STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2012B128**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOANNE BROWN,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE IN PUEBLO,
Respondent.

This matter came on for hearing before Senior Administrative Law Judge (ALJ) Mary S. McClatchey on July 22 and 23, 2013. The case was commenced on May 1, 2013. The record was closed on July 29, 2013 upon filing of the parties' written Closing Arguments. Complainant appeared through Mark Schwane, Esquire. Respondent appeared through Heather Smith, Assistant Attorney General. Respondent's advisory witness was Sharon Gilbert, Director of Hospital Operations, CMHIP.

MATTER APPEALED

Complainant appeals her administrative separation of employment following exhaustion of paid leave, alleging discrimination on the basis of disability. As relief, Complainant requests to be reinstated to her position with reasonable accommodations, back pay, and an award of attorney fees and costs.

Respondent asserts that Complainant was unable to perform the essential functions of her position with or without reasonable accommodations; therefore, it did not discriminate against her on the basis of disability.

For the reasons set for the below, Respondent's action is affirmed.

ISSUES

1. Whether Respondent's administrative discharge of Complainant was arbitrary or capricious, or constituted discrimination on the basis of disability;

2. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant commenced employment at Colorado Mental Health Institute at Pueblo (CMHIP) on May 1, 2000 as a Mental Health Clinician I (Psychiatric Care Aide). Respondent promoted her to the position of Mental Health Clinician II in May 2002.

2. CMHIP is a state psychiatric hospital that serves mentally ill patients including adolescents, adults, and geriatric patients.

3. In April 2007, Complainant suffered a work related injury as the result of being assaulted by a patient at CMHIP. The assault caused damage to her neck and lower back, including severe central canal stenosis. (Stipulated Fact)

4. After treatment, Complainant returned to work in or about August 2008 and continued performing the essential functions of her position at that time. (Stipulated Fact)

5. Complainant was placed at Maximum Medical Improvement by her Workers Compensation provider on August 14, 2008, and was not assigned any permanent work restrictions. (Stipulated Fact)

Admissions Psychiatric Liaison Position

6. In August 2010, Respondent promoted and transferred Complainant to the position of Admissions Psychiatric Liaison, classified as a Health Professional I, in the Admissions area of the hospital. (Stipulated Fact) In February 2012, her position was reallocated to Health Professional II.

7. CMHIP has a forensic hospital, the Institute of Forensic Psychiatry, which is a locked maximum security facility that houses individuals who have been criminally adjudicated to be insane.

8. Complainant works in a different hospital building which accepts patients from mental health centers, jails, and community corrections facilities.

9. Complainant worked the graveyard shift five nights per week. During her shift, Complainant typically processed the admissions of one to four patients.

10. On three of Complainant's graveyard shifts each week, another Admissions Psychiatric Liaison worked with her. On the other two nights, Complainant worked alone.

11. By contrast, during the day shift the Admissions Unit was very active. Most of the admissions occurred during the day or swing shifts, because they were scheduled ahead of time. During the period 2010 to 2012, there were two take-downs of patients on the Admissions Unit. There were no patient take-downs during the graveyard shift on the Admissions unit during this period.

Complainant's PDQ

12. According to the Position Description Questionnaire (PDQ) for the Admissions Psychiatric Liaison position, the Admissions work unit exists to process all inpatient, outpatient, clinic, dental and medical surgical admissions to CMHIP. The unit screens all incoming referrals to determine if admission criteria are met, assesses patient unit placement within the hospital, and ensures that all legal, medical, and mental health forms are completed and provided at the time of admission. The unit also functions as the first line of contact with patients and public entities ensuring quality customer service.

13. Complainant's PDQ contains eight "Duty Statements," delineated by letters A through H, with percentages totaling 100. Three of the duty statements, accorded 20 percent each, involve the assessment process and analysis of data and information to decide the

clinical appropriateness of patient admissions, and the communication of the admission policies and criteria to community entities, other public and private organizations and agencies, family members of patients, and other interested persons (e.g. jails, detention centers, courts, Youth Corrections and Youth Offender agencies, etc.).

14. Five percent of Complainant's duties were designated as advising, counseling, and resolving complaints and correcting problems relating to the admissions process. An additional five percent were geared towards customer service. Ten percent of Complainant's duties consisted of clinical assessment feedback to staff for admission questions, approval, or denial of admission, and to provide rotating, on-call coverage for the Director of Admissions.

15. The last Duty Statement, H, allocated 10 percent, stated, "The position provides clinical direct patient intervention i.e., admission interview, behavioral management of a patient supported by CTI, Verbal Judo, CPR and other mandatory training as identified by CDHS-CMHIP Administration."

16. Every Duty Statement in Complainant's PDQ contained the following Functional Attributes. "Physical Demands" consisted of: "7. reaching, 8. handling, 11. talking, and 12. hearing." The position was categorized as "A. Sedentary – Exert up to 10 lbs. of force occasionally and/or a negligible amount of force frequently or constantly to lift, carry, push, pull, or otherwise move objects, including the human body. Involves sitting most of the time, but may involve walking or standing for brief periods of time."

17. None of the Duty Statements in Complainant's PDQ included the "Physical Demand" of "20. Control of others – seizing, holding, controlling, and/or otherwise subduing violent, assaultive, or physically threatening persons to defend oneself or prevent injury. Body strength and agility of all four limbs is necessary."

Verbal Judo and CTI (Continuum of Therapeutic Interventions) Training

18. According to the CMHIP Policy Manual, "Continuum of Therapeutic Intervention (CTI) and Verbal Judo Unit Drills," "It is the policy of CMHIP to ensure that each staff member is confident to provide safe care and treatment to patients based on the staff member's assigned responsibilities and competencies relevant to the specific patient populations they serve. . . The purpose of this policy is to determine how education and training of these two programs will be conducted in order to ensure competent staff who provide safe and effective care in the treatment of CMHIP patients."

19. The policy states, "Verbal Judo and CTI are two skill sets that CMHIP direct care staff are required to learn through mandatory training."

20. Verbal Judo is Part I of the CTI training. Escapes and Physical Control is Part II.

21. The policy defines "Verbal Judo" as "a system of tactical communication that can be used to effectively resolve conflict in confrontational situations. It is based on easy to learn communication skills that enable the user to redirect the energy of others in order to gain cooperation. It is also used to generate voluntary compliance from individuals encountered under stressful conditions."

22. Verbal Judo techniques direct CMHIP staff to make contact with patients by using an appropriate greeting, then identifying oneself and one's department, then explaining the reason for the contact. Once the initial contact has been made, in order to gain compliance with what the staff member is requesting of the patient, Verbal Judo establishes a five-step process: Step 1 is to ask the patient for specifically what is requested; Step 2 is to "set context," tell the patient why the request is being made; Step 3 is to "present options" for complying with the request; Step 4 is to "confirm," by asking, "Is there anything I can say to gain your cooperation at this time? I'd like to think there is;" Step 5 is to "act."

23. CTI teaches staff to respond to situations where escalation interventions have failed and the behavior of the patient is an imminent or actual threat to him/herself or others. It teaches staff how to respond quickly, professionally and ethically by using techniques to safely physically contain and restrain a patient.

24. Improper restraint of a patient that does not comport with approved CTI procedures can result in patient abuse, especially if the restraint results in harm to the patient, as well as legal liability for CMHIP.

25. There were two types of CTI trainings offered at CMHIP: a four-hour training entitled PET, "Primary Escape Techniques," which was physical in nature but did not include take-downs, and the full, eight-hour CTI course, which specified approved ways of gaining physical control over patients.

26. CMHIP had a chart of all positions and the trainings required or recommended for each position. As indicated, Complainant's position, Duty Statement H, required, "The position provides clinical direct patient intervention i.e., admission interview, behavioral management of a patient supported by CTI, Verbal Judo, CPR and other mandatory training as identified by CDHS-CMHIP Administration."

27. Nursing staff were also required to take CTI, Verbal Judo, and CPR (cardiopulmonary resuscitation).

28. The medical staff, including all doctors, physician assistants, psychiatrists, nurse anesthetists, and nurse practitioners, were not required to take CPR, PET, or CTI. One reason for this policy is that such staff are viewed as being "patient advocates." CMHIP has no policy defining "patient advocate."

29. The Director of Nursing and Nursing-MSS positions were also not required to take the full CTI class.

Admissions Process

30. Complainant and her peer Admissions Psychiatric Liaisons used an "Admissions Process Checklist" to perform their jobs. The list contained the following 27 job tasks:

- Take call from mental health center or hospital and take referral;
- If patient is former patient, check in Avatar and Master Patient Inquiry;
- Check Form 100, pull up old form, update info, save;
- Fill out Form 100;
- Only patients from hospital/nursing home require medical clearance;

- Ask mental health center/hospital to fax current evaluation/narrative, labs;
- While waiting, fill out criminal database if applicable;
- Get key for medical records and supplemental chart;
- If prior patient, run an "S/R & Precautions report" and Patient Brief;
- Once all faxes are received, call the on-call person for approval;
- After approved for admission, call on-call doctor to review paperwork/labs (only for patients needing medical clearance);
- If on-call doctor approves, call mental health center or hospital, tell them to call the on-call doctor at CMHIP for a doctor-to-doctor telephone conference;
- Write times on everything;
- After doctor-to-doctor and patient is cleared for admission, call mental health center or hospital and tell them to set up a nurse-to-nurse telephone conference;
- Make sure to get transfer of M1 form to CMHIP faxed to CMHIP, the original M1 form must come with the patient;
- Any M9 certification form needs to be faxed before authorization for transport; patient cannot come without certification transfer to CMHIP;
- Start admissions packet – pull form 190, page 1, and give to Hospital Police when patient arrives;
- Whoever brings patient into hospital "MUST stay until HP (Hospital Police) arrives in admissions";
- Fill out Form 100, page 4 if patient is going to either of two specific units;
- Get out Form 690 (Hold Order) to have law enforcement fill out, if needed;
- After Hospital Police takes patient to search, start to enter patient into AVATAR, making sure times on the forms match;
- Print 3 addressograph cards;
- Call nurse to do the patient part of the admission;
- Start stamping patient chart and put chart together;
- Pull immunization, dental and primary provider info from supplemental and put in new chart, if applicable;
- Make 4 copies of Form 100, 3 copies of legal paperwork;
- Make 5 packets – Admissions, MR, QSS, Patient Accounts, and Traci.

31. In addition to the checklist above, Complainant and her peers used a second list containing 37 items. Some of these are additional duties, and some simply explain more fully the steps above. The additional duties are: call the psychiatric liaison on call; if patient is denied admission, call the mental health center and inform them why patient is being denied or delayed at this time, and include this information on the Form 100; if the doctor requests additional information, call the mental health center and inform them of what the doctor wants/needs, and document on Form 100; place all information on the doctor's desk prior to patient arrival; page the doctor after you do AVATAR; document the time the doctor goes in with the patient and is finished seeing the patient; the nurse performs a nursing assessment, gets patient vital signs and documents; take a picture of the patient; when all staff are finished with the patient, have the patient sit in the waiting area; Admissions can give the patient a sack lunch if the doctor approves; make sure the doctor signs the medical reconciliation; call "PBX" to let them know you have a patient to transport, female/male, cooperative/uncooperative, what unit.

Role of Security in Admissions

32. As these check lists indicate, no patient was admitted at CMHIP unless a Hospital Police Officer was present to take physical custody of the patient. Once the Hospital Police

Officer searched the patient, the transport service that had delivered the patient was permitted to depart from CMHIP.

33. According to the CMHIP Department of Public Safety Policy 4.02, Security Station 2, Admissions Center Building 125, the normal operating hours of the Admissions security staff are 9:00 a.m. to 5 p.m. "When no Security Officer is on duty in the Admissions Center, the Admission Officer duties will be accomplished by Department Police Officers."

34. Under Policy 4.02, "The Officer assigned to the Admissions Center is primarily responsible for retaining custody of patients that are committed to CMHIP."

Admissions Interview

35. Complainant's main contact with incoming patients was during the admissions interview. Complainant, accompanied by the Hospital Police Officer, brought the patient into the exam room. The exam room had two doors, one on either side. Complainant sat with the patient and asked questions, making entries on the computer and filling out forms, as she conducted the admissions interview. Complainant also asked the patient to sign a series of forms.

36. If the patient was agitated or uncooperative, Complainant wrote "refused" and charted the reason.

37. During the entire admissions process, the Hospital Police Officer was approximately two-to-four feet from Complainant and the patient, at the door to the exam room, just on the other side of a curtain which was usually drawn closed.

38. Complainant's intake process with each patient took approximately fifteen minutes. Complainant was never in the presence of more than one patient at a time and was always in the presence of a Police officer charged with maintaining custody of the patient.

39. Once the admissions process had been completed, the Hospital Police Officer then escorted the patient to his or her living unit.

40. Complainant spent an average of fifteen minutes each with one to four patients per graveyard shift. The entirety of that time was in the presence of a member of Hospital Police.

41. Nursing staff were on another unit during all admissions activities, except for when they conducted the nursing assessment of the incoming patient.

42. During her tenure in Admissions, Complainant never had a patient put hands on her and she never had to put her hands on a patient. In addition, Complainant never had to perform CPR on a patient.

CMHIP Americans with Disabilities Act (ADA) Policy

43. CMHIP's ADA Policy defines an "essential function" as "Those duties that are integral parts of the job and the removal of which would fundamentally alter the job. Subsidiary or incidental functions are not essential functions."

Modification of Lightfoot PDQ

44. Sherri Lightfoot is the Rehabilitation Supervisor I at CMHIP. According to Ms. Lightfoot's PDQ, she formulates, designs, plans, and directs clinical, vocational, and rehabilitation programs that provide both individual and group counseling sessions aimed at developing successful work behaviors and positive self-care habits for patients.

45. Ms. Lightfoot has daily contact with patients and runs group rehabilitation sessions at CMHIP. When Ms. Lightfoot has contact with patients and runs group sessions during the day, there is no Hospital Police officer present. There are many types of other CMHIP staff present on the unit.

46. Ms. Lightfoot's PDQ contained eight Duty Statements. Four of those Duty Statements, comprising 60% of her job, had the following "Functional Attributes:" Stooping, Kneeling, Crouching, Crawling. In addition, her PDQ included item "20. Control of others – seizing, holding, controlling, and/or otherwise subduing violent, assaultive, or physically threatening persons to defend oneself or prevent injury. Body strength and agility of all four limbs is necessary."

47. The Physical Demand level of her position was "B. Light. Exert up to 20 lbs of force occasionally, and/or up to 10 lbs. of force frequently, and/or a negligible amount of force constantly to move objects. Physical demands are in excess of those of Sedentary work. Light work usually requires walking or standing to a significant degree."

48. In 2011, Ms. Lightfoot injured one of her knees. Her doctor issued work restrictions and she was placed on work restrictions because she could not be down on her knees.

49. Ms. Lightfoot was unable to perform CTI or CPR.

50. Ms. Lightfoot submitted a request for reasonable accommodation, consisting of removing the requirement to participate in CTI and CPR training.

51. The request was initially denied.

52. Sharon Gilbert was the Division Director of Geriatric Adult Psychiatric Services at CMHIP in 2011. Ms. Gilbert was the appointing authority for Complainant and Ms. Lightfoot.

53. Ultimately, Ms. Gilbert agreed to provide the accommodation to Ms. Lightfoot. Ms. Gilbert was aware that Ms. Lightfoot had daily contact with patients where it was possible a physical confrontation might occur. However, the majority of Ms. Lightfoot's duties were supervisory in nature and did not involve direct care of patients. In addition, she believed that the number of other staff in the vicinity mitigated the need for Ms. Lightfoot to be able to perform CTI and CPR.

54. Ms. Gilbert directed Ms. Lightfoot's PDQ to be modified to remove CTI and CPR training requirement, and to remove the Functional Attributes of Stooping, Kneeling, Crouching, Crawling, and Control of others.

Complainant's 2011 Work Restrictions and Modified Duty

55. In 2011, Complainant began to experience an increase in symptoms related to her 2007 injury. On June 15, 2011, Complainant was seen by her authorized treating physician, Dr. Michael Dallenbach, who assigned Complainant new work restrictions of avoiding confrontational situations and not participating in CTI and CPR training.

56. As a result of the new work restrictions, Complainant's immediate supervisor, Marilyn Vargas, and Ms. Gilbert, placed Complainant on modified duty. Modified duty is the temporary reassignment, or realignment, of job duties delegated to an employee who suffers an injury that accommodates the doctor's physical restrictions and enables the employee to progress back to her original work assignment.

57. Complainant's modified duty consisted of not being required to undergo trainings of CPR and CTI and not being required to use these techniques. The assignment of a Hospital Police Officer to the Admissions Unit during graveyard shift was not a part of Complainant's modified duty.

58. During modified duty, Complainant was fully capable of performing Verbal Judo. However, she could not perform either the four-hour or the eight-hour CTI course, the CTI maneuvers themselves, the CPR course, or CPR.

Request for Accommodation of Disability

59. On December 30, 2011, Complainant notified Jane Boyer, Benefits Coordinator, of her request for an accommodation of her disability under the Americans with Disabilities Act (ADA). On that day, Ms. Boyer notified Eileen Tanoue, DHS's ADA Coordinator, of Complainant's request. Ms. Boyer stated, "JoAnne Brown called me and asked for an ADA [accommodation]. She had an injury here a few years ago with her back . . . She says it has gotten much worse and there is no way she can do CTI training. She now works in Admissions where I don't know if it is as essential as it is on the unit."

60. On January 4, 2012, Ms. Tanoue sent a letter to Complainant inquiring whether Complainant was requesting an accommodation under ADA. Complainant did not respond.

Additional Work Restrictions

61. On January 31, 2012, Complainant saw Dr. Dallenbach again. He assigned her additional work restrictions of no lifting, carrying, pushing or pulling more than 10 pounds, and no bending, twisting or turning. He continued her restrictions of avoiding confrontational situations and no CPR or CTI training. He also noted that Complainant continued to follow up with Dr. Evans, her psychologist, for reactive anxiety and depression.

62. Respondent's modified duty policy limited its duration to six months. Respondent permitted Complainant to remain on modified duty for eight months.

63. On the two nights per week when Complainant worked alone, if a physical confrontation with a patient, occurred, there were no other staff on the Admissions unit to assist Complainant other than the Police Officer.

64. Respondent advised that her period of modified duty would end on February 29, 2012. Respondent then placed Complainant on Family Medical Leave Act (FMLA) leave on March 1, 2012. Complainant applied for Short Term Disability in March 2012, but was denied.

65. Ms. Tanoue sent Complainant a second letter inquiring about ADA accommodations on March 29, 2012. Complainant did not respond. Ms. Tanoue closed the ADA file for Complainant on April 16, 2012.

April 2012 Request for Accommodation

66. On April 20, 2012, Complainant submitted the ADA Request for Reasonable Accommodation form to Respondent. Dr. Dallenbach completed the second page, stating Complainant had "chronic neck and low back pain and post-traumatic stress disorder secondary to work-related assault." He stated her work restrictions were, "no lifting, pushing, pulling, carrying greater than 10#, avoid high stress environments or those in which physical confrontations could occur; no bending, twisting, or turning; should be allowed to change positions from sitting, walking, standing as needed."

67. In response to the question, "What portions of your job can you no longer perform?" Complainant stated, "less than 1% - there have been two take down (sic) in 2 years in the admissions department."

68. Complainant responded to the question, "State what accommodation would enable you to perform you job duties" with, "No CTI or CPR training." Complainant was unable to participate in the four-hour or the eight-hour CTI training, unable to perform patient escape techniques, physical take-downs, or CPR.

69. Ms. Tanoue informed Complainant she would talk to hospital leaders regarding her request. Complainant discussed her request to remove the CTI and CPR training requirements with Ms. Vargas, her direct supervisor, and Ms. Gilbert. Both of them informed Complainant that it was not possible.

70. Ms. Gilbert knew that Complainant had successfully used Verbal Judo in her positions at CMHIP and had been able to do behavioral management with patients. The issue for Ms. Gilbert was Complainant's permanent restriction on performing the physical portions of CTI and CPR. Ms. Gilbert was concerned about Complainant being isolated on the Admissions Unit with no other staff available to perform CPR or a physical take-down if necessary. The presence of the Hospital Police Officer was not sufficient to ensure the safety of incoming patients who were at times volatile and uncooperative. In addition, Ms. Gilbert considered the fact that new patients are potentially more unstable mentally because they are transitioning to a new environment that may be unsettling.

71. In making her decision, Ms. Gilbert did not review CMHIP's ADA policy and did not talk to the Hospital Police about their role in the Admissions Unit.

72. Ms. Gilbert was the appointing authority over the Admissions unit at CMHIP for seven years. During that period she did not recall physical intervention techniques of CTI or CPR ever having been used.

73. Ms. Gilbert determined that the Admissions Psychiatric Liaison position needs to be able to perform CTI and CPR in order to protect patient and staff safety, and therefore were essential functions of the position.

74. Ms. Gilbert did not determine whether removal of CTI and CPR from Complainant's duties would create an expense for CMHIP.

75. Complainant also spoke with Teresa Bernal, Acting Superintendent of CMHIP. Ms. Bernal did not agree to Complainant's request.

Vacant Job Search

76. In April 2012, Ms. Tanoue conducted a job analysis of positions Complainant could perform based on her application. Ms. Tanoue then conducted a vacant job search for every position Complainant was qualified to perform at CDHS in the Southern District. These searches were conducted on May 2, 11, 16, and 24, 2012. Complainant informed Ms. Tanoue she was not interested in driving to Home Lake Nursing Home for a part-time Therapy Assistant I position. Ms. Tanoue completed a final review of vacant jobs for Complainant on May 31, 2012.

77. On June 12, 2012, Complainant attended a Status Meeting with her Colorado WINS representative, the CDHS Human Resources Manager, Ms. Boyer, Mr. Anthony Cordova, Risk Manager for CDHS, and Ms. Gilbert. They discussed Complainant's exhaustion of all leave balances. In addition, Ms. Tanoue presented Complainant with the result of the job search.

78. Complainant exhausted her annual leave, sick leave, and Family and Medical Leave prior to her administrative separation on June 13, 2012. (Stipulated Fact)

79. Complainant's application for short-term disability was denied prior to her administrative separation on June 13, 2012. (Stipulated Fact)

80. Complainant was not laid off as the result of a lack of funds, reorganization, or a lack of work. (Stipulated Fact)

81. On June 13, 2012, Ms. Gilbert issued a letter to Complainant administratively discharging her under State Personnel Director's Administrative Procedure 5-10.

82. Complainant timely appealed her discharge.

DISCUSSION

I. GENERAL

A. Burden of Proof

Complainant bears the burden of proof in this appeal of her administrative separation. *Valesquez v. Department of Higher Education*, 93 P. 3d 540, 542 (Colo. App. 2004). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Respondent did not discriminate against Complainant on the basis of disability

Complainant asserts that Respondent discharged her in violation of the Colorado Anti-Discrimination Act's (CADA) prohibition on discrimination on the basis of disability. § 24-34-402(1), C.R.S. State Personnel Board Rule 9-4, 4 CCR 801, provides that " [s]tandards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred." Wherever possible, the CADA should be interpreted consistently with the ADA. *Ward v. Department of Natural Resources*, 216 P.3d 84, 92 (Colo.App. 2008). *Accord*, Colorado Civil Rights Commission Rule 60.1C, 3 CCR 708-1 ("Whenever possible, the interpretation of [CADA] concerning disability shall follow the interpretations established in Federal regulations adopted to implement the Americans with Disabilities Act . . . , and such interpretations shall be given weight and found to be persuasive in any administrative proceedings").

To prevail on an ADA claim, a plaintiff must show: (1) she is disabled as defined by the ADA; (2) she is qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) she suffered discrimination on the basis of her disability. *Hennagir v. Utah Dept. of Corr.*, 587 F.3d 1255, 1261 (10th Cir. 2009).

Respondent does not contest Complainant's status as a disabled individual. Rather, Respondent contends that Complainant is not qualified to perform the essential functions of her job with or without reasonable accommodation, because CTI and CPR are essential functions of the Admissions Psychiatric Liaison position.

Complainant bears the burden of showing that she is able to perform the essential functions of her job with or without reasonable accommodation. *Hennagir*, 587 F.3d at 1262; *US Airways, Inc. v. Barnett,* 535 U.S. 391, 400 (2002). To determine whether CPR and CTI training are essential job functions, the first inquiry is whether Respondent actually requires all employees in the particular position to satisfy the alleged job-related requirement. *Davidson v. Am. Online, Inc.,* 337 F.3d 1179, 1191 (10th Cir.2003). The PDQ, Duty Statement H, and Respondent's the list of mandatory training for all positions, confirm that Respondent requires all employees holding Complainant's position to perform and train in CTI and CPR.

Federal regulations guide the analysis of what duties constitute essential job functions under the ADA. *Hennagir,* 587 F.3d at 1262. Under those rules, essential functions are defined as follows:

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of the following reasons, including but not limited to the following:
   (i) The function may be essential because the reason the position exists is to perform that function;
   (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
   (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:
   (i) The employer's judgment as to which functions are essential;
   (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
   (iii) The amount of time spent on the job performing the function;
   (iv) The consequences of not requiring the incumbent to perform the function;
   (v) The terms of a collective bargaining agreement;
   (vi) The work experience of past incumbents in the job; and/or
   (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(1), (2) and (3); *see also Hennagir,* 587 F.3d at 1262.

Applying the first set of criteria to the instant case, it is clear Complainant's position does not exist to perform CTI or CPR, and Complainant was not hired because of her special expertise in CTI or CPR. 29 C.F.R. § 1630.2(n)(2)(i) and (iii). It also appears at first blush that the ability to perform CCI and CPR are "marginal" functions of Complainant's position – during her entire shift, Complainant spent between fifteen minutes and one hour having direct patient contact, during which she performed the admissions interview accompanied by a Hospital Police Officer. The remainder of her time was spent on other duties involving no direct contact with patients.

However, the venue in which Complainant works is unique. CMHIP is a mental health hospital with legal responsibility for the physical safety of the patients in its custody and care. As the Admissions checklists indicate, incoming patients can be both cooperative and uncooperative. With Respondent's legal duty of care comes the attendant duty to prepare for the worst possible scenario. At CMHIP, the worst case scenario occurs when a patient's behavior escalates to the point where Verbal Judo no longer works and a physical intervention becomes necessary. In those situations, the ability to engage the patient physically in compliance with approved CTI procedures is no longer marginal. Failure to comport with approved CTI procedures can result in patient abuse and legal liability for Respondent.

CMHIP determined that CTI and CPR are essential functions of Complainant's position because of the limited number of staff on the Admissions unit and the seriousness of potential

consequences of failing to do so. 29 C.F.R. § 1630.2(n)(2)(i) and (3)(iv). This determination is not a new one, and the requirements existed at the time Complainant was promoted into the Admissions position.

The potential consequences of not requiring CTI and CPR for the Admissions Psychiatric Liaison position are unquestionably serious, and potentially costly, for CMHIP. On the two nights per week that Complainant worked in the unit alone, the only staff available to assist her with a violent patient would be one Police Officer. No evidence was submitted concerning the possibility of requesting nurse or other backup staff assistance when an uncooperative patient was expected for admission. It appears that this was not an option. Therefore, in the event a patient became suddenly violent, whether anticipated or not, the presence of the Police Officer was the only means available of containing the patient. In an emergency situation, the risk of injury to the patient, Complainant, or the Police Officer was real, and dependent entirely on the Officer's ability to overtake a patient. In view of CMHIP's mandate to protect the patients in its care, it is reasonable for Respondent to require the presence of two CTI-certified individuals to handle an incoming patient who becomes violent, instead of one.

It is noted that Complainant and her graveyard shift peer have spent none of their time performing CTI or CPR in the Admissions Unit. Further, Ms. Gilbert could not recall any time during her seven-year tenure when Admissions staff had used CTI or CPR.

On the other hand, Complainant herself noted on her request for accommodation that there had been two take-downs in two years in admissions. While no additional evidence was submitted on these incidents, it is readily apparent that the threat of a potential need for a take-down is a constant anywhere at CMHIP, regardless of unit or time of day.

In *Hennagir,* the Tenth Circuit Court of Appeals held that a work function "rarely required in the normal course of an employee's duties" may be deemed essential when the potential consequences of employing an individual unable to perform it are sufficiently severe. 587 F.3d at *1258-1259*, In that case, the court upheld the requirement that all physician's assistants employed in a jail setting become certified as peace officers. The plaintiff had never been required to use physical force with an inmate during eight years of employment; neither had her peers. 587 F.3d at 1263. The primary basis for the holding was the unique environment of the employer: a correctional institution responsible for the safety and control of all inmates and staff. Similarly here, CMHIP is legally responsible for the safety of all patients and staff on site. To override Respondent on its decision concerning such a core institutional mandate would not be appropriate. *Hennagir*.

It is acknowledged that *Hennagir* is factually distinct from this case in several ways. First, the physician's assistant had constant contact with inmates; Complainant, by contrast, did not. Second, physician's assistants work independently; Complainant was always in the company of a Police Officer during her contact with patients. The determining factor here is that during the graveyard shift, on the two nights per week when Complainant worked alone, if a physical confrontation occurred, there were no other staff on the Admissions unit to assist that Police Officer. By the time a confrontation occurs, it is too late to call in backup assistance from one of the living units.

Complainant rightly points out that Respondent has inconsistently applied its mandatory training requirements of CTI and CPR. The decision to exempt Ms. Lightfoot from CTI and

CPR, and not Complainant, smacks of favoritism. In addition, the decision to exempt so many medical personnel from CTI and CPR training, when they have more daily contact with the patients than Complainant, appears to establish a double standard and to incur unnecessary risk for CMHIP. Nonetheless, the fact that Respondent is willing to incur risk through other medical personnel does not require it to take the same risk with Complainant. Further, Complainant's isolation on the Admissions Unit from other staff, and the fact she dealt with patients facing a new, potentially unsettling environment, may distinguish her situation from that of the day shift personnel.

In summary, Complainant has not met her burden of proving that CTI and CPR are not essential functions of her position. Therefore, her disability discrimination claim fails. There is no need to examine whether it would be a reasonable accommodation to remove CTI and CPR from Complainant's duties. As a matter of law, modification or elimination of an essential function is not a reasonable accommodation. *Hennagir,* 587 F.3d at 1264.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

2. Complainant is not entitled to an award of attorney fees and costs because she did not prevail.

ORDER

Respondent's action is **affirmed.** Complainant's appeal is **dismissed with prejudice**.

Dated this 13th day of Sept., **2013.**

[redacted]

Mary McClatchey
Senior Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202-3604

CERTIFICATE OF MAILING

This is to certify that on the 13th day of Sept., **2013**, I electronically served a true copy of the foregoing **INITIAL DECISION**, as follows:

Mark Schwane Esq.

[redacted]

Heather Smith A.A.G.

[redacted]

[redacted]

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 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.