheco had drawn administrative funds from the federal government in the CBHP program, when no expenditures existed to support the administrative expenses.
143. Complainant noted performance issues in Pacheco's evaluation. Soliman told Complainant to modify Pacheco's evaluation. Complainant responded that she felt it was fair and that it would not be appropriate to change it.

March 21, 2007 Request to Fill Controller II Vacancy

144. On March 21, 2007, Soliman sent a memo to Henneberry stating, "This is a request to fill position #3300, Controller II. The Controller II position became vacant as of March 20, 2007. Annmarie has accepted a voluntary demotion and transferred from the Controller II position to the vacant Accountant III, MMIS/Medicaid Accountant, position #425. I already submitted the required documents and request to transfer Annmarie to her new position. This request is part of the Controller's Division reorganization."
145. Henneberry signed off on this request as approved on March 25, 2007.
146. Soliman posted the Controller II position. Pacheco, an Accountant III, was the only individual who applied for the position. Soliman appointed Pacheco to the position. Pacheco moved into Complainant's cubicle. Complainant moved into a less desirable cubicle location.

Discrimination Claim

147. In May 2007, Complainant filed a claim of sex and race discrimination challenging her demotion, and a claim of retaliation for filing a previous discrimination claim, with the Equal Employment Opportunity Commission.

SMIB Overdraw Issue

148. As the Medicaid Accountant for HCPF after her demotion, Complainant was responsible for assuring the accuracy of all Medicaid transactions and reports. In May 2007, Complainant took over responsibility for the Supplemental Medicare Insurance Benefit (SMIB) program. Under SMIB, Respondent pays the Medicare Part A and Part B premiums on behalf of qualifying Medicaid clients. The amount of federal financial participation

(refund to Respondent) available for each payment varies based on the client's income.

149. Complainant immediately found a red flag indicating an accounting error. Every single payment coded into the SMIB program was for a certain population only, the "state only" population. Then, these populations were later being reclassified manually by Accounting staff as a "federally eligible" population, which triggered an automatic federal matching payment or "draw."
150. Complainant informed Soliman of her discovery of the SMIB error issue in May 2007. Complainant attempted to discuss the issue with Pacheco, but she would not meet with Complainant on a face-to-face basis.
151. In October 2007, Complainant set up meetings with Sharon Brydon, the program contact person for SMIB, to learn about the SMIB program and how the reports for the program work.
152. On October 1, 2007, Jennifer Evans replaced Esgar, and became the Deputy Director for Administrative Operations at HCPF. Evans, an attorney, had worked as a regulatory attorney for a health care company. During her career, Evans had defended a company that had been the subject of a whistleblower complaint.
153. Evans supervises the Controller section, the Legal section, and the Information Technology section.
154. During November 2007, Soliman was aware that Complainant and Brydon were attempting to reconcile the SMIB program numbers.
155. On December 14, 2007, Complainant sent memos to Evans, Soliman, and Budget Director John Bartholomew, regarding the SMIB entries, federal draw, and reporting issues. She outlined the three basic problems she and Brydon had identified, attached their preliminary calculations (over \$3 million in overdrafts of federal funds) and requested a meeting as soon as possible due to upcoming payments that had to be made in December.
156. The three issues were generally as follows. The first was an accounting issue, wherein Accounting staff had incorrectly entered a debit instead of a credit for amounts of payment eligible for SMIB reimbursement. This error resulted in an overdraft of \$3,632,788 in federal funds.
157. The second issue consisted of reporting problems, arising from the implementation of a new computer reporting system. Prior to the implementation of the new computer report, an additional manual process was necessary to correctly reclassify eligible clients to the appropriate rate of federal reimbursement. When the report was implemented in April 2007, staff

erroneously assumed that some manual reclassification was still necessary, and staff reassigned clients to an inappropriate, higher rate of federal reimbursement. Third, the computer report had been incorrectly programmed to automatically award a higher rate of federal reimbursement, in the case of conflicting Medicaid and Medicare data regarding a client. The reporting problems resulted in Respondent having overdrawn \$4,393,503 in federal funds.

158. When Complainant pointed out to Pacheco that she (Pacheco) and others had been making the SMIB error, Pacheco responded that that was how it had always been done. Pacheco stopped making the error from that time forward.

159. According to Evans, failure of a state agency to identify and reimburse the federal government for improperly overdrawn funds is a federal felony offense.

September 2007 Corrective Action for Missed Payment

160. On September 13, 2007, Complainant was given a Corrective Action for making a late payment to the federal government, resulting in a \$31,500 assessment of interest to the State of Colorado. The payment of \$6,872,646 was due to CMS (Centers for Medicare and Medicaid Services) on July 25, 2007, and was not paid until August 3, 2007. This missed payment caused accounting difficulties for the Department.

161. Complainant did not grieve this Corrective Action.

162. In 2006, Pacheco had missed a similar payment, resulting in a similar assessment of interest by the federal government. Soliman was aware of the missed payment and did not impose a corrective action against Pacheco.

October 24, 2007 Missed Meeting

163. On October 15, 2007, an Outlook calendar notice was sent to twelve recipients, including Complainant, Pacheco, Reinboldt, and others, concerning the annual Production Calendar meeting on October 24. The purpose of the meeting was to finalize the financial cycles and dates for the "interface from the MMIS System to the COFRS System."

164. This annual meeting was initially set up by Complainant as Controller II, in order to improve communication and coordination between Accounting staff, IT staff, and IT Contracts Monitoring staff.

165. During the two-week period preceding the October 15 meeting, Complainant's computer was often either off or was being worked on by the computer staff. Her access to email during this period was sporadic.
166. Complainant did not open the first meeting invitation. She opened the second meeting invitation, sent in the afternoon on October 15, but did not respond to the email to confirm her attendance.
167. On October 24 at the time of the meeting, Complainant was at her desk. Pacheco, the Controller II, and another staff member from Accounting were at the meeting. No one attending the meeting called Complainant to remind her to join them. She missed the meeting.
168. Pacheco emailed Soliman to inform him that Complainant had missed the meeting. She did not inform Complainant of this.
169. On October 31, 2007, Soliman emailed Complainant asking why she had missed the meeting. He stated, "I am concern[ed] that you are not performing the most important function for your position which is the reconciliation of MMIS to COFRS and the projection of over/under expenditures."
170. Complainant responded that due to a problem with her computer on October 24, she had had to shut down her computer and "I did not reopen my email by accident so I didn't get notified by the system. I always review the production schedule before hand and we have worked out the process a long while ago." She also reviewed all of the work she had performed on reconciliation of MMIS to COFRS, and asked him to clarify his concern.
171. Soliman responded with two points. He stated that the group discovered at the meeting that FY 07/08 has 53 cycles, not 52 cycles, which has budgetary implications. And, he asked her if she had not opened her email for the entire 9-day period after the meeting invitation had been sent.
172. Complainant responded, "Valerie Johnson came by my desk to fix a problem I was having with a BOA and I had to turn down my system to allow her to access the Administrative Functions. When I signed back in, I inadvertently did not reopen my email system. That is why the meeting minder did not go off." She also indicated that the 53 cycles is normally picked up later in the fiscal year, that the Department "frequently has 53 payment cycles in a fiscal year," and that she felt she was "being picked on here."
173. Soliman responded that he still did not understand what she meant regarding her email, and again asked, "Are you saying that you did not reopen your e-mail system for 9 days? He then disagreed with most of her statements.

174. Complainant responded again, clarifying that after shutting down and logging out of her computer, when she turned it back on, "Outlook was not open on my desktop at the time." She stated that she had not missed the meeting on purpose, and confirmed that two of the last four years had had 53 cycles.

175. Soliman responded, "My question is why you did not attend the meeting?" He asked her why she had not read her email. She responded. Soliman replied again that he still did not understand why she had missed the meeting.

November 26, 2007 Corrective Action for October 24, 2007 Missed Meeting; Complainant's Grievance

176. On November 26, 2007, Soliman issued a Corrective Action to Complainant for missing the October 24, 2007 meeting. He stated in part, "This action is considered a failure to perform a major function of your position as the Department's Medicaid Accountant. . . This position certifies the accuracy and timelines of Medicaid system payments. The above meeting falls within your job assignments. By not responding and not attending this meeting, you have failed to perform one of your major job assignments. When I asked you why didn't you respond to the e-mail? And why didn't you attend the meeting? Your response was I have no reason why I didn't respond to the e-mail."

177. On December 5, 2007, Complainant filed a grievance challenging the Corrective Action with Evans. Complainant stated that she was being treated differently than other employees, and was being targeted and subjected to gender discrimination and retaliation for filing CCRD charges and grievances and an appeal with the State Personnel Board. She stated, "On a daily basis, I am faced with a constant hostile work environment and retaliation."

178. Complainant indicated that she had offered a valid explanation as to why she had not attended the meeting; that she had been present at her desk and it would have been possible for anyone at the meeting to call her; if someone had done so, she would have immediately attended; and the fact that this wasn't done is "symptomatic of the hostile environment that I am experiencing."

179. She asked for an in-person meeting with Evans and Complainant's attorney.

Complainant's Request to Mediate with Soliman

180. On November 30, 2007, Complainant emailed Soliman, indicating that she would read and digest the material he had provided her, to help her

understand his perception of her being difficult. She asked him if he would be willing to go to CSEAP together to discuss the situation.

181. Soliman responded on December 4, 2007, "Annmarie, I'm not sure why I need to discuss [this] with C-SEAP?"

182. On December 4, Complainant responded that she sought to have the two of them go to C-SEAP together. "The reason why I suggested this is because I think that we see these emails different ways. It was not my intention on any of these to be difficult but in most cases to get clarification of instructions or direction. Or even to provide information. I think that if you feel that I was having these email exchanges to be difficult then we have a communication problem that perhaps we can sit down with a third party and work on – together. Thanks, Annmarie."

183. On December 6, 2007, Soliman responded, "Annmarie, I believe that going to C-SEAP at this point will not be productive it is somewhat very late." He indicated that she sends excessive emails, that no one else does so, and that she needed to improve her communication skills, spend less time writing emails, and spend more time on "communicating effectively with other personnel."

184. At hearing, Soliman testified that he had refused to mediate with Complainant in December 2007 because she "had burned every bridge." He testified, "she was filing lawsuits against me all the time. I felt discriminated against. She had filed charges of discrimination against me so many times I felt we could not sit down and talk about our differences."

November 2007 Investigation of Controller Section

185. Henneberry asked Smuda to arrange to have Human Resources staffers from Henneberry's former place of employment, Colorado Department of Public Health and Environment (CDPHE), conduct an investigation into the Controller's section to identify whether there were any problems with the work environment, and to come back to Henneberry with recommendations on improving morale in the division.

186. Jessica Ross and Renee Strauss, from the HR Division at CDPHE, were directed to conduct a general review of the work environment in the Controller section. They interviewed all employees in the Controller's section with the exception of Soliman. They asked the employees the following questions only: how would you characterize the atmosphere of your work environment; what do you like most about working here, and why; what do you like least about working here, and why; how would you characterize the working relationships between you and your co-workers (listed supervisor and co-workers specifically); is there any other information you would like to share.

187. At the end of the day, Ross and Strauss were going to interview Soliman, but he was out of the office. They inquired with the HR office at HCPF, and were told they did not need to interview Soliman for their investigation. Therefore, they did not.
188. Ross and Strauss did not ask Complainant questions about the basis for her gender discrimination, hostile work harassment or retaliation claims against Soliman. They did not investigate her grievance.
189. Ross and Strauss made verbatim notes of the tape recorded conversations; however, Ross never printed the notes and did not provide them to anyone at HCPF. Neither Smuda, Henneberry, nor Evans ever viewed the notes.
190. Ross wrote an Investigative Report containing the summary of her findings on November 20, 2007. The report findings revealed that the Controller's Division had an excessive workload; severely cramped space; and that the work environment had been stressful for a long time.
191. The report concluded: "Following the review of the individual and summarized findings, this analyst concludes that the work environment in the Controller's Division, while tense, is not hostile or antagonistic. The employees have experienced, and continue to experience a changing work environment, which has caused some natural conflict to occur. Overall, employees are optimistic, enjoy their jobs and their co-workers, believe progress is occurring, and that the environment is stable."
192. The report noted that several employees [including Pacheco] stated they did not like to work with Complainant and mentioned specific examples of difficult interactions with her. It also stated that none of the employees except Complainant mentioned any problem working with Soliman.
193. Complainant did not receive a copy of the report.
194. Henneberry reviewed the report.

Charge of Discrimination

195. On February 28, 2008, Complainant filed another charge of discrimination with the EEOC, asserting that the November 2007 corrective action for missing the meeting was part of a pattern of unlawful harassment based on her sex, race, and in retaliation for having filed a previous discrimination claim. She stated in part, "My supervisor, who is not of my race and sex, has created a hostile work environment and targets me for write-ups and other disciplinary actions; I have complained to management about the supervisor's

treatment of me, but because of my previously filed charge, I am subjected to retaliation.”

March 25, 2008 Step 1 Grievance Meeting with Evans Regarding November 2007 Corrective Action for Missed Meeting; Denial of Grievance

196. On March 25, 2008, the meeting to discuss Complainant’s grievance of the November 2007 corrective action was held. The delay was due to an intervening settlement conference concerning Complainant’s demotion, as well as the illness of Complainant’s attorney.
197. At the March 25 meeting, Smuda, Evans, Complainant, and her attorney were in attendance. Complainant explained the following: she had never missed a meeting prior to October 24; her computer reminder function was not working that day; she had set up the meeting several years ago herself in order to improve communication between Accounting, IT, and IT Contracts Monitoring, and two representatives from Accounting was sufficient; she was at her desk and had she been called, she would have attended.
198. Complainant and her counsel stated that Complainant felt her reporting of fiscal irregularities to Soliman in November 2007 may have triggered him to issue the Corrective Action well over a month after she had missed the meeting.
199. Complainant’s attorney also pointed out that the Corrective Action appeared to be a retaliatory action by Soliman, due to Complainant’s pending appeal of the demotion alleging discrimination. He noted that a more productive way to handle one missed meeting would be to mention it and ask that it not happen again, instead of issuing a Corrective Action, when no pattern of missed meetings existed.
200. During this meeting, Complainant informed Evans that she had taken the initiative to address the 38% level of collection of receivables at HCPF, and had increased that level to 82%. She had done this by conducting research and issuing letters advising contractors of the amounts owed. She informed Evans that Soliman had ordered her to stop doing this, for reasons that were a mystery to Complainant. Complainant and her attorney informed Evans that they believed Soliman had done this in order to undercut Complainant’s success at the agency.
201. On April 7, 2008, Evans denied Complainant’s grievance. Evans stated in part, “I understand from our meeting that you would have attended the meeting if one of your colleagues had reminded you, but you must be accountable for your own schedule.”

Events Regarding SMIB Overdraw Issue Preceding April 2008 Meeting

202. In December 2007, Soliman, HCPF Budget Director John Bartholomew, Medicaid Budget Analyst Block, and others participated in a meeting where the SMIB overdraft issue was discussed.
203. In January 2008, the Executive Management team discussed the SMIB overdraft issue. Henneberry, Evans, Bartholomew, Smuda, the legislative liaison, and others attended.
204. On January 15, 2008, Brydon, sent an email to Bartholomew, Block, Gary Ashby, Benefits Coordination, and Complainant, summarizing the two overriding SMIB overdraft problems and proposed solutions. After receiving no response, on February 5, 2008, Complainant emailed Bartholomew, copying Brydon and Soliman, requesting a response to Brydon's January 15 email, so that they could start performing the SMIB entries correctly. On February 11, Bartholomew responded that he has spoken to Evans and they would meet soon in order to make a decision.
205. On March 3, 2008, the EEOC sent a letter to Respondent, attaching a copy of Complainant's February 28, 2007 charge of discrimination and a Request for Information.
206. In March 2008, Complainant, Block, and Brydon spent an enormous amount of time reviewing agency data to recalculate how much HCPF had overcharged the federal government on the SMIB program. By April 2008, they had double checked the numbers and agreed the total owed was \$8,026,291 between FY [fiscal year] 2004-05 and FY 2007-08.

April 16, 2008 Memo on SMIB Overdraft with Summary

207. On April 16, 2008, Complainant sent a memo to Evans, Soliman, Pacheco, Bartholomew, Block, and Brydon, with an attached summary document. The document reveals that the FY 08 overdraft amount was \$3,296,434.03. Complainant's cover email indicates that since it was currently FY 08, she could correct that figure through a Journal Voucher, and needed authority to do so. A Journal Voucher is an accounting entry used to correct an accounting error.
208. Page One of the summary document listed the totals overdrafted for fiscal years 2008 (\$3,296,434.03), 2007 (\$2,615,860.81), 2006 (\$2,049,523.93), 2005 (\$0.00), and 2004 (\$64,472.45).
209. Pages 2 and 3 contained monthly overpayment totals and calculations for Issue 1. Pages 4 - 8 contain the monthly overpayment totals and calculations for Issue 2.

210. Complainant separated out the Fiscal Year 08 total of \$3,296,434.03 into a separate document containing monthly calculations of the amounts erroneously overdrawn, the correct amounts that should have been drawn, and the "Federal Overpayment" total amount for each month in FY08.
211. On April 16, 2008, Evans responded to everyone on the email, "Adel – let's review. Annmarie – we will get back to you promptly."
212. Complainant heard nothing back on this until a meeting was scheduled by Soliman on April 24, 2008.
213. Complainant had begun tape recording meetings with Soliman in 2007, because she believed she might some day need a record of his treatment of her. She brought her MP3 player with her to the April 24 meeting and recorded it in its entirety. No one else at the meeting was aware it was being recorded. The recording of the meeting was admitted into evidence at hearing.

April 24, 2008 Meeting

214. On April 24, 2008, Soliman scheduled a meeting for the Accounting and Budgeting staff in order to reach agreement between the two sections on how to resolve two issues prior to his retirement on April 30, 2008: the missed payment to the federal government from July 2007, and how to properly account for the payment; and the SMIB federal overdraw issues, including a plan for repayment. The meeting was held in Soliman's office.
215. In attendance were Soliman, Pacheco, Complainant, Bartholomew, Block, and Sung Hong, an Accountant.

First issue: reporting necessitated by the late payment.

216. Upon arrival at the meeting, all participants were lighthearted and exchanged small talk.
217. Pacheco was not present at the beginning of the meeting. Someone suggested that they call her, but she arrived shortly thereafter.
218. The first issue that was discussed concerned the great difficulty HCPF had in accounting for the federal government's refusal to accept the late payment made by Complainant in July 2007.
219. During the several-month period preceding this meeting, Soliman, Block, Pacheco, and Hung had worked on a proposed solution to the missed payment issue. This issue was extremely complex, but they had agreed on a general approach to resolving the issue.

220. Prior to the April 24, 2008 meeting, no one had advised Complainant of the proposed solution to the overpayment issue.
221. Block and Soliman began the discussion of how to properly report and account for the late payment to the federal government in July 2007. Complainant, Block, and Soliman discussed the factual background. Then, the three of them and Bartholomew engaged in a problem solving discussion. Soliman made a suggestion on how to resolve the issue. Complainant indicated that she did not understand what he was proposing, then asked if he was suggesting the use of a Journal Voucher (JV). Soliman responded that yes, that was what he was suggesting, and he elaborated. Others clarified what he was suggesting.
222. During this portion of the meeting, Complainant asked occasional clarifying questions, and offered information to help reach a mutual decision. Block stated that either scenario using a JV "is unacceptable." Block and the others attempted to outline a scenario that will work.
223. Finally, Soliman summarized the solution. Complainant asked who was going to do the journal voucher (JV) entry. Hong and Pacheco also offered to do it. Soliman said anyone can do it and he would approve it. Pacheco said, "Do we all agree on this?" Bartholomew said, "that makes sense to me." Block then stated that his "understanding was slightly different" because he is not an accountant. Block asked a clarifying question. Soliman and the others then discussed the details of how to make the transaction show on the books. Block continued to ask questions, to which Soliman responded, attempting to clarify what the plan was. Complainant and the others were silent during this conversation.
224. Pacheco then asked Complainant what she thought. Complainant indicated that she was not sure what they all were saying, but said, "if we are doing the entry now, we have plenty of time, but if it doesn't look right in the end, we can fix it. . . if it doesn't have all the impacts that we anticipate that it's going to have, just fix it." Bartholomew responded, "It's only April." Complainant responded, "Yeah." With that agreement, the first subject came to a close.
225. The entire discussion was professional in nature. Everyone in attendance worked together in a positive, productive manner to educate each other on the ideas considered, and to determine a solution to the complex issue. There was joking among all present.

Second issue: SMIB overdraw

226. Block then introduced the second issue, turning to Complainant to explain it to the group, because she had done all of the work on it. Complainant was taken aback, because she had not known this item would be discussed or that she would be asked to explain it to the group. She stated that she had expected to hear back from Jennifer Evans after Evans met with Soliman to review her April 16 email with the attached summary.
227. Soliman asked Complainant, "Okay. Can you tell us how you got to these figures?" Complainant stated that she had given everyone the reports, referring to her April 16 email. She then explained in detail what documents she had reviewed, and how she and Block had recalculated the amounts. Block and Complainant explained the process of recalculation of SMIB payments, based on the accounting problem and the reporting problems.
228. Pacheco asked, "So are we just looking at a certain year like just 2007?" Block responded, "No." Pacheco continued, "or are we going to go all the way back to, like, 2005?" Block responded, "That's – that's the question." Pacheco stated, "Because it looks like a lot." Soliman asked, "Are you talking about the 3 million or the 8 million?"
229. Block, Soliman, Complainant, and Pacheco then had a discussion about dividing the SMIB repayment to the federal government between the current fiscal year, and all previous years. In the current fiscal year, it was possible within HCPF's current budget to pay back the approximately \$3.3 million owed. For the remaining amount due from prior years, they noted, it would be necessary to obtain explicit spending authority from the Colorado legislature.
230. Block stated, "Going back beyond that [December 2007] is asking for more money [from the Colorado legislature] because it requires a significant amount of general fund to catch up."
231. Pacheco asked how far back the incorrect netting of debits and credits went. Complainant indicated that it may have been 2004 or 2005, but she did not have her April 16 summary report with her.
232. Pacheco, who was sitting to Complainant's immediate left, started to flip through Complainant's April 16 report, and nearly hit Complainant in the face with the report by accident. Complainant put up her hand to guard her face from the flipping pages. Pacheco laughed and said, "Sorry." Complainant laughed also.
233. Soliman confirmed that he was approving the payment of \$3,296,000 in FY 08, and stated that he would like Sharon Brydon to write a memo indicating that the agency had found the error, that the federal government was overcharged and the state General Fund was undercharged.

234. Complainant responded by stating that the error had been Accounting's fault, and that Sharon [in Budget] had had nothing to do with the transactions. Block agreed, "I don't think you are going to get anything useful in asking Sharon to write us a memo on . . ." Complainant stated, "I think we have that memo already." Block agreed, "Yeah, I think we do."
235. Soliman then asked for a "simple spreadsheet" for audit purposes, outlining the amounts overdrawn, with back-up documentation for the JV's, so that when an auditor came to look at the agency's records, it would be clear why the JV's were done.
236. Complainant responded that her April 16 report contained what Soliman was requesting. Block agreed, "Absolutely."
237. Complainant reiterated that any amounts due the federal government for previous years would require the Budgeting staff to request from the legislature. She stated, "I'm ready to go. I have all the – as Josh knows, we have all the reports. We reran them, we reviewed them over and over again."
238. Block stated, "We are taking them, we are putting them in a shared location [on the computer network] so that they can be backed up, they can be archived, they are accessible to everybody. I don't know if we've done it yet, but that's what will happen."
239. Block stated, "I think we need to make a distinction in terms of your summary spreadsheets, like one summary for '07 – '08." Complainant responded that she had it broken out by year. Block stated, "Right. But I don't mean broken out. I mean completely separate." Pacheco asked, "Just stand alone by itself?" Block said, "Yeah. So if somebody ever comes in and says –." Complainant stated, "I think they are separate. I think I put them on separate sheets." Pacheco stated, "They're on separate tabs of your worksheet."
240. Complainant asked, "What's the difference if I have them all in the same electronic workbook? I'm not going to – I don't have to attach all the tabs."
241. Pacheco responded, "I think Josh wants to be careful in case, somehow it gets out."
242. Block stated, "That's exactly right. If that goes to the auditor, he's like, 'Okay, you guys.' That's exactly it – if it goes to the auditor, he's like, 'You guys knew about this problem.'" Pacheco then said, "You knew about all of these other ones. Why didn't you pay them back?"
243. Block then said, "It's something that is eventually going to happen anyway, but let's make them work for it." Pacheco said, "Right. Plus we can –"

244. Complainant responded, "The only piece of information that's going to be attached to the FY '07-'08 is the stuff that's - - " Soliman said, "Belonged to '07."
245. Complainant was uncomfortable with Block's request to create two separate Excel workbook documents outlining the SMIB overdraw amounts. She felt it would violate her ethical obligation as an auditing professional to be fiscally transparent. She said, "I'm not separating my files in my computer." Complainant's tone of voice was not raised, loud, rude or accusatory when she made this statement.
246. Following a short silence, Soliman then said, "Why – is it difficult to do?" Block asked, "Do they ever – do they ever – do they ever come in and ask for the electronic files?"
247. Complainant responded, "Well, if they do, I'm not going to be put in a position, because the bottom line is: if they come in and ask me, I'm going to tell them the truth. I mean, I'm not going to lie and say, 'Oh, here, you can look at my computer.'" Complainant's tone of voice was not raised, loud, rude or accusatory when she made this statement.
248. Block responded, "Right. But they're going – they're going to ask for the supporting information." Complainant responded, "But the supporting information is attached to the JV. So they shouldn't have to ask me for anything more if it's all attached to the JV."
249. Pacheco responded, "Well, they usually are starting to ask for electronic copies of everything." Complainant said, "Well, I'm not – you know." Pacheco said, "No one's asking you to lie or make something up." Soliman said, "We are not lying. We are doing a document. We are trying to pull the spreadsheet –"
250. Complainant reiterated that all spreadsheets will contain separate entries for each fiscal year, and that each tab will correspond to the fiscal year.
251. The discussion then shifted back to the \$3.3 million that was to be paid in the current fiscal year, and how to present a clear summary of the information. Soliman asked for certain types of documentation. Complainant and Block explained how the information was currently organized in Complainant's April 16 summary report, which she had emailed to Soliman, Bartholomew, Evans, and others.
252. Complainant, realizing that Soliman had not yet reviewed her April 16 report, then came over to Soliman at his desk and reviewed her summary document with him. Soliman said, "yeah, but I'm trying to say, you know, I

want to add seven or eight months to come up with the 3.3.” Complainant responded, “Right. What I’m going to do – why don’t you let me do it, and then I’ll give you the work paper, and it’s going to – see how that says for State for fiscal year ‘08?” Soliman responds, “Yeah.” Soliman said, “Okay. Can we go ahead and do that and look at it. If you want to e-mail it to me. I would like to do that and approve it before I leave.”

253. Complainant stated, “I can do it tomorrow.” The next morning, Complainant prepared all of the necessary JV’s and summary documents for the FY 08 payment, and gave them to Soliman. He signed them as approved on April 25, 2008.

254. The remainder of the meeting then focused on a concern raised by Hong, regarding whether the JV solution to the SMIB overdraw issue for FY 08 would result in a reversion of funds to the federal government (a loss to the state), and how to properly process it to avoid such a reversion.

255. The entire discussion of the SMIB issue was professional and collegial in tone. Complainant and Block worked hard to clarify the issues for the rest of the group. A significant amount of time was taken up in the meeting by the fact that Soliman had not reviewed Complainant’s April 16 summary report.

256. Complainant was not rude, confrontational, or hostile in the April 24, 2008 meeting.

257. On April 28, 2008, HCPF reimbursed the federal government for the \$3.3 million in overdrawn SMIB funds for FY 08.

Bartholomew Complaint

258. When John Bartholomew left the April 24, 2008 meeting, he was upset about Complainant’s conduct. He went to Soliman’s office and they discussed Complainant.

259. Bartholomew then went to his office and drafted a memorandum to Smuda regarding the meeting. Block, who reports to Bartholomew, then came to his office. Bartholomew asked Block to review his memo to make sure it was accurate.

260. Block read the memo and made some amendments.

261. Block told Bartholomew that Block’s own statement about “making the auditors work for it” had been the trigger for Complainant not agreeing to create two separate Excel spreadsheets and indicating she would not lie to the auditors.

262. Bartholomew sent the memo to Smuda. The memo opened by stating that during the April 24 meeting, "Ms. Maynard was extremely combative, accusatory to all participants, and insubordinate towards Mr. Soliman."
263. Bartholomew stated that from the very beginning of the meeting, Complainant challenged the methodology proposed by Soliman to solve the missed payment problem, and "refused to accept the proposed solution, which had been agreed upon by both Accounting and Budget staff. [She refused] to accept multiple explanations. Ultimately, after at least 20 minutes of discussion, Ms. Maynard stated that because she wasn't involved, her opinion wasn't relevant and that we could move on. This delay caused a large amount of consternation among the participants and ultimately had absolutely no bearing on the solution."
264. Bartholomew also stated that when the meeting moved to the SMIB overdraw issue, Complainant "initially refused to provide an overview of the topics and only did so after multiple requests from the Controller." He also stated, "To ensure that the documentation was specific to the periods in which payment was being made, Budget staff asked that the Excel workbooks which contained the supporting documentation be separated into the current fiscal year and the prior fiscal years. Ms. Maynard immediately took the point of view that she was being asked to hide information to prevent possible audit findings. Further, she accused the Controller of trying to make her lie to the auditors and stated that she would not separate the components of her workbook. Obfuscating information in the manner which she implied was clearly not the intention of either my staff or the Controller and I felt personally insulted."
265. Bartholomew further stated that after Soliman requested a summary of the reconciled amounts owed to the federal government, Complainant "stated that she would not provide the additional information because she had already provided enough information in her workbooks. Despite several additional efforts by the Controller, Ms. Maynard continued to refuse to agree to do the additional work which the Controller requested."

Smuda Investigation of April 24, 2008 Meeting

266. HR Director Smuda conducted the investigation into Bartholomew's complaint against Complainant. She used the same method of investigation as the prior resulting in Complainant's demotion. In each of her interviews, Smuda opened by stating, "You're here because of a violence in the workplace investigation or hostile work environment investigation."
267. On April 28, 2008, Smuda interviewed Bartholomew. He stated, "When we asked her, we really just needed to split into fiscal years, she accused the controller that he was making her lie to the auditors. She specifically said,

'I'm not going to lie to the auditors if I know it not to be true.'" Bartholomew continued, "And nowhere were we talking about audit findings or auditors or audit records or anything."

268. Bartholomew told Smuda that Complainant's data was in the form of a one hundred page document, and that she had refused Soliman's request to create a summary document.

269. At the time Bartholomew gave this statement to Smuda, he knew the following: Soliman had asked for summary pages to document only the FY 07/08 \$3.2 amount that was being credited to the federal government; Complainant had sent a summary of the FY 07/08 amounts due on April 16 to Soliman, Bartholomew, Evans, and others; and, the April 16 summary contained monthly amounts totaling the \$3.2 million, on four pages.

270. Bartholomew stated of Complainant's refusal to create the summary, "She literally went on a rant" and "confrontational." He said he felt insulted by her tone and by her implication the others were "trying to make her obfuscate or confuse the truth or hide the truth."

271. On April 28, 2008, Smuda interviewed Juanita Pacheco. Pacheco informed Smuda that from the beginning of the meeting, Complainant talked "right over" Soliman, gave no input to the discussion of the overpayment issue, behaved as though she wanted to argue about everything, and was insubordinate to Soliman. Pacheco stated that Soliman asked Complainant to "split out" the FY 07/08 SMIB amount due from the prior years, and that Complainant responded by stating to Soliman, "I'm not going to hide anything, if the auditors ask me, I'm not hiding anything." Pacheco told Smuda, "no one was trying to hide anything."

272. Pacheco told Smuda that "it was obvious she didn't want to be in there participating," and that Complainant "did not want to" prepare the JV for the missed payment issue. In fact, Complainant had asked at the meeting who would be preparing the JV, and she did not state that she did not want to do it. Pacheco had volunteered to do it.

273. Pacheco stated that during the meeting, Complainant had put her hand up in front of Pacheco's face in a gesture for her to be quiet.

274. Smuda asked Pacheco if she felt the meeting was a hostile work environment. Pacheco responded yes.

275. Smuda interviewed Sung Hong on April 28, 2008. Hong stated, "Adel asked Annmarie to isolate the file for 2008," because they were preparing the file to repay the federal government for only FY 07/08. She said that Complainant accused Soliman and the others at the meeting of hiding

information, of lying. Hong said she had no idea why Complainant said that, and that Complainant was insubordinate towards Soliman in the meeting.

276. On April 29, 2008, Smuda interviewed Block. Block stated that there were two points in the meeting where Complainant became "combative." He indicated that after Complainant heard their plan to resolve the missed payment issue, she "basically just went off on why it wouldn't work. You know, she was argumentative."

277. Block explained the SMIB issue at length to Smuda, focusing on the intent to pay back the current fiscal year now, and the intent to pay back prior years through a supplemental appropriation, subject to the approval of the Governor's Office of State Planning and Budgeting and the legislature. He stated that he asked Complainant to create two separate Excel workbooks, containing FY 07/08 and prior years owed under SMIB. He continued, "And Annmarie immediately accused me, and Adel, who had agreed with me, that we were trying to get her to lie to auditors; that we were trying to hide something."

278. Block told Smuda, "I think the insinuation was that we . . . were going to try to sweep this under the rug until such point that auditors showed up and say, "Oh, hey, you guys owe the Feds lots of money. And I think she took that as we were going to intentionally ask her to try to hide something from them. And that was not what I intended. It wasn't what anyone had said. . . ." In fact, Block and Pacheco had discussed precisely this issue: whether the auditors would discover the amounts owed from previous years while reviewing the agency's FY 07/08 payment on the SMIB overdraw. It was this discussion which led Complainant to state that she would not create a separate Excel workbook.

279. During the meeting, Block explained to Smuda, "it's not the sort of thing that we can just announce to the world and, . . . we owe the Feds lots of money. It has to go through the official governor's budget office process. The department has to discuss it and agree that it's going to repay this money without the Feds coming and asking for it. It has to go through our department's management. It has to go through the governor's office. Then it has to go to the Joint Budget Committee." Block said, "Jennifer Evans, our division director in charge of – our office director in charge of accounting and the controller's division, is mostly in agreement that we are prepared to make the payment for the current fiscal year."

280. Block told Smuda that when Soliman asked for a summary document, showing how the \$3.2 million figure had been reached, "she flat-out refused to do any other work."

281. Block summarized by stating Complainant had been “absolutely insubordinate” towards Soliman at the meeting, and had been argumentative with him [Block], Pacheco, Bartholomew, and Hung. He stated that the meeting was a hostile work environment, “probably the most hostile environment I’d ever been in, in terms of . . . an internal meeting.” He and Complainant “have worked very closely on a lot of projects, and we do generally work well together.” “I’ve never had problems working with her in the past. And this meeting was a complete departure from my other work experiences with her.”
282. At the end of the interview, Block told Smuda that he had said something to Juanita about not making it easy for the auditors, not just handing it to them on a silver platter, and that the way it was phrased came out wrong. He said, “In terms of timing, I think this is after the accusations and all that, after it had calmed down a little bit. But I did say it.”
283. At the time Block made this statement to Smuda, he knew that he had made these statements immediately prior to Complainant’s refusal to create a second Excel workbook and her statement about not lying to the auditors. Block had told Bartholomew immediately after the meeting that his statements had prompted Complainant to say she would not lie to the auditors.
284. Block told Smuda that if he had the chance to go back and restate the issue, it “would be, Let’s do this on our time line, not theirs.” He explained to Smuda, “it is the executive branch’s decision on when do we want to make that payment, not the auditors.” “We definitely don’t want the auditors to come in here and say, ‘You guys need to start making this payment back.’ We know it. Jennifer Evans knows it. John Bartholomew knows it. You know, it’s on the agenda.”
285. Smuda interviewed Soliman on April 29, 2008. Soliman stated that Complainant refused to provide an oral overview of the SMIB issue, refused to create a summary of the SMIB data, and insulted him and Bartholomew by accusing them of asking her to lie. Soliman also told Smuda that Complainant put her hand up in Pacheco’s face to gesture for her to be quiet.
286. On April 29, 2008, Smuda interviewed Complainant. Smuda opened the meeting by stating, “Annmarie, this is a workplace violence investigation or a hostile work environment investigation. . . . The questions you will be asked are based on an incident which occurred on April 24, 2008. . . . This alleged hostile work environment occurred when an employee was expected to perform a task which then escalated. . . So I have a series of six questions, okay?”
287. Complainant responded, “Well, I would like to know what the incident is, because I hadn’t – I have no idea what you’re talking about, literally.” Smuda

responded that the questions should answer Complainant's question. Smuda asked, "Did you speak rudely, combative, or in an accusatory tone in that meeting?" Complainant stated, "No, I did not."

288. Smuda then asked if Complainant agreed with the methodology used to make the payments to SMIB. Complainant responded that she "did the recasting of the SMIB's, so, yeah, I agreed with that. And the other part, I wasn't sure what they were saying that they were going to do. I'm not doing the entry, and no, I didn't disagree with it. My statement was, I wasn't sure – I wasn't following what they were saying, and that when they did the entry, then we would see how it falls out, and we had plenty of time if it didn't fall out the way that they wanted it to."

289. Smuda asked, "Did you act in an insubordinate manner to any other person in that meeting?" Complainant responded, "Absolutely not. And who was I supposed to act insubordinate to?" Smuda responded that the documentation she has states "that you flat-out disregarded a direction that was given to you." Complainant asks what direction had been disregarded. Smuda stated, "The direction to separate fiscal years so that the payment could be made in '07/'08, which was not a problem, . . . and prior years and making a summary for those separations in order to – for the budget office to go back to JBC and ask for the money to allocate for those payments."

290. Complainant explained that the reports "were separated," and that, "I didn't say I wouldn't do a summary, the summary was already done. And what I said to Adel in the end of the meeting was that, let me give you the information and we can make whatever changes that you feel are necessary." Complainant explained that she had given Soliman all the documents he needed the next morning, and he had approved them all.

291. Smuda asked, "Did you accuse the controller of hiding or preparing illegal transactions for the accounting office or that suggested actions were inappropriate?" Complainant responded, "I did not." Smuda asked if she had said she was uncomfortable with the request Soliman was making to separate the documents. Complainant answered, "No, the documents were already separated."

292. Smuda asked, "Did you create a hostile work environment on April 24, 2008?" Complainant responded, "No, I did not." Smuda asked, "Did you get angry in that meeting?" Complainant responds, "No, I did not."

293. Smuda asked Complainant if she had anything to add, and Complainant responded that she didn't think the meeting was "any big deal."

294. At the end of the meeting, Complainant offered to provide Smuda with the JV's she prepared, which were signed by Soliman on April 25. Complainant

returned later that day with the summary, explaining to Smuda her four-page summary document demonstrating how the data adds up to \$3.2 million for fiscal year 07/08.

April 24, 2008 Needs Improvement Evaluation

295. On April 28, 2008, Soliman gave Complainant an annual performance evaluation at a Needs Improvement level. Complainant signed the box indicating she disagreed with the evaluation, upon receipt. The evaluation rated her a level 1.00, Needs Improvement, in Job Knowledge, Communication and Privacy (HIPAA), Customer Service and Interpersonal Skills, Accountability, and Training.

296. Complainant asked Soliman to discuss the evaluation with him, but he refused to do so.

297. Soliman retired from HCPF at the close of April 2008. He remained at HCPF on a contract basis through July 2008 to close the books.

Smuda Email to Henneberry Regarding Evaluation

298. In April 2008, Henneberry requested from Smuda the number of Needs Improvement evaluations given in 2008. Smuda responded on May 1, 2008, "I think we have 1 Needs Improvement overall score. Anmarie Maynard."

299. Henneberry responded, "Uh oh. Or as Brittany Spears would say, 'oops, I did it again.' Jh." Smuda responded, "LOL." [laugh out loud]

Employee of the Year Nomination for Block

300. On April 29, 2008, Bartholomew nominated Josh Block to be Employee of the Year.

Smuda Report on Violence in the Workplace Investigation

301. On May 5, 2008, Smuda issued her final report, finding that Complainant had created a hostile work environment at the April 24, 2008 meeting. The findings included: Complainant was insubordinate, unprofessional, and accused the Controller and the Budget Director of trying to make her lie by hiding accounting transactions that may have been discovered by the auditors; Complainant refused to break up the SMIB spreadsheet into different fiscal years and accused Soliman and others of trying to cover up the SMIB error; Complainant placed her hand up in front of Pacheco to gesture for her to be quiet; and, Complainant was very aggressive, rude, and unprofessional to others in the meeting.

302. The report noted that Complainant denied all of the allegations, and that Complainant stated she had complied with the direction Mr. Soliman gave her and created the journal vouchers the following day. The report did not corroborate Complainant's statement by confirming that she did provide the JV's to Soliman on April 25, 2008, and that he signed them.

303. The report recommended that Complainant meet with Evans in a pre-disciplinary meeting, to determine if disciplinary action was needed.

May 9, 2008 Grievance of Evaluation and Whistleblower Claim

304. On May 9, 2008, Complainant filed a grievance of the 2008 annual performance evaluation with Evans, and copied Henneberry and Smuda. The grievance contained a claim of retaliation under the Colorado State Employee Protection Act (whistleblower act) and a claim of hostile work environment. Complainant stated that the 2008 evaluation was "a continuation of an abusive, hostile and illegal work environment and is in retaliation for my making claims of discrimination, filing prior grievances and bringing forward fiscal irregularities." Complainant asserted the evaluation was part of a plan to terminate her employment in an unjust and retaliatory fashion.

305. Complainant stated, "I am also putting you on notice that this evaluation was given to me shortly after a meeting that I attended concerning the approximately \$8 million dollars that is owed to the federal government because of accounting irregularities that I discovered. In that meeting, which Mr. Soliman attended, there was an indication that I should modify some data reporting because my presentation could alert auditors to certain issues. I indicated in that meeting that I would not alter the data, or do anything of a dishonest nature. Following that meeting and on the same day that I was given this unjust evaluation, I was called into Janice Smuda's office and questioned about the meeting and my participation in that meeting. I suggest to you that my refusal to engage in potentially dishonest or questionable behavior is a protected right that I have. It is also the correct course of action for an employee of the state."

306. Complainant stated that Smuda had refused to inform her who had reported Complainant and what information had been reported about her conduct at the April 24 meeting. She stated that being investigated in this manner created a "hostile, abusive and threatening environment and that actions seem to be coordinated. As a result of this perception I am also grieving the entire work environment and my apparent targeting."

307. Complainant asserted that she was protected under the whistleblower statute "because of my reporting of fiscal irregularities." She sought as remedies: modification of her evaluation by raising all 1.00's to at least a level

2.00 and by raising the 1.00 in Job Knowledge to 2.70; complete information about why Smuda was investigating her, including who made the complaint, what she allegedly had done, and an end to the hostile and abusive environment; attorney fees paid to defend herself; an outside mediator to meet with the new Controller, herself, and Evans, "to work out appropriate rules" so that "a positive direction can occur."

May 16, 2008 Meeting with Evans on Grievance of 2008 Performance Evaluation

308. On May 16, 2008, Evans, Complainant, and her attorney met to discuss the grievance of Complainant's 2008 performance evaluation. They discussed each rating under the level 2.00.

309. In addition, Complainant and her attorney explained that Complainant had performed work demonstrating that HCPF had overcharged the federal government for its work administering the Children's Health Program, and that although she had reported this information to Soliman and others in the Department since his arrival, nothing had been done in response to this information. Complainant explained that she felt Soliman had retaliated against her for raising this issue by targeting her for demotion and ultimate termination.

310. Evans stated she had never heard of the CBHP 10% overdraw issue and requested information from Complainant.

311. Evans explained that due to the pending investigation of the April 24, 2008 complaint against Complainant, she preferred to defer a discussion of her whistleblower and hostile work environment claim until the completion of Smuda's report.

312. Evans looked into the CBHP issue, educating herself about the regulations, talking with federal regulators, and others at HCPF. She determined that there were several ways to interpret the 10% cap regulations, that the federal agency with oversight did not have a clear policy on the issue, and that it was unclear whether HCPF had overdrawn funds.

Evans' May 19, 2008 Step 1 Decision on Grievance of 2008 Performance Evaluation

313. On May 19, 2008, Evans issued a memo partially granting Complainant's grievance request for a modification of her 2008 evaluation. Evans amended the level 1.00 scores in Training and Communication and Privacy to 1.5. Evans' memo was silent on the issue of the 1.00 rating in Job Knowledge, thereby denying that remedy. Evans' revised evaluation raised Complainant's overall 2008 score to 156.25, Successful Performer.

314. Evans inadvertently omitted the required notice to Complainant that she could proceed to Step 2 of the grievance process.

Evans Step 1 Decision on Whistleblower Grievance

315. On May 23, 2008, Evans issued a written response to Complainant's whistleblower and retaliation grievance. Regarding the alleged unfair treatment by Soliman, Evans determined that since he had retired, this should no longer be a concern. However, "Recognizing that you are concerned about the potential of lasting impressions that may or may not be present, I accept your proposed remedy to engage an outside mediator to meet with the Accounting team to help address the work environment."

316. Regarding the claim she was being retaliated against due to the events of the April 24 meeting, Evans indicated she had received the report on the April 24, 2008 meeting, and would be scheduling a meeting with Complainant soon regarding that report. Evans provided appeal rights to the State Personnel Board.

317. On May 28, 2008, Complainant emailed Evans a two-page memo outlining the CBHP 10% Administrative Expenditure Limitations, and her calculations on how HCPF had exceeded that 10% draw. Complainant explained that the error that took place in drawing additional federal money between March 2004 and June 2006 was due to entries reflecting more than the actual administrative expenditures.

Complainant's Step 2 Grievance

318. Evans' May 28 Step 1 decision crossed paths in the mail with Complainant's filing of a Step 2 written grievance, filed with Henneberry. Complainant asserted that the amended 2008 evaluation was inadequate and demonstrated her "targeting as a result of whistleblowing activity" as well as other protected activities. She indicated the low evaluation was part of a pattern of creating a hostile work environment and retaliation.

319. Complainant also noted that the May 19, 2008 grievance decision had not addressed the second half of her grievance, and indicated she was moving to step 2 of the grievance process on her whistleblower and retaliation claims.

320. On May 23, 2008, Henneberry emailed Complainant, confirming receipt and stating she would act on it next week.

May 30, 2008 Step 2 Meeting with Henneberry Regarding 2008 Evaluation

321. On May 30, 2008, Henneberry, Smuda, Complainant, and her attorney met regarding Step 2 of her May 9, 2008 grievance. At the outset of the meeting, the parties agreed to bifurcate the issues into two separate Step 2 meetings, because Henneberry had not planned to address the whistleblower, retaliation, and hostile work environment claim on that date.
322. The parties discussed Complainant's 2008 evaluation. Complainant spoke extensively about several projects she had worked on during the evaluation period, including: she discovered that the pre-natal program would be able to get additional federal money on some expenditures; she initiated a HCPF collection pilot program under which she found moneys that had not been collected, and collected them; she cleared up an audit finding in the MMIS reconciliation, which was not her area; she identified the SMIB overpayment issue and worked with Block and others to calculate the accurate amount due.
323. Complainant informed Henneberry that Soliman had a history of refusing to provide a forum in which Complainant could resolve interpersonal issues with others in the office, and that in November 2007 she had requested to mediate with Soliman to address their communication issues. Soliman had refused, stating, "It's too late."
324. At the May 30 meeting, Complainant's attorney handed Henneberry a document entitled, "Outline of Critical Events for Whistleblowing and Fiscal Mismanagement and Retaliation." The document listed the times Complainant had discussed SMIB and CBHP overdrawn funds with Soliman, Esgar, Evans, and others from 2006 through the present. It indicated that Soliman always responded to discussions of CBHP in an agitated manner.
325. The Outline references Complainant's April 16 memo on the SMIB overdrawn funds in the amount of approximately \$8 million, and the April 24, 2008 meeting to address it. Regarding the April 24 meeting, the Outline states, "In the course of the discussions it was suggested Maynard alter the electronic workbook . . . she had produced so that auditors would not be able to tell that money had not been repaid back to for prior years. Maynard objected indicating that it would be concealing information or giving misleading information and that she didn't want to manipulate the workbook product."
326. The Outline then notes that on April 25, Complainant completed the SMIB tasks and submitted the JV's and supporting documents to Soliman; on April 29, Soliman gave Complainant an overall "Needs Improvement" evaluation; on April 29, Complainant was called into HR meeting and told she was being investigated for workplace violence in meeting of April 24, 2008; and on May

28, Complainant was “served Notice of Rule 6-10 meeting for May 30, 2008 from Evans.”

327. At the close of the meeting, Henneberry stated, “I still need to review the second part of your grievance and we need to chat about that further.”

328. Henneberry read the Outline of Critical Events for Whistleblowing on Fiscal Mismanagement and Retaliation. She did not follow up by attempting to verify the information contained in the document.

329. On June 2, 2008, Complainant’s attorney sent a letter to Henneberry, informing her that Complainant had a tape recording of the April 24 meeting which proves that the allegations against her arising from that meeting are false. He also stated, “The behavior of these high ranking officials who have made improper and false allegations demonstrates the severity of the hostile and abusive work environment.” He informed Henneberry that the work environment had become so hostile as to be a constructive discharge situation.

330. He continued, “She believes that this adverse employment action is motivated by her reporting of fiscal irregularities and her filing of discrimination charges against the Department.” He also asserted that if she had been male, the inaccurate charge of workplace violence would not have been made. He indicated that he and his client would elaborate on these issues when they meet for Step 2 of the grievance process.

331. Henneberry read the June 2, 2008 letter.

Henneberry’s June 4, 2008 Step 2 Grievance Responses

332. Complainant’s attorney called Henneberry’s office to schedule the Step 2 meeting on the whistleblower grievance. Henneberry, through her assistant, declined to meet with him and Complainant.

333. On June 4, 2008, Henneberry sent Complainant a letter denying her whistleblower and hostile work environment grievance. Henneberry stated that she believed this claim had been adequately addressed by Evans in her May 23, 2008 grievance response. In addition, Henneberry stated, “Last fall the Department contracted with human resources professionals to conduct an independent investigation of your allegations of workplace violence. Two HR specialists conducted interviews with every individual in the Controller’s Division, which at that time was led by Adel Soliman. None of the employees, other than yourself, stated they had conflict or negative interactions with Adel Soliman. Five employees stated they did not like to work with you, and mentioned specific examples of difficult interactions with you. Twice in the past two years, you have been investigated yourself for hostile behavior and

workplace violence, and you are currently on administrative leave due to the most recent complaint and investigation.”

334. Prior to issuing the June 4 denial of Complainant’s grievance, Henneberry did not listen to the tape recording of the April 24 meeting.
335. On June 4, 2008 Henneberry sent Complainant a memo denying her Step 2 grievance response on the 2008 performance evaluation, retaining the Job Knowledge rating at 1.00, Needs Improvement. Henneberry stated she had reviewed the original evaluation; Complainant’s May 9 grievance; the amended evaluation; Evans’ May 19 Step 1 decision; and the comments made by Complainant’s attorney at the May 30 meeting, including the information she had received at the meeting (Outline of Critical Events for Whistleblowing on Fiscal Mismanagement and Retaliation).
336. Prior to issuing her decision, Henneberry did not verify with Evans or Soliman whether Complainant had performed the extra duties Complainant had discussed in the grievance meeting. Henneberry provided Complainant with appeal rights to the State Personnel Board.
337. Complainant appealed both of Henneberry’s decisions on her grievance. She claimed retaliation and constructive discharge under the anti-discrimination act; violation of the whistleblower act; and violation of the grievance rules by failing to allow for a Step 2 process on her whistleblower grievance.

Delegation of Appointing Authority

338. On May 21, 2008, Henneberry emailed Evans indicating she had received Smuda’s investigative report on the April 24, 2008 meeting, and was delegating authority to Evans to conduct an R-6-10 meeting to determine if disciplinary action was needed. On May 27, 2008, Evans confirmed this email.
339. On May 28, 2008, Gregory Tanner, the new Controller, sent Evans a memo delegating appointing authority to Evans on all ongoing personnel issues in the Controller Division that preceded his appointment.

Pre-disciplinary Process Preceding Complainant’s Termination

340. On May 27, 2008, Evans hand delivered a letter to Complainant, noticing a pre-disciplinary meeting on May 30, 2008 regarding the “possible need to administer disciplinary action based on a Workplace Violence and/or a Hostile Workplace Investigation.”

341. On May 30, 2008, Evans hand delivered a copy of Smuda's investigative report of the April 24, 2008 meeting to Complainant. Evans informed Complainant in her cover letter that she could take administrative leave to review the report, prior to their pre-disciplinary meeting that afternoon.
342. On May 30, 2008, Evans, Smuda, Complainant, and her attorney attended the R-6-10 meeting. Complainant's attorney asked for a copy of the written delegation of appointing authority to Evans. Evans indicated she did not have a copy of it, and that her computer was down due to a move. Complainant's attorney brought out the delegation of appointing authority from Henneberry to Evans, and asked Evans if she was a division director. She responded that she was a deputy executive director, and that in general, division directors report to office directors such as herself. The Controller was one such division director, she said.
343. Complainant's attorney asked for copies of the tape recordings of the witness interviews from Smuda's investigation. Smuda responded that he could not have them at that time, and that they would be provided through their attorney; Evans confirmed this.
344. Complainant's attorney asked for confirmation of whether there were issues other than the April 24, 2008 meeting that were the subject of potential disciplinary action. Evans confirmed that there were none.
345. Complainant explained to Evans that she had not refused to separate information into fiscal years, and that the April 16 summary document attached to her email to Soliman, Evans, and others, contained the information Soliman had requested. Complainant explained, "we spent time during that conversation going through those [April 16] documents. . . It was at his computer." She explained, "he asked for it to be broken down by FY '07/'08," and that document already existed. And we went through it."
346. Evans had received the April 16 summary document when it was sent.
347. Complainant then explained that Soliman had requested the JV's for the \$3.2 million, that she had prepared them the next day, that Soliman had approved and signed them that day, and that she [Complainant] had given copies to Smuda.
348. Evans asked Complainant if she had stated in the meeting that she would not lie. Complainant's counsel stated, "The context of that is Juanita made a statement about breaking up the electronic work product so if the auditors looked at the electronic work product, they would not be able to tell they hadn't paid the back years. That was a statement that she made in which it raised ethical issues concerning hiding information from auditors. And my client did say in the meeting that if asked, she wouldn't lie, which is the

correct ethical approach under the governmental ethics standards.” Evans responded, “There is no doubt about that. There is no doubt about that.”

349. Complainant’s attorney explained that she had tape recorded the meeting, as a means of protecting herself from false allegations against her, which she felt had occurred in the past. Complainant and her attorney stated that she had not been insubordinate, rude, unprofessional, or angry at any time in the meeting, and that the tape would confirm this. Complainant’s counsel informed Evans that the witness statements reveal that that “people here are overstating, exaggerating, not being accurate, we think that walk the plank on this one.”

350. Complainant’s counsel stated, “I listened to the tape today, and I can tell you that the statement about concealing information from auditors was made, and that’s the context in which Annmarie said, I won’t lie about this.”

351. Evans responded, “Okay. Try as I might not to get into the work issues when we are trying to do Human Resources stuff, I just want to say that unequivocally, Annmarie, that I would very much appreciate that position if someone suggested that we not disclose something. That is absolutely not the mission or the approach that the agency is taking at this time. So you should not consider yourself to have done anything contrary to what the department wants you to do, to say, hey, we need to be transparent, because we do.”

352. Evans continued, “Now, the issue here, though, is not the substance of what was said, but the manner in which it was said. And there are certainly ways of saying things like that that are more productive in the workplace and less productive in the workplace in terms of creating an environment where people can work as a team and provide their best performance.”

353. At the meeting, Complainant made it clear that the assertion she had raised her hand in front of Pacheco to make her stop talking was a fabrication. She explained that Pacheco had accidentally turned a page of her April 16, 2008 SMIB summary and nearly hit her in the face, saying, “Sorry,” as she did so. She indicated that the tape recording would demonstrate that they both laughed as this occurred.

354. The parties agreed to continue the meeting to another day, so that Complainant’s counsel could prepare a written response to the report. Evans asked for a copy of the tape of the April 24 meeting, and stated that she understood Complainant’s counsel may want to trade that tape for the recordings of the witness interviews by Smuda.

355. Complainant’s attorney gave Evans a document written by Complainant, relating her recollection of the meeting.

356. All parties agreed that Complainant should be placed on paid administrative leave at that time, and Evans gave Complainant a letter making this official.

Evans Reviews the Tape

357. The R-6-10 meeting reconvened on Monday, June 9, 2008. Complainant's attorney pointed out that the tape recordings and transcripts of the witness statements used by Smuda in her investigation had not been produced. He also stated that the tape recording of the April 24, 2008 meeting had been delivered to the settlement judge at the State Personnel Board on June 6, and was available for pick-up.

358. Early during the week of June 9, Evans received a copy of the tape recording of the April 24, 2008 meeting and listened to it during a business trip that week.

359. Evans did not authorize release to Complainant of the transcripts or tape recordings of witness interviews regarding the April 24 meeting, prior to Complainant's termination.

Complainant's Release of Tape Recording to the Press

360. In mid-June, Complainant notified Channel 9 News that she felt she was being targeted for termination by HCPF in retaliation for the events at the April 24 meeting. She provided a reporter with a copy of the recording of the meeting.

361. On June 25, 2008, HCPF's Public Information Officer, Joanne Lindsay, spoke with Henneberry about press inquires from 9 News regarding Complainant. Henneberry was out of town at the time, and indicated that Lindsay and Evans needed to confer with the Attorney General's office.

362. Evans was informed that 9 News reporters had already spoken with a member of the Legislative Auditing Committee (LAC) about the SMIB overdraw issue and the April 24 meeting.

363. On June 26, 2008, Evans met with that LAC member in his office. He invited HCPF leaders to testify before the committee at its next meeting, on February 14, 2008, regarding the SMIB overdraw issue and the events at the April 24, 2008 meeting.

364. HCPF managers were concerned about talking to the press about Complainant, because they considered personnel matters to be confidential

and because of the pendency of the disciplinary action process. Therefore, they declined to be interviewed until Henneberry returned from out of town.

365. The following Monday morning, June 30, a 9News reporter waited for Henneberry in the alley outside her garage, and stopped her as she was preparing to return to the office. Henneberry had not consented to an interview.

366. The reporter asked Henneberry questions about whether the Department was attempting to cover up erroneous accounting entries and to avoid repaying federal funds.

367. The 9News included Block's statements about "making the auditors work for it." The report suggested that HCPF had intended to hide information from auditors regarding the pre-FY 08 SMIB overdrawn amounts of \$4 million.

Termination

368. After listening to the tape recording, Evans discussed the April 24, 2008 meeting with Block and Bartholomew. Bartholomew was still unhappy about the meeting.

369. Evans reviewed the interview transcripts of those who attended the April 24, 2008 meeting. She also reviewed Complainant's personnel file.

370. Evans testified that she concluded Complainant's conduct at the April 24 meeting violated the workplace violence policy because she determined that Complainant's conduct at the meeting was "disruptive to our department's ability to get its work done." She also testified that termination was the right response because "nothing seemed to be working or sinking in. I felt we were not in a position to do rehabilitation."

371. Evans informed Henneberry of her intent to terminate Complainant. Henneberry approved the decision.

372. On June 30, 2008, Evans sent a termination letter to Complainant. In the letter, Evans stated that in reaching her decision, she had reviewed the information presented by Complainant and her attorney at the Rule 6-10 meetings, the Smuda investigative report of the April 24 meeting, the transcripts of the witness interviews conducted by Smuda for her report, the tape recording of the meeting, Complainant's written recollection of the meeting, and Complainant's personnel file. Evans also indicated she had spoken with two participants in the meeting.

373. As grounds for the termination, the letter states, "In addition to the actions described in the workplace violence investigation, there are several items in

your personnel file that indicate a pattern of engaging in disruptive behavior and failure to properly perform duties which support the decision to terminate your employment as an appropriate result of progressive discipline. Some of the items reviewed are described below. . .” The letter then lists Complainant’s performance evaluations, the November 2006 corrective action for the violation of the workplace violence policy; the March 2007 demotion violation of the workplace violence policy; the September 2007 corrective action for the late payment; the November 2007 corrective action for missing the meeting; and the allegation of workplace violence policy at the April 24, 2008 meeting.

374. Complainant appealed the termination, asserting retaliation and sex discrimination under the anti-discrimination act, retaliation for filing grievances and appeals with the personnel board; and violation of the whistleblower act.

375. Between mid-May 2008, when Evans listened to the tape of the April 24 meeting, and July 2008, Evans did not express concern to Block, Bartholomew, or Pacheco about the inappropriateness of the statements made at the meeting or the inaccuracy of their statements about it to Smuda.

376. Henneberry listened to the tape recording of the April 24 meeting over the July 4, 2008 weekend. After hearing it, she was concerned about the inappropriateness of Block’s statements. She met with Bartholomew and they decided to issue Block a corrective action.

377. On July 14, 2008, Henneberry testified before the Legislative Audit Committee. She informed the Committee members that action had been taken against Block for his statements made at the April 24 meeting. Block apologized to the LAC for his statements made at the April 24, 2008 meeting. He testified, “During the events which precipitated this hearing, a statement of mine was used to imply that the Department attempted to cover-up the overdrawing of federal funds related to this issue. While that was not my intention, it is clear that the words I chose carry that implication. As a financial professional in a state department, I have a responsibility to ensure that taxpayer dollars, both state and federal, are used appropriately at all times. Any statement that might imply that we are attempting to hide something from auditors, or that we are attempting to conceal any error, is inexcusable in any context. For my remarks, I am truly sorry.”

378. On July 18, 2008, Bartholomew issued Block a corrective action for his statements made at the April 24, 2008 meeting.

379. Evans was generally not credible. Her testimony on direct examination was contradicted by her testimony on cross examination and in deposition on several critical factual issues.

380. Soliman, Bartholomew, Pacheco, Block, and Hong were not credible regarding Complainant's conduct at the April 24, 2008 meeting in their statements to Smuda, and in their sworn testimony at hearing. The tape recording of the April 24 meeting demonstrated their version of Complainant's conduct at the meeting to be a coordinated fabrication. The degree to which these witnesses' testimony regarding April 24 lacked credibility casts doubt on the entirety of their testimony.

381. Soliman testified at hearing that at the April 24 meeting, Complainant "became violent" when she raised her hand to Pacheco's face, and that he was "shocked" when this occurred. This testimony lacked any veracity.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12B, 4 CCR 801, and generally includes:

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

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Demotion

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

Respondent has not met its burden of proving by preponderant evidence

that Complainant created a hostile work environment for Terri Davis on February 8, 2007, or that Complainant violated the terms of the November 2006 Corrective Action.

On February 8, 2007, Complainant acted appropriately as a supervisor in taking the time necessary to assist her subordinate with the rebill issue. She discussed the situation with Teshineh; she then went to the IT Contract Monitoring staffer to confirm that it was appropriate for the provider to be entered into COFRS; she obtained the W-9 for the provider; she checked back in with Teshineh to ask if he wanted to close the loop with Davis; and, when he declined, she went to Davis's cubicle to complete the transaction and resolve the issue.

When Davis saw Complainant at her cubicle, informing her that it was appropriate for her to add the provider to COFRS, Davis responded in a hostile manner by interrupting Complainant and refusing to listen to her explanation.

Davis's response to Complainant was unprofessional, unproductive, and rude. Had Davis permitted Complainant to complete her thought process, Davis would have learned that Complainant had already spoken to an IT Contracts Monitoring staffer, obtained the requisite W-9 form for the provider, and that it was appropriate to add the provider to COFRS immediately. Instead, Davis's hostility towards Complainant was such that Davis never even learned on February 8 that Complainant had performed these two tasks. In her February 8 email complaint, Davis stated, "I asked her [Complainant] to speak with ITCOMMON and develop a process so that I will know what to do . . . [in rebill situations]."

Davis's hostile behavior on February 8 instigated a conflict. It is not surprising that an individual in Complainant's situation on that day, having just taken twenty minutes to fully resolve an issue, would have been taken aback, and would have asked Davis to stop using an aggressive tone of voice and allow her to finish speaking. When Davis continued to refuse to listen to Complainant, Complainant appropriately commented that Davis's conduct was bordering on insubordination. Complainant's comment did not constitute a veiled threat to terminate Davis' employment or an attempt to intimidate Davis. Complainant was correct: Davis had a professional duty to stop talking, stop accusing "Accounting" of not doing its job, and to listen to what Complainant had to say.

Complainant's documented history of problems with interpersonal communication and supervision is noted. There is no question that from the outset of her appointment as Controller II, Complainant had a difficult time supervising those whose tenure long surpassed her own. In addition, in Esgar's December 2006 denial of Complainant's grievance of the November 2006 corrective action, Esgar had noted that she had personally witnessed Complainant treating others with disrespect in meetings, and that staff had complained about Complainant's lack of constructive leadership. However, the

February 8 exchange with Davis did not constitute grounds to demote Complainant.

ii. **The Discipline Imposed was Arbitrary and Capricious**

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing 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; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising 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 Education, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent failed to give candid and honest consideration to all of the evidence in imposing the three-level demotion on Complainant. IT Division Director Wagner's explanation of the problems over the prior two years between Accounting and IT, including lack of leadership and clarity regarding Davis's COFRS duties, provides a critical historical context in which to view the events of February 8. Davis was upset about having to take on what she felt were extra duties imposed by the Accounting section's short staffing. Her emotional response prompted her to refuse to listen to Complainant; the fact that Davis never knew Complainant had conferred with the IT Contracts Monitoring staffer corroborates Complainant's statement that Davis refused to permit her to speak. Soliman overlooked this important historical context, and Davis's unprofessional and rude refusal to allow Complainant to talk to her, in violation of *Lawley*.

In addition, both Wagner and Reinboldt confirmed that either a W-9 form or an email would suffice to provide Davis with sufficient documentation to support her entry of the provider into COFRS. Their statements demonstrate that Davis's account of the need for a new written procedure lacks credibility. Moreover, their statements demonstrate that everything Complainant did on February 8 was appropriate. If Davis had permitted Complainant to fully explain what she had done to permit the rebill to occur, no conflict would have occurred. Soliman ignored this important mitigating information, in violation of *Lawley*.

Lastly, neither Soliman nor Smuda attempted to verify Complainant's statement that she had talked to the IT staffer prior to approaching Davis with the rebill resolution. This omission is symptomatic of their overarching failure to ascertain what actually occurred on February 8, from the perspective of both Davis and Complainant.

No reasonable appointing authority in Soliman's position would have demoted Complainant at all, much less from Assistant Controller three levels down to an Accountant III, on the basis of the events of February 8, 2007. *Lawley, supra*. Hence, the decision to demote Complainant was arbitrary and capricious.

iii. The Disciplinary Action Violated Board Rule 6-6, 4 CCR 801

State Personnel Board Rule 6-6 states,

"The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." (Emphasis added.)

Respondent's failure to consider mitigating information, as discussed above, violated Rule 6-6.

iv. The Disciplinary Action Violated Board Rule 6-10

State Personnel Board Rule 6-10 establishes procedural safeguards which appointing authorities must follow prior to imposing disciplinary action.

State Personnel Board Rule R-6-10, 4 CCR 801, mandates,

"When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision"

The pre-disciplinary meeting "must afford the employee a reasonable chance of succeeding if he chooses to avail himself of the opportunity to defend himself." *Shumate v. State Personnel Board*, 528 P.2d 404, 407 (Colo.App. 1974). Otherwise, the meeting is an empty exercise, the disciplinary action is "invalid and the employee must be reinstated." *Shumate*, 528 P.2d at 407.

In *Shumate*, the appointing authority handed the employee a termination letter at the outset of a meeting, asked the employee to read it, and then asked the employee if he had anything to say about the matters contained in the letter. The employee responded, "I haven't done anything wrong." When the employee

refused to resign, the appointing authority then stated, "This will serve as notice of your dismissal, effective immediately." *Shumate*, 528 P.2d at 406. The Colorado Court of Appeals noted that "the immediate termination of Shumate's employment . . . was inevitable. Any attempts by Shumate to refute the information or present mitigating evidence at that point would have been an exercise in futility. Thus, the agency, by its action . . . , violated both the spirit and the letter of [the rule]." *Id.*

Soliman drafted the demotion letter on March 5, 2007, prior to the pre-disciplinary meeting required by Rule 6-10. This letter is persuasive evidence that Soliman planned to demote Complainant regardless of what occurred at the meeting. When the letter is viewed in the context of the mitigating information Soliman failed to consider, it is concluded that Respondent prejudged the decision to demote Complainant.

Respondent asserts that Soliman did not pre-judge the demotion decision, because he noted in his email to Smuda and Esgar, "I will need to change the letter based on any new information that comes from the meeting." However, Soliman provided no testimony at hearing that he considered mitigating information. In addition, the demotion letter contains no reference to information presented by Complainant or her attorney at the pre-disciplinary meeting, no discussion of mitigating information, and no indication that Soliman weighed the conflicting evidence available to him. The letter states, "I have decided that you created a hostile environment"

As in *Shumate*, any attempt by Complainant to refute the assertion she created a hostile work environment or present mitigating information would have been futile. Therefore, the demotion must be rescinded.

v. **Respondent's Demotion of Complainant Violated the Colorado Anti-Discrimination Act**

Complainant asserts that in demoting her, Respondent discriminated her on the basis of gender and race. Complainant presented no evidence demonstrating race discrimination, and this claim is deemed to have been abandoned.

Under the Colorado Anti-Discrimination Act (CADA), it is a discriminatory or unfair employment practice for 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 against any person . . ." on the basis of gender. Section 24-34-402(1)(a), C.R.S.

To prove intentional gender discrimination under section 24-34-402, C.R.S., an employee must establish, by a preponderance of the evidence, a

prima facie case ("*pf*") of discrimination. The elements of a *pf* of intentional discrimination are:

- a. complainant belongs to a protected class;
- b. complainant was qualified for the position;
- c. complainant suffered an adverse employment decision despite his or her qualifications; and
- d. circumstances give rise to an inference of unlawful discrimination.

Bodaghi v. Department of Natural Resources, 995 P.2d 288, 300 (Colo. 2000).

Once the employee has established a *pf* of intentional discrimination, he or she has created a presumption that the employer unlawfully discriminated against the complainant. If the employer does not rebut the presumption, the fact finder is required to rule in favor of the complainant. *Id.*

Complainant has met her burden of establishing a *prima facie case* of sex discrimination. As a female, she belongs to a protected class; she was qualified for the Controller II position; she was demoted; and the circumstances give rise to an inference of unlawful discrimination.

The evidence supporting an inference of unlawful gender discrimination includes Soliman's pattern of being verbally abusive towards Complainant. Two witnesses with no interest in the outcome of this case, Pat Yoder, a low-level accountant, and Bill Heller, the Director of the Children's Basic Health Program, testified that they heard Soliman yelling at Complainant so loudly through the telephone that they could hear him from some distance away. Heller was stunned by Soliman's treatment of Complainant and felt embarrassed for her. Both Heller and Yoder noted that Soliman did not permit Complainant to meaningfully participate in these conversations, because Soliman's manner with Complainant was demanding and impatient. When Complainant asked Soliman to stop raising his voice at her, he denied the conduct and accused her of lying. The fact that Complainant sought the assistance of Smuda in 2006 further corroborates Complainant's testimony regarding Soliman's verbal harassment of her. Soliman did not treat any other subordinates in this manner.

Yoder testified that during the five-year period she served two levels under Soliman at the Department of Human Services, she witnessed Soliman treat Yoder's supervisor, who was at a management level roughly equivalent to Complainant's, in the same manner that he treated Complainant. He yelled at her, was short with her, and behaved in an exasperated manner towards her. Yoder also testified the Soliman treated the men at that Department differently, in an informal, collegial manner. Yoder's testimony establishes a pattern of verbal abuse of women who report to him.

Therefore, Complainant has established a *prima facie case* of gender

discrimination.

Respondent's proffered business reason for demoting Complainant is her alleged mistreatment of Terri Davis on February 8, in violation of the November 2006 Corrective Action. As the section above makes clear, Complainant did not create a hostile work environment for Davis on February 8. Davis failed to conduct herself professionally by refusing to permit Complainant to speak. Complainant reacted to the situation by commenting on the inappropriateness of Davis's conduct.

Assuming Respondent had met its burden of articulating a legitimate, non-discriminatory reason for the adverse employment action, the burden then shifts back to Complainant to prove that the employer's proffered reasons were in fact a pretext for discrimination. The employee can satisfy this burden of proof through evidence already in the record. Colorado law does not require, in every case, that the employee offer additional evidence to support an inference of intentional discrimination. *Bodaghi*, 995 P.2d at 298. Complainant's *prima facie* case, combined with the fact finder's conclusion that the employer's asserted justification is false or pretextual, is sufficient to permit the trier of fact to conclude that the employer unlawfully discriminated. *Id.*

"Pretext may be proven either directly by demonstrating that an unlawful motive more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 257 (1981); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999).

Pretext is proven directly in this case, because the evidence demonstrates that gender discrimination more likely motivated Soliman to demote Complainant. He engaged in a pattern of verbally abusing Complainant. In telephone conversations with Complainant, he demonstrated such disregard for Complainant as to talk over her and preclude her speaking in more than one word snippets. His tone of voice in these instances was loud, angry and abusive.

In addition, pretext has been proven indirectly herein. Pretext is proven indirectly by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." *Bullington, supra*. To show pretext, the plaintiff must call into question the honesty or good faith of the employer's decision. *Exum v. U.S. Olympic Committee*, 389 F.3d 1130, 1137 (10th Cir. 2004). It is not enough that a fact finder could disagree with the employer's assessments. The relevant inquiry is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs. *Exum*, 389 F.3d at 1138 (10th Cir. 2004).

The evidence supporting a demotion of Complainant is so weak as to be pretextual. Soliman's failure to consider Davis's responsibility for initiating the conflict, and the minor nature of the February 8 exchange, demonstrate that the proffered reasons for Complainant's demotion were a pretext for sex discrimination. Soliman did not act in good faith in demoting Complainant. His testimony at hearing established his lack of honesty in matters relating to Complainant. Soliman's written statement to Henneberry on the day after the demotion that Complainant had "voluntarily" demoted, is indicative of his manipulation of the facts surrounding Complainant's demotion. Soliman was a twenty-five year employee and he knew that the demotion had not been voluntary.

It is noted that Soliman replaced Complainant with a female. However, Pacheco did not challenge Soliman, was deferential to him, and called him "Sir." Complainant challenged Soliman by asking him not to yell at her, and by yelling back at him on October 30, 2006, resulting in her first corrective action. Her conduct did not comport with that of a deferential female.

In conclusion, the preponderance of evidence demonstrates that Respondent intentionally discriminated on the basis of gender in demoting Complainant.

vi. **Complainant is entitled to an award of attorney fees and costs incurred in appealing the demotion.**

The Board's enabling act provides for an award of attorney fees and costs upon certain findings. Section 24-50-125.5, C.R.S. It states in part,

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

State Personnel Board Rule 8-38 implements this provision. The Rule defines a "groundless" personnel action as one "in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Rule 8-38(A)(3), 4 CCR 801.

Respondent's demotion of Complainant was groundless. As the discussion above demonstrates, she did not create a hostile work environment

for Davis on February 8. As a supervisor, Complainant appropriately responded to the request for assistance from her subordinate. She conferred with the staff member of the IT Contracts Monitoring staff, then returned to Davis with documents Davis needed to justify adding the provider to COFRS. Had Davis listened to Complainant, she would have learned that Complainant's actions comported with what Wagner, the IT Division Director, and Reinboldt, Davis's second level supervisor, expected of the situation. There is no competent evidence in the record to support any demotion of Complainant.

B. November 2007 Corrective Action

Complainant asserts that the November 26, 2007 Corrective Action for missing the meeting on October 24, 2007, constituted sex discrimination and a hostile work environment, and was imposed in retaliation for filing the discrimination claim challenging her demotion, in violation of CADA.

It is a discriminatory or unfair employment practice to "discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by this part 4, because he has filed a charge with the 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." Section 24-34-402(1)(e)(IV), C.R.S. This language is identical to that in the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. section 2000e-3(a). Therefore, federal case law interpreting this provision is given persuasive authority by the Board. Colorado Civil Rights Commission v. Big O Tires, 940 P.2d 397 (Colo. 1997); Board Rule 9-4, 4 CCR 801.

To establish a *prima facie* case of retaliation under the Act, Complainant must establish she:

1. engaged in protected activity of opposing discriminatory conduct or filing a charge of discrimination;
2. was subjected to adverse employment action; and
3. a causal connection exists between the protected activity and the adverse action.

Berry v. Stevinson Chevrolet, 74 F.2d 980, 985 (10th Cir. 1996).

Complainant filed an appeal of her demotion with the State Personnel Board and the Equal Employment Opportunity Commission alleging sex and race discrimination. Therefore, she has met the first element of a retaliation *pf*c.

Adverse action in CADA is broadly defined as, "to discriminate." To establish adverse action in retaliation cases, "a plaintiff must show that a reasonable employee would have found the challenged action materially

adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006). A reasonable classified employee might find a corrective action to be materially adverse, as it could dissuade him from filing a charge of discrimination. A corrective action is often the precursor to disciplinary action, and therefore can be construed as an adverse employment action.

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. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999). The inference of retaliation 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). For instance, the Tenth Circuit has held that a six-week period between protected activity and adverse action may, by itself, establish causation for purposes of the *pfc*.

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 (emphasis in original). The close temporal proximity standard is relaxed, however, "where the pattern of retaliatory conduct begins soon after [the protected activity] and only culminates later in actual discharge" [or a more serious adverse action]. *Id.*

Complainant filed her appeal of the demotion alleging discrimination with the State Personnel Board in March 2007. In May 2007, she filed another claim of discrimination challenging her demotion, and a claim of retaliation, with the EEOC. Complainant missed the meeting in late October 2007, and Soliman issued the corrective action on November 26, 2007.

Because of the gap in time between Complainant's charges of discrimination and the issuance of a corrective action, Complainant must rely on additional evidence beyond temporal proximity to establish causation here. Complainant notes that when it appeared that Pacheco had forgotten the April 24 meeting, someone suggested that they call her. This is the normal protocol when a colleague is not at a meeting. No one called Complainant on October 24, 2007 when she did not appear at the meeting. She asserts that this double standard is evidence of retaliatory motive. Further, Complainant made it clear to Soliman that she had had computer difficulties on the day of the meeting, as well as during the two week period prior to the meeting. She had not missed the meeting intentionally, and there was no indication that she had a pattern of missing meetings or failing to perform her assigned duties.

Soliman testified at hearing that he refused to mediate with Complainant in December 2007 because she "had burned every bridge. She was filing lawsuits

against me all the time. I felt discriminated against. She had filed charges of discrimination against me so many times I felt we could not sit down and talk about our differences.”

This testimony constitutes direct evidence that Soliman resented Complainant’s charges of discrimination against him. Soliman’s feeling that Complainant had “burned every bridge,” indicates that by the end of 2007, he had determined that the relationship with Complainant was not worth saving. Therefore, the inference is drawn that his hostility towards Complainant led him to retaliate against her by imposing the corrective action in November 2007.

Once an employee has established a *pr* of retaliation, the burden shifts back to the employer to articulate a legitimate nondiscriminatory [non-retaliatory] reason for the adverse action. *Id.* Respondent has done so here. Complainant should have made arrangements to track her meeting schedule, and she failed to do so. She missed a meeting that concerned the program over which she was lead accountant.

Complainant’s explanation of her computer problems did not fully explain her failure to attend the meeting. Moreover, if an employee’s computer system is down and he or she knows that the computerized calendaring system will not be available, the employee is responsible for assuring an alternate method of tracking his schedule. It was Complainant’s responsibility to know about the meeting, and to be at the meeting. Even though Pacheco, or someone else, should have exercised the professional courtesy to call Complainant, their failure to do so does not excuse Complainant’s omission.

Complainant can prevail in her retaliation claim by demonstrating Respondent’s proffered reason for issuing the corrective action to be a pretext for retaliation. *Id.* Again, Soliman’s testimony evincing hostility towards Complainant for “filing lawsuits against me all the time” and that she “had burned every bridge” indicates that by November 2007, he had actually burned any remaining bridge with Complainant, and was intent on terminating her employment. Had Complainant demonstrated a pattern of missing meetings and failing to focus on her job, a corrective action would be appropriate. However, in view of Soliman’s longstanding pattern of verbal abuse of Complainant, his baseless demotion of her, and his anger about her charges of discrimination, it is concluded that the corrective action was imposed to retaliate against Complainant for filing charges of discrimination.

C. May 9, 2008 Grievance

On May 9, 2008, Complainant filed a grievance challenging Soliman’s April 29, 2008 Needs Improvement rating. She asserted that the evaluation was “a continuation of an abusive, hostile and illegal work environment and is in retaliation for my making claims of discrimination, filing prior grievances and

bringing forward fiscal irregularities.” She also asserted that she was being retaliated against in violation of the whistleblower act for refusing to alter data reporting \$8 million in accounting irregularities that she had discovered, in order to avoid alerting auditors.

Under CADA, it is a discriminatory or unfair employment practice for an employer to “harass [an employee] during the course of employment.” Section 24-34-402(1)(a), C.R.S. Under the act, “harass” means to create a hostile work environment based upon an individual’s race, national origin, sex, sexual orientation, disability, age, or religion. Notwithstanding the provisions of this paragraph (a), harassment is not an illegal act unless a complaint is filed with the appropriate authority at the complainant’s workplace and such authority fails to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate.” Section 24-34-402(1)(a), C.R.S.

Complainant’s May 9 grievance alleging harassment comports with statute’s complaint requirement. Complainant filed a grievance alleging that Soliman’s Needs Improvement evaluation was part of his pattern of harassment against her on the basis of sex.

The next inquiry is whether the agency failed “to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate.” Section 24-34-402(1)(a), C.R.S. At Step 1, Evans modified Complainant’s evaluation to the level of “Successful Performer,” and declined to raise Complainant’s Job Knowledge rating above Level 1, Needs Improvement.

On May 30, 2008, Complainant and her attorney met with Henneberry. Complainant described the extra work she had performed on several projects during the rating period. In addition, she gave Henneberry the outline of events concerning her whistleblower claim. On June 2, 2008, Complainant’s attorney informed Henneberry via letter that he had a tape recording of the April 24 meeting which verified that the allegations against Complainant by Soliman and the others present were false. He stated, “she believes that if she had been a male that all of the behavior occurring in the meeting of April 24, 2008 would have been judged acceptable and that only because of her gender is she being exposed to such outrageous and inaccurate charging of workplace violence.”

Following this meeting, Henneberry conducted no review of any of the information provided by Complainant concerning her job performance. She did not corroborate Complainant’s information with Evans or Soliman, who was still at the agency through June 2008. Nor did Henneberry listen to the tape recording of the April 24 meeting, which would have addressed Complainant’s assertion that Soliman was engaged in a pattern of groundless adverse actions against her.

Henneberry was aware that Complainant had previously served as

Assistant Controller, and that Complainant's history of performance problems was in the areas of supervision and interpersonal relations, not Job Knowledge. Complainant was plainly overqualified for the Accountant III position she held, in the area of Job Knowledge.

Soliman issued the Needs Improvement evaluation four days after the April 24, 2008 meeting, as part of his pattern of harassing and retaliating against Complainant for filing charges of discrimination. Henneberry's decision to do nothing but affirm Soliman's Needs Improvement rating permitted the pattern of gender harassment and retaliation to continue. Hence, Complainant prevails on her claim of harassment based on gender, because at the Step 2 stage of her grievance, the agency failed to initiate any investigation of her complaint, and failed to take any appropriate remedial action.

Complainant's claim under the whistleblower act, will be addressed in the discussion of her termination, below.

D. Termination

i. Complainant did not commit the acts for which she was terminated.

The termination letter describes the basis for discipline as follows: "In addition to the actions described in the workplace violence investigation, there are several items in your personnel file that indicate a pattern of engaging in disruptive behavior and failure to properly perform duties which support the decision to terminate your employment as an appropriate result of progressive discipline. Some of the items reviewed are described below. . . ." The "actions described in the workplace violence investigation" is the only reference to the April 24, 2008 meeting. Therefore, the reader is referred to the May 5, 2008 investigative report prepared by Smuda for a description of the conduct that formed the basis for discipline.

The May 5 report concludes, "The findings of the investigation did in fact disclose a hostile work environment created by Annmarie Maynard. The employees interviewed stated that they were upset by the accusations that were made about Ms. Soliman and Mr. Bartholomew. Annmarie Maynard was insubordinate and created a hostile environment by acting in an unprofessional manner. Ms. Maynard did in fact accuse the Controller and Budget Director of trying to make her lie by hiding accounting transactions that may have been discovered by the Auditors."

The report dedicates one paragraph each to Bartholomew, Hong, Pacheco, Block, and Soliman, detailing their allegations against Complainant. In summary, the report concludes that Complainant refused to follow the directives of Soliman, was confrontational and rude towards the other meeting participants,

and that she put her hand up in Pacheco's face in order to "gesture for her to be quiet."

Complainant was not rude, confrontational, or hostile in the April 24, 2008 meeting. The entire meeting was professional in nature. Complainant's participation in the meeting was appropriate and professional. Complainant raised her hand to avoid having Pacheco accidentally hit her in the face with a document, not to gesture her to be quiet. At the time this occurred, Pacheco said, "Sorry," and laughed, and Complainant laughed as well.

The only time during the April 24 meeting that Complainant refused to do what was asked of her was when Pacheco and Block asked her to create two Excel spreadsheets out of one. The record is unequivocal that Block and Pacheco sought to hide the prior SMIB overdraw calculations from auditors by creating two separate Excel spreadsheets. Complainant believed that this was unethical and she refused to do so. However, in the course of refusing to do so, Complainant stated repeatedly that she would be able to prepare the JV and supporting documents in such a way as to show only the FY 08 amounts due. Therefore, the entire conversation evinces Complainant's continuing desire to provide Pacheco, Block, and the entire group with what they had requested.

There is no evidence to suggest that Block and Pacheco sought to have Complainant create two separate Excel spreadsheets in order to avoid paying the federal government the money owed it. As Block explained in his interview with Smuda, they sought to control the timing with which the overpayment issue could be handled by HCPF leadership, as the agency navigated the legislative process to obtain supplemental spending authority. Unfortunately, the means by which they sought to achieve this objective crossed the line: to conceal information from auditors in case they sought access to Complainant's Excel spreadsheet. This directive arguably did violate standards of fiscal transparency; Complainant's belief that it was unethical was reasonable; and Complainant was fully justified in refusing to do it.

The issue before the Board is whether Complainant's conduct in the April 24 meeting, her refusal to create two spreadsheets, and the manner in which she did so, "created a hostile work environment." The answer is no. The tape recording of the meeting reveals two important truths: 1) Complainant was professional in her handling of the situation the others placed her in. She did not raise her voice. She was not rude. The only reason Complainant continued to object to the request is because the others in the meeting continued, inappropriately, to pressure her to consent. 2) Complainant repeatedly stated she could prepare the JV documents in such a way as to include only the FY08 amounts due. Therefore, her refusal to create two Excel spreadsheets had no impact on the basic objective of releasing only FY 08 information at that time.

At hearing, Evans relied on the following provision of the hostile work

environment policy as the basis for discipline: "Violent behavior: . . . Disruptive behavior is defined as behavior that disturbs or interferes with or prevents normal work functions and includes yelling, using profanity, verbally abusing others and making inappropriate demands." Evans testified that Complainant violated this policy because her conduct at the meeting was "disruptive to the agency's ability to get the job done." Creating two Excel spreadsheets had no bearing on the job at hand. Complainant consistently agreed with the objective of releasing only those documents relating to FY 08. On the morning following the meeting, she placed the JV with all supporting documents on Soliman's desk. Soliman then approved and signed the documents on April 25 and the money was paid to the federal government on April 28, 2008.

The central conclusion of Smuda's May 5 report was that Complainant had accused Soliman and Bartholomew of "trying to make her lie by hiding accounting transactions that may have been discovered by the Auditors." The tape recording of the meeting reveals that Complainant did not accuse anyone of trying to make her lie. Further, she did not address any of her comments to Soliman or Bartholomew. Block and Pacheco were the two putting pressure on Complainant to create two Excel spreadsheets; Complainant's statements were in response to them. Bartholomew said nothing during the entire conversation about auditors and spreadsheets.

In summary, Block and Pacheco pressured Complainant to create two separate documents in Excel in order to conceal from auditors the fact HCPF had accidentally overdrawn over \$4 million in federal funds prior to FY 08. Complainant was uncomfortable with this request because it violated her ethical principles of fiscal transparency. Complainant handled this extremely difficult situation admirably. Nothing she did at the April 24, 2008 meeting constituted disruptive behavior that could violate the agency's hostile work environment policy.

Respondent has failed to prove by preponderant evidence that it had good cause to impose discipline on Complainant. Therefore, the discipline must be rescinded. *Kinchen, supra*.

ii. **The Termination of Complainant's Employment was Arbitrary and Capricious.**

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner 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. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

The tape recording of the April 24, 2008 meeting demonstrates that Complainant conducted herself appropriately at all times. Evans failed to give candid and honest consideration to the evidence before her in deciding to terminate Complainant's employment, in violation of *Lawley*. No reasonable appointing authority in Evans' position, after listening to the tape recording of the April 24 meeting and comparing it to the baseless accusations of all other participants in the room, could have proceeded with a termination of Complainant's employment.

An appointing authority who is considering disciplinary action has a duty to step back and ascertain the truth of the situation before taking action. The truth before Evans was that five out of six subordinates, including two section managers, Soliman and Bartholomew, had fabricated a story about Complainant's conduct at the meeting, in an apparent attempt to "cover" for Block and Pacheco's misconduct. Block had made inappropriate statements about "making the auditors work for it," and he and Pacheco had asked Complainant to hide data showing \$4 million in overdrawn pre-FY 08 federal funds from auditors, by separating that data from the FY 08 data.

As the leader for the agency in this situation, Evans was called upon to establish and enforce the standards of conduct she expected of her senior and mid-level managers. Her failure to hold her staff accountable for their actions at the April 24 meeting, and for their lies about it afterward, abdicated this leadership role. Evans made a decision to punish Complainant and to condone Soliman, Bartholomew, Block, and Pacheco's serious misconduct. This decision condoned a work environment that permits managers and employees to engage in gossip, false innuendo, and outright lies to remove an employee from the workplace. No reasonable appointing authority would reach the conclusion to terminate Complainant's employment under the circumstances presented her. Respondent's decision was arbitrary and capricious, in violation of the standards of *Lawley*.

iii. The Termination Violated Board Rule 6-5

Board Rule R-6-5 states,

"An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature."

There was no basis to discipline Complainant due to her conduct at the April 24 meeting. The termination letter makes it clear that the decision to end Complainant's employment was premised in large part on her employment

history. In the absence of an independent basis upon which to impose disciplinary action, it was a violation of Rule 6-5 to terminate Complainant because of her history of corrective actions and the demotion.

iv. Respondent Violated the Colorado State Employee Protection Act, section 24-50.5-101 et seq, C.R.S.

Complainant asserts that her termination was imposed in violation of the Colorado State Employee Protection Act, also known as the "whistleblower act." This statute protects state employees from retaliation by their appointing authorities or supervisors because of disclosure of information about state agencies' actions which are not in the public interest. *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985).

The purpose of the Act appears in the Legislative Declaration,

"The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in governmental authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official." Section 24-50.5-101, C.R.S.

Disclosures

The threshold determination is whether an employee's disclosures fall within the protection of the Act. *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). The Act defines "disclosure of information" as: the "provision of evidence to any person or the testimony before any committee of the general assembly, 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." Section 24-50.5-102(2), C.R.S.

In order to be protected under the Act, a disclosure of information must touch on a matter of public concern. *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo.App. 2007). The disclosure may be provided in writing or orally. *Ward v. Industrial Commission*, 699 P.2d 960, 967 (Colo. 1985).

Work on SMIB and CBHP. Complainant asserts that her ongoing discussions with Soliman, Bartholomew, Esgar, and Evans regarding accounting errors resulting in state overdrafts of SMIB and CBHP federal program dollars constitute protected disclosures under the Act. Respondent counters that Complainant's work on these programs was a customary part of any accountant's job in the Controller section and hence cannot serve as the basis for a disclosure protected under the Act.

The potential mismanagement of the financial administration of joint state/federal programs in the Controller section of a state agency such as HCPF is a topic that touches on a matter of public concern. The record demonstrates that the failure of a state to identify and refund moneys owed to the federal government is a federal felony, subjecting the State to legal liability. In addition, if unchecked for a period of years, fiscal mismanagement of state/federal programs can result in the state having to pay millions of dollars to the federal government in a lump sum payment. Such a lump sum supplemental appropriation get can severely hamper the State's ability to operate within budget and in accordance with its business plan. In the case of pre-FY 08 SMIB overdrawn funds exceeding \$4 million, this is exactly what occurred. Therefore, Complainant's discussions and correspondence with Soliman, Bartholomew, and others at HCPF constitute protected disclosures under the Act.

Directive to Conceal Data at April 24 Meeting. Complainant's disclosures to Henneberry, Evans, and 9 News regarding the directive by Pacheco and Block to conceal pre-FY 08 data from auditors also constitute protected disclosures under the Act. It is a matter of public concern when budget and accounting professionals in a state agency direct an accountant to separate data for the purpose of concealing information from auditors. The directive arguably violated ethical principles of fiscal transparency which govern the Controller's Division.

The Act also requires, "It shall be the obligation of an employee who wishes to disclose information under the protection of this article to 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." Section 24-50.5-103(2), C.R.S. Hence, two disclosures are necessary: 1. to a "supervisor or appointing authority or member of the general assembly," and 2. to "any person or the testimony before any committee of the general assembly." On May 9, 19, and 30, on June 2, 2008, both Evans and Henneberry were informed that Complainant had been directed to conceal information from auditors concerning \$4 million in overdrawn federal funds, by creating a separate Excel spreadsheet for that data. These disclosures were an attempt to obtain protection under the whistleblower act in-house, from Evans and Henneberry. When it became apparent that no such protection was forthcoming, she went to the press. In addition, Complainant made it clear to them that she believed her work on the SMIB and CBHP accounting errors had

resulted in retaliation against her. Complainant has met the disclosure requirement of the Act.

Substantial or Motivating Factor

Once it is established that protected disclosures occurred, the employee must demonstrate that the protected disclosures were "a substantial or motivating factor" in the agency's adverse actions taken against the employee. *Ward*, 699 P.2d at 968. Section 24-50-103(1), C.R.S. This requires a showing of employer knowledge of the disclosure and a causal connection between the disclosure and the adverse action.

The record demonstrates that Complainant's disclosures regarding the April 24 meeting were a substantial or motivating factor in her termination. Respondent consistently refused to acknowledge or ever address the substance of Complainant's whistleblower claim in regard to the April 24 meeting throughout May and June until her termination. Respondent "handled" the issue by ignoring it until such time as 9News rendered that approach no longer feasible.

Complainant attempted to discuss her whistleblower claim with Evans at the Step 1 grievance meeting on May 19. Evans indicated that Smuda was investigating the meeting, and therefore she sought to postpone consideration of the claim. Once Evans had received the Smuda report on or about May 20, Evans reiterated that she would address that issue separately in the pre-disciplinary process.

During the pre-disciplinary meetings with Evans, Complainant and her counsel again made it clear that the task Complainant refused to do at the April 24 meeting was to separate Excel files in order to conceal \$4 million owed to the federal government from auditors.

Once Evans reviewed the tape of the April 24 meeting, she learned that the Smuda report was groundless, and that in fact Block and Pacheco had directed Complainant to hide accounting transactions from auditors. By failing to protect Complainant, and by neglecting to hold Block, Pacheco, Soliman, Bartholomew, and Hung accountable for fabricating a story about Complainant as a means of covering for Block and Pacheco, Evans engaged in whistleblower retaliation against Complainant.

Henneberry engaged in a similar pattern of refusing to respond to Complainant's grievance alleging a whistleblower violation. At the May 30, 2008 meeting to discuss the evaluation grievance, Henneberry indicated she had not yet reviewed the whistleblower claim, and would need to set a second meeting with them to address it. During the meeting, Complainant gave her the Outline of critical whistleblowing events, which stated in part, "In the course of the discussions it was suggested Maynard alter the electronic workbook . . . she had

produced so that auditors would not be able to tell that money had not been repaid back to for prior years. Maynard objected indicating that it would be concealing information or giving misleading information and that she didn't want to manipulate the workbook product."

Closing the May 30 meeting, Henneberry stated, "I still need to review the second part of your grievance and we need to chat about that further." On June 2, 2008, Henneberry was informed by letter that Complainant had a tape recording of the meeting demonstrating the allegations against her to be false. Henneberry then reneged on her commitment by refusing to hold the Step 2 meeting to address the whistleblower claim.

In her June 4, 2008 decision, Henneberry sidestepped the merits of Complainant's whistleblower complaint by indicating Evans had "adequately addressed" it in her May 23, 2008 grievance response. Evans had, in fact, not addressed Complainant's concerns about the investigation of the April 24 meeting.

During the last week of June 2008, Henneberry and Evans learned that Complainant had disclosed the tape recording of the April 24 meeting to 9News, were questioned by reporters about the agency concealing information from auditors, and were on notice they needed to answer for the events of the April 24 meeting before the LAC on July 14, 2008. Evans knew there was no basis to support disciplinary action based on what had actually occurred at the April 24 meeting. Nonetheless, in the absence of good cause, she issued the termination letter. This evidence demonstrates that Complainant's release of the tape to 9News was a primary substantial or motivating factor in Evans' decision to terminate her employment.

It is therefore concluded that Respondent terminated Complainant's employment because of her disclosures regarding the April 24, 2008 meeting, in violation of the whistleblower act. *Ward, supra*.

The evidence does not support a finding that Respondent terminated Complainant because of her work on the SMIB and CBHP accounting errors. Notably, Soliman never informed Evans about the CBHP issue between her appointment in October 2007 and May 2008, when she learned about it from Complainant in the grievance meeting. In addition, the record indicates that Soliman and Bartholomew did nothing on the CBHP issue from December 2006 forward, until Evans learned of the issue. However, once Evans learned about the CBHP issue, she addressed it. In addition, with regard to the SMIB issue, Soliman kept this issue moving forward and made a point of bringing it to resolution in April 2008, prior to his retirement. He authorized the payment of the \$3.2 million to the federal government on April 28, 2008. In summary, while Soliman did not place the federal overdraw issues on the front burner, the record

does not support a conclusion that he or Evans retaliated against Complainant by issuing corrective and disciplinary actions because of her work on those issues.

If it is concluded that an employee's protected disclosures were a substantial or motivating factor in the agency's adverse action, the burden next shifts to the agency to prove that "it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968. There is no record support for the agency taking any action against Complainant, based on her conduct at the April 24 meeting. Therefore, Respondent cannot meet this burden.

The issue of remedy is addressed below.

v. Respondent Retaliated Against Complainant under CADA

Complainant asserts that Respondent terminated her in retaliation for filing charges of discrimination in her appeals of the demotion and her corrective actions. Complainant has established a *prima facie* case of retaliation. The same evidence discussed above establishes the inference of retaliation.

Respondent has failed to meet its burden of articulating a legitimate nondiscriminatory [non-retaliatory] reason for the adverse action. The tape recording of the April 24 meeting demonstrates that Complainant conducted herself appropriately at all times.

Even assuming Respondent had met its burden, Complainant has demonstrated Respondent's proffered reason to be pretextual. Soliman determined in late 2007 that Complainant had "burned every bridge" with him because she had filed so many claims of discrimination against him. The preponderance of evidence demonstrates that Soliman was determined to terminate Complainant's employment, and that he utilized the April 24 meeting investigation, and the 2008 Needs Improvement evaluation, as the means of doing so.

Soliman's testimony regarding Complainant's conduct at the April 24 meeting, including his claim that she "became violent" and that he was "shocked" when she raised her hand to Pacheco's face, was directly contradicted by the tape recording of the meeting. The evidence conclusively calls into question the honesty and good faith of Soliman's actions leading to Complainant's termination.

Evans, with full knowledge of the facts, terminated Complainant's employment anyway. Respondent's termination of Complainant, and the 2008 evaluation, constituted retaliation against Complainant for filing charges of discrimination.

vi. **Complainant is entitled to attorney fees and costs in defending the termination.**

Complainant is entitled to an award of attorney fees and costs incurred in defending the termination. Section 24-50-125.5, C.R.S. Under Board Rule 8-38(A)(2), 4 CCR 801, a personnel action made "in bad faith, was malicious, or was used as a means of harassment" is defined as one that was "pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth." Rule 8-38(A)(2). The termination of Complainant's employment was made in bad faith, because Evans, Soliman, Bartholomew, Pacheco and Block were all disrespectful of the truth in their actions leading to the termination. See *Renteria v. Department of Labor and Employment*, 907 P.2d 619 (Colo. App. 1995) (rehearing denied). None of the testimony of these witnesses regarding Complainant's conduct at the April 24 meeting was credible.

The termination was also groundless because Respondent failed to produce any competent evidence to support the termination. Rule 8-38(A)(3); *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo. App. 1993)(certiorari denied).

E. Remedy

Discrimination and Retaliation under CADA. Where a legal injury is of an economic character, legal redress in the form of compensation should be equal to the injury. *Dept. of Health v. Donahue*, 690 P.2d 243 (Colo. 1984); *Ward v. Dept. of Natural Resources*, No. 2008-CO-R0418.005, slip op. (Colo. App. April 17, 2008). Complainant is entitled to reinstatement to the position of Controller II, back pay and benefits, including all pay increases she would have received from the date of demotion through the present. Any compensation earned from other sources is to be deducted. *Lanes v. O'Brien*, 746 P.2d 1366 (Colo. App. 1987).

Complainant requests front pay, based on the impossibility of returning to work at HCPF. In cases of discrimination, CADA expands the remedies otherwise available to the Board. *Ward*, slip. op at 30. The State Personnel Board has jurisdiction to order front pay in discrimination cases where reinstatement is not feasible. *Id.* at 31. See also Board Rule 9-6.

Front pay is an equitable remedy that can be awarded for compensation that will be lost due to the wrongful termination until reinstatement or, in lieu of reinstatement, until the plaintiff's earning capacity has fully recovered from the effects of discrimination. *Black v. Waterman*, 83 P.3d 1130, 1133 (Colo. App. 2003), citing *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

Reinstatement to her former position as Controller II is not an option for Complainant. Returning to HCPF would place her back into a position where she is likely to be retaliated against again. Therefore, Complainant is entitled to an

award of front pay to compensate her for the continuing future effects of Respondent's actions taken against her in bad faith. See, *Hansel v. Public Service Co. of Colorado*, 778 F. Supp. 1126, 1135 (D.Colo. 1991).

An award of front pay cannot be speculative. *Id.* It must specify an ending date and must take into account any amount that the plaintiff could earn using reasonable efforts. *Hansel*, 778 F.Supp. at 1136.

Therefore, a hearing will be necessary to determine the appropriate amount of front pay in this case, and the amount to be deducted in order to avoid a windfall, if any. *Donahue, supra*.

Whistleblower Act. The State Employee Protection Act addresses remedies as follows:

"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 the 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 employees such employee." Section 24-50.5-104(2), C.R.S.

"Whenever the state personnel board determines that an appointing authority or supervisor has violated section 24-50.5-103, the appointing authority or supervisor shall receive a disciplinary action which shall remain a permanent part of the appointing authority's or supervisor's personnel file, and a copy of the disciplinary action shall be provided to the employee. The disciplinary action shall be appropriate to the circumstances from a mandatory minimum of one week suspension or equivalent up to and including termination. In considering the appropriate disciplinary action . . . the appointing authority or supervisor of the appointing authority or supervisor who has committed such violation shall consider the nature and severity of the retaliatory conduct involved." Section 24-50.5-104(4), C.R.S.

Complainant is entitled to have the termination expunged from her records.

Evans and Henneberry violated the whistleblower act. In view of

Henneberry's close involvement in the events leading up to Complainant's termination, her approval of the decision to terminate Complainant's employment, and her failure to rescind the wrongful termination once she listened to the tape, Henneberry is equally subject to the disciplinary action required under 24-50.5-104(4), C.R.S. The statute requires that "the appointing authority or supervisor of the appointing authority" shall consider the appropriate disciplinary action to be taken against the "appointing authority or supervisor" who violated the whistleblower Act. The Governor is the appointing authority for Henneberry.

F. Respondent's Delegation of Appointing Authority was Invalid

Complainant challenges the validity of the delegation of appointing authority for the demotion and the termination. The Colorado Constitution, article XII, Section 13(8), specifies that classified employees in the personnel system may be dismissed, suspended or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, willful misconduct, willful failure or inability to perform their duties, etc. The State Personnel Systems Act repeats this provision. Section 24-50-125(1), C.R.S.

Section 13(7) provides: "The head of each principal department shall be the appointing authority for the employees of his office and for heads of divisions, within the personnel system, ranking next below the head of such department. Heads of such divisions shall be the appointing authorities for all positions in the personnel system within their respective divisions. Nothing in this subsection shall be construed to affect the supreme executive powers of the governor prescribed in section 2 of article IV of this constitution."

C.R.S. section 24-1-108, concerning "Appointments of officers and employees," reinforces this two-tiered system of appointing authority. It states, "Any provisions of law to the contrary notwithstanding and subject to the provisions of the constitution of the state of Colorado, the head of a principal department shall be appointed by the governor, with the consent of the senate. The head of a principal department shall appoint all subordinate officers and employees of his office and the head of each division under his department, and the head of each division shall appoint all employees in his division . . ."

This two-tiered system of appointing authority creates a buffer between gubernatorial or "political" appointees and classified employees: the executive directors have appointing authority over their direct hires, the division directors and those in the executive director's office; and, the division directors in turn have appointing authority over the subordinates in their respective divisions. This buffer serves the purpose of de-politicizing disciplinary decisions regarding classified employees.

HCPF is created by statutory enactment at C.R.S. section 24-1-119.5.

Unlike other state agencies such as the Department of Labor and Employment and the Department of Regulatory Agencies, there are no statutorily created divisions in HCPF. Therefore, any divisions that exist are subject to the discretion of the Executive Director of HCPF.

Henneberry administered HCPF through six divisions. Evans' Office of Administration and Operations was one. Evans functioned as a division director, as did Bartholomew, Smuda, and three other individuals.

State Personnel Director's Procedure 1-8 governs appointing authority. It states that executive directors are appointing authorities "for their own offices and division directors. Division directors as defined by law are appointing authorities for their respective divisions. An appointing authority may delegate in writing any and all human resource functions, including the approval of further delegation beyond the initial designee. In the area of corrective, disciplinary, or other actions that have an adverse effect on base pay, status, or tenure, each department must establish a written document specifying the appointing authority for each individual employee and this information must be made available to the employee."

Henneberry's decision to retain all appointing authority over all employees in the entire department, including those serving under her division directors, violated the constitutional buffer between her position as a gubernatorial appointment and the classified workforce in the agency's divisions. Therefore, it was a violation of Colo. Const. art. XII, Section 13(7), and Director's Procedure 1-8.

CONCLUSIONS OF LAW

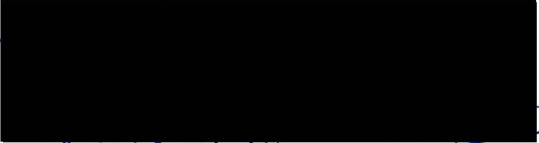
1. Complainant did not commit the acts upon which discipline was based;
2. Respondent's actions were arbitrary and capricious;
3. Respondent's actions violated Board Rule 6-6, 6-6, and 6-10, 4 CCR 801;
4. Respondent did not engage in race discrimination;
5. Respondent's demotion of Complainant constituted gender discrimination;
6. Respondent's November 2007 corrective action and termination of Complainant were retaliatory in violation of CADA;
7. Respondent's termination of Complainant violated the Colorado State Employee Protection Act;
8. Complainant is entitled to an award of attorney fees and costs;

9. Complainant is entitled to back pay and benefits, and front pay, because reinstatement is impossible in this case.

ORDER

Respondent's action is **rescinded**. Respondent is ordered to rescind the demotion and termination of Complainant, provide her back pay and benefits to the date of demotion, provide front pay in an amount to be determined at hearing, and pay attorney fees and costs incurred in bringing this action. This case will be set for hearing on the issue of the appropriate award of front pay.

Dated this 8th day of December, 2008

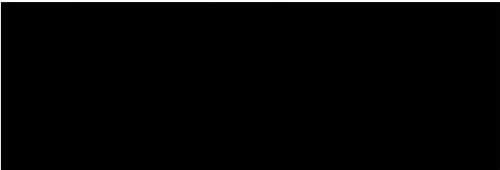


Mary S. McClathcey
Administrative Law Judge
633 - 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

CERTIFICATE OF SERVICE

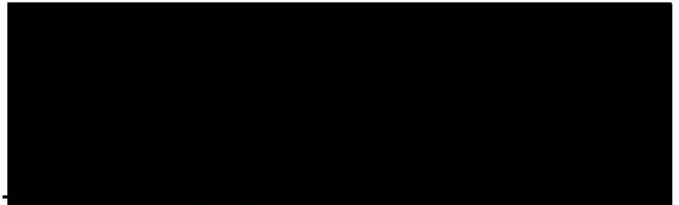
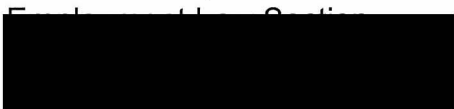
This is to certify that on the 8th day of December, 2008, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

William S. Finger
Tamara J. Wayland



and in the interagency mail, to:

Vincent E. Morscher, First Assistant Attorney General
Willow Arnold, Assistant Attorney General



 Andrea C. Woods

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 8-67, 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 8-70, 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 8-68, 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 record on appeal in this case is \$50.00. 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 8-69, 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 8-72, 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 8-75, 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 8-65, 4 CCR 801.