

**AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**MOURAD KSOURI,**  
Complainant,

v.

**GOVERNOR'S OFFICE OF INFORMATION TECHNOLOGY,**  
Respondent.

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Senior Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on November 25, 26, December 2, 4, and 16, 2013. The case was commenced on the record on June 26, 2013. The record was closed on December 17, 2013, after presentation of Closing Arguments. Complainant appeared through Lisa Sahli, Esquire. Respondent appeared through Davin Dahl, Assistant Attorney General. Respondent's advisory witness was Joetta Fischer, Service Desk Access Control Manager, Governor's Office of Information Technology (OIT).

**MATTERS APPEALED**

Complainant appeals a September 27, 2012 corrective action, a January 10, 2013 disciplinary reduction in pay and corrective action, and the April 30, 2013 disciplinary termination of his employment. Complainant asserts claims of discrimination based on disability, national origin, race, and religion, and retaliation for protected conduct under the Colorado Anti-Discrimination Act. For the reasons set for the below, the September 2012 corrective action is rescinded; the January 2013 disciplinary and corrective actions are rescinded; and the April 2013 termination is modified.

**PETITION FOR RECONSIDERATION**

The Initial Decision was issued on January 31, 2014. On February 6, 2014, Complainant timely filed a Petition for Reconsideration of the Initial Decision, requesting that the termination be rescinded instead of modified. Respondent was given the opportunity to file a Response, and did so on February 18, 2014.

The ALJ has reviewed the arguments of the parties. In the course of that review, the ALJ determined it was necessary to clarify portions of the Findings of Fact and the Discussion sections relating to March 2013. Complainant's Petition for Reconsideration is therefore granted insofar as the decision has been clarified. However, the relief requested in the Petition is denied.

**This Amended Initial Decision replaces and supersedes the January 31, 2014 Initial Decision. Therefore, a Notice of Appeal Rights is attached to this decision.**

## FINDINGS OF FACT

1. Complainant was born and raised in Tunisia. He is of Arab ethnicity and his native language is Arabic. Tunisia is a predominantly Muslim country and Complainant is a Muslim.
2. In 1988, Complainant received a Bachelor of Arts degree in Management and Economics.
3. In 1991, Complainant moved to the United States. In 1992 he completed a Master's Degree in Math and Statistics, in Tunisia.
4. In 1997, Complainant became a United States citizen.
5. Complainant attended the University of Colorado at Denver in 1995, and in December 2001 he received a Bachelor of Science degree in Computer Science and Engineering.

### Early Employment

6. On March 1, 2005, Complainant was hired as an Information Technology Professional (IT Pro) III on contract at the Colorado Department of Health Care Policy and Finance (HCPF). He was later hired into a permanent IT Pro III position and became certified in the position on September 1, 2007.
7. Complainant was hired to assist in the early programming for the Colorado Benefits Management System, or CBMS, the online system for administering all state and federal public benefits in Colorado. Complainant played a major role in programming CBMS Medical programs, of which there are thirteen. He worked exclusively in the Medical area, developing decision tables and identifying and fixing problems with the program. Medical programs include Medicaid, Family Medical, long-term care programs, and the Children's Health Program Plus (CHP+).
8. Complainant worked closely with Eugene Kendall, Bonnie Hartman and Karen Talbot from 2004 through 2009. They worked out problems in the programs together, and found him to be a fast learner, hard working, polite, humorous, professional, and well-liked by team members.
9. Other CBMS programmers worked on the "State" program areas of food and cash assistance.

### 2009 and 2010 Evaluations

10. In April 2009, Steve Holland rated Complainant Level 2, Successful, with 240 points out of a range of 150 – 269 points on his annual evaluation. Holland made the following comments: In Job Knowledge, "Mourad is continuing to increase his knowledge of the CBMS Decision Tables and has become recognized as a subject matter expert in the CHP+ decision tables. He has used this knowledge to train the Deloitte Decision Table developers as they begin to take over CBMS decision table maintenance. Mourad has also ... used these skills to implement improvements to those programs in CBMS." In Communication, "Mourad's verbal and written skills are good. He is continuing to make improvements in his listening skills. He communicates statuses and issues to the Family

Programs Business Analysts and testers appropriately and is fully engaged with the team in developing solutions to program issues.”

11. In Customer Service & Interpersonal Skills, Holland wrote, “Mourad’s customer service and interpersonal skills are good – other members of the Section has (sic) praised Mourad for his willingness to assist with research into detailed CBMS decision table issues and the thoroughness of his research. Mourad is responding to requests for assistance on trouble tickets within 24 hours and usually within hours of the request – this is a marked improvement over last year’s performance. He also has learned the Adult programs decision tables to assist that team with trouble ticket requests and decision table research.”
12. In 2010, Holland rated at Level 2 overall, with 251 points, and Level 3, Exceptional, in Core Competencies. Holland’s comments included, “Mourad continues to demonstrate a very high level of knowledge of program rules and CBMS functionality, using this in his research into CBMS trouble tickets and in training the CBMS Help Desk as they started to take over help desk duties from EDS.<sup>1</sup> He has responded to over 80 help desk ticket research requests with a very quick turn around and clear, concise answers. Mourad always responded to the help desk with a courteous response and was very careful to make sure his responses were well-thought-out and clearly emphasized the information the receiver needed to resolve the help desk tickets.”
13. Additional comments noted, “Mourad has been a major contributor to the resolution of help desk tickets and in assisting the CBMS business analysts with their research needs. He demonstrates excellent knowledge of the CBMS program rules and functionality and uses this knowledge to assist in the resolution of help desk tickets.” “The Help Desk has commented that they appreciated Mourad’s level of involvement and support in researching and resolving help desk tickets. The CBMS team leader responsible for HCPF business analysis and help desk support gives Mourad very high praise when describing his performance in this area. This role enables Mourad to demonstrate one of his most outstanding skills-that of a research analyst.”

#### Complainant’s Hearing Disability

14. In September 2007, Complainant was diagnosed with Tinnitus, which is ringing in the ear, and Hyperacusis, hypersensitivity in hearing. Normal workplace background sounds are amplified as ringing in Complainant’s ears. When his condition is triggered it causes Complainant to lose concentration and focus.
15. Tinnitus and hyperacusis are exacerbated by stress. When both of these conditions are at their worst, Complainant experiences normal air vent noise as an airplane engine.
16. After receiving these diagnoses, Complainant informed Holland. Holland did research on the condition and suggested to Complainant that he work at home as often as possible. They asked Human Resources (HR) if this would be permissible as an accommodation for his condition, but it was not. HR directed Holland to find an accommodation for Complainant at work.

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<sup>1</sup> The initial private vendor under contract with HCPF to handle CBMS.

17. Holland and Complainant found a quiet work space and the issue was resolved for several years until CBMS reorganized.
18. Complainant's coworkers knew about Complainant's hearing disability and noticed that if his work area became loud, the ringing in his ears gave him nausea and he didn't feel well, causing difficulty in working. Talbot and Hartman often helped him close AC vents and make other necessary adjustments to his work area.

#### HCPF Service Desk and Tier I, II and III Tickets

19. County workers who assist members of the public in applying and qualifying for benefits comprise the majority of CBMS "end users." When the county workers started using CBMS, they confronted technical problems that were the result of either their own data entry errors or kinks within the CBMS system.
20. To handle these problems, HCPF opened a Service Help Desk to take calls and assist county workers to assure a smooth process for eligibility determination and provision of public benefits. Help Desk staff were divided into three tiers:
  - **Tier I** staff took the phone calls, entered password resets, and entered the tickets into the database;
  - **Tier II** staff worked directly with the end users to determine whether the problem was caused by a data entry error by the user, made sure all attachments (screen shots) were properly included with the ticket, reviewed all written documentation connected with the ticket to locate an error, and resolved tickets. If the Tier II staff were unable to resolve the ticket, it was elevated to a **Tier III analyst**;
  - **Tier III** staff reviewed all of the screen shots and data entry conducted by the end user and Tier II analyst; corresponded with the end user to determine why the benefit was not being approved on CBMS; reviewed prior similar tickets to find resolutions; ran test panels to reveal programming issues; reviewed recent system changes resulting from modifications in state or federal welfare rules; and consulted with Policy staff at HCPF, who were the most current on federal and state public benefits regulations. When Tier III staff worked with Policy staff, it was important that they provide thorough and accurate information to Policy staff, including screen shots and work conducted, so that Policy staff would not have to duplicate the work.
21. When Tier III analysts identified technical issues that needed to be integrated into CBMS, they referred the ticket to Deloitte, the new private vendor.
22. For Help Desk staff with no prior county experience, such as Complainant, it takes approximately six months to develop a working knowledge of new welfare benefit program areas.

#### Creation of the Governor's Office of Information Technology

23. In 2009, Colorado Governor John Hickenlooper created an Office of Information Technology (OIT). Over the course of the next few years, the IT positions previously housed in seventeen state agencies were transferred to and consolidated into OIT. Approximately 900 employees were affected.

24. Classified positions transferred to OIT remained classified. OIT positions that became vacant were usually modified to exempt, at-will positions prior to being filled.
25. During the period of late 2009 through mid-2011, HCPF implemented at least four reorganizations of the CBMS program. Tier 1 and II Service Desk positions were moved permanently to OIT.
26. The Tier III Service Desk Analyst positions were transferred to Deloitte. Then, several months later, they were returned to HCPF.
27. Paul Potts supervised the HCPF Tier III CBMS Help Desk team, creating a Medical group consisting of Complainant, Ben Masten, another IT Pro III, and Brian Knight, and assigned State tickets to Mike Zern.
28. In May 2011, Complainant's sister in Tunisia became gravely ill and he spent some work time on the telephone to monitor her status. Complainant advised Potts about the situation.

#### June 2011 Move to New Office; July 2011 Family Medical Leave Act (FMLA) Approval

29. On June 1, 2011, the HCPF Help Desk staff moved to new offices. Complainant's cubicle was in a noisy area that was harmful to his disability and made it difficult to concentrate. Complainant brought his concern to Potts. On at least one working day, after a few hours the noise became unbearable and he left work with Potts' permission.
30. Before his cubicle location issue was resolved, Complainant received news that his sister in Tunisia had died. He took a month of leave and returned on July 5, 2011. After his return, he had continuing problems securing a quiet work area.
31. On July 21, 2011, Complainant's physician filled out the FMLA forms documenting Complainant's covered serious health condition as "Chronic tinnitus with Hyperacusis when flares due to ambient noise he is unable to focus and do any work. Background noise such as fans, AC vents, even computer fans will clearly make this worse and should be limited to allow him to stay at work." The probable duration of the condition was "lifetime." Dr. McGrath noted that he had treated Complainant on 2/11/08, 4/30/09, and 7/13/11 for the condition.
32. The form stated, "When having a flare-up, he is unable to work." It requested up to 8 hours of intermittent leave once a week, as necessary, for the condition.
33. HCPF issued Complainant a FMLA Designation Notice approving up to 8 hours per week for flare-ups, stating, "Your requested leave is approved as FMLA. All leave taken for this reason will be designated as FMLA leave beginning 7/13/11."
34. Due to the continual reorganizations and moves, Complainant had asked Al Hocker, a CBMS manager, on three separate occasions for a quieter cubicle.
35. Complainant's coworkers, Hartman and Talbot, both witnessed Hocker complaining about having to find Complainant a quiet place to work. He stated several times in casual conversation that he did not feel he should have to move Complainant. Hocker

made it clear he did not believe Complainant had a hearing problem that warranted moving him to a quiet area, and he was annoyed and resentful toward Complainant.

36. Hocker complained to Talbot's entire work team in team meetings about having to find a quiet work space for Complainant.
37. Potts gave Complainant an overall Level 2 Satisfactory review in 2011, but rated him at "needs improvement" in Accountability, stating that Complainant was "frequently absent from his work area taking phone calls in the hallway for extended periods of time" and had been late or missed meetings on his schedule. Complainant checked the box for "disagree" on the evaluation and noted that he had informed Potts that his sister in Tunisia was seriously ill and he needed to take some phone calls regarding her status. Complainant agreed that he was fifteen minutes late for one meeting.

#### Business Analyst (BA) Team; Transfer to OIT

38. In December 2011, the entire HCPF Service Desk Tier III group, including Complainant, was informed that they would be transferred to the BA Team. This transfer was welcomed by Complainant and the others as an appropriate utilization of their IT knowledge, skills, and experience.
39. Complainant and the others received invitations to attend a welcome/working meeting on December 1, 2011.
40. On November 30, 2011, the day before the BA Team welcome meeting, Hocker informed Complainant he was not going to the BA Team. Instead, Complainant would be transferred to the OIT Service Desk, joining the Tier I and Tier II CBMS analysts at 1575 Sherman Street. Complainant's new title would be IT Pro III/Tier III Service Desk Analyst.
41. Complainant felt singled out and upset by the sudden change in plans for his transfer. Some at HCPF felt that this transfer was a downgrade and an attempt by Hocker to get him to quit.

#### December 2, 2011 Meeting to Discuss Transfer to OIT

42. On December 2, 2011 Complainant met with Joetta Fischer, Service Desk Access Control Manager at OIT, Hocker, and Renee Marble, OIT Service Desk Manager. Fischer informed Complainant he would help them to manage the Service Desk better, training the other Tier I and II Service Desk staff in troubleshooting tickets more. She explained that staff could do the simple tickets, but needed technical expertise that he could provide.
43. Complainant stated that he would be happy to do the Service Desk job, and would improve the areas they wanted him to improve. He then asked who had made the decision, so that he could share some questions directly with that person.
44. Fischer and Hocker responded that it was a joint management decision.
45. Complainant expressed his concern that first he was told he would be joining the BA team, and then suddenly, a few hours before the BA Team meeting, everything had

changed. He stated that he felt singled out, and that while he was “not seeking results,” he was frustrated by the sudden manner of the decision and the way it had been communicated to him.

46. Fischer stated, “If you don’t want the position I need to know now. I don’t want to put you in a position you don’t want.” He responded, “Yes, I will take it. I will be more than happy to work with you.” He asked if he could do it from his existing work station. He was informed that he would have to move to 1525 Sherman Street, where the Service Desk team was located. Complainant also stated, “I have to do what the business needs me to do. I’ll be more than happy to help.”
47. During the meeting, Complainant stated that he felt he was being discriminated against based on his religion and race.
48. The meeting closed on a positive note, with Complainant stating he was excited to do the work, thanking them, and wishing everyone happy holidays and “Merry Christmas.”
49. Within a week of this meeting and his transfer, Complainant reported to the OIT Human Resources (HR) office that he felt he was being discriminated against on the basis of race and religion. The HR office did not investigate his claim and he did not follow up on it. HR staff informed Fischer that Complainant had visited the office to complain about his transfer to OIT.

#### OIT Early Phase

50. At Fischer’s directive, Marble informed Complainant he could choose any cubicle he thought would help address his hearing disability. They walked around the OIT work area and he found a satisfactory location.
51. Masten was transferred to the OIT Help Desk as the other Tier III analyst at approximately the same time as Complainant.
52. The OIT Service Desk Team included nine Tier 1 Analysts, five Tier II Analysts, and two Tier III Analysts, Complainant and Masten.
53. Complainant and Masten therefore handled the work that had formerly been performed by three-to-four Tier III analysts at HCPF.
54. Complainant integrated well with the Service Desk Team. Marble was pleased with Complainant’s performance and gave him positive ratings on his performance evaluation before she left the position in April 2012.

#### Service Level Agreements: Priority 1 (P1) Tickets

55. The OIT entered into Service Level Agreements (SLA’s) with its client state agencies to resolve tickets within a specific time and in compliance with specific standards.
56. Under the SLA with Colorado Department of Human Services (CDHS), which administered all of the benefits programs in CBMS, OIT had to meet the following timelines in responding to tickets: **P1 (Priority 1) Medical tickets** are life and limb

threatening situations that must be resolved within 4 hours of receipt; **P2 tickets** must be resolved within 3 working days; **P3 tickets** must be resolved within 14 days.

57. When a P1 ticket is not resolved within four hours, it is an SLA violation.
58. Complainant was assigned the exclusive role of handling all P1 tickets. He was also chiefly responsible for the Medical tickets. Once Complainant received a P1 ticket, he had to work only on that ticket until its resolution.
59. Masten handled State tickets and as back-up on P1 tickets between 7:30 a.m. and 9 a.m., when Complainant arrived in the office, and during Complainant's lunch break.

#### SLA Violations; Working with Policy Staff

60. Complainant often needed Policy staff involvement to resolve P1 tickets, either through issuance of a Notice of Approval, or NOA (an immediate approval of public benefits), or to obtain updates on medical benefit regulations, which changed often.
61. Complainant found that it was not uncommon for HCPF Policy staff to take one to two hours to respond to an inquiry on a P1 ticket. When OIT Service Desk staff or Policy staff at HCPF failed to resolve a ticket in a timely manner, it was considered to be an "SLA violation."
62. If the ticket was in the Policy office at the time the 4-hour limit expired, the SLA was attributed to Policy because it was in AWP (Awaiting Policy Staff) status. If it was at OIT, the SLA violation was attributed to Complainant.
63. OIT Tier II and III analysts met weekly with HCPF Policy staff to discuss problems, issues, and resolutions of Medical tickets. Complainant attended these meetings. Improvement of Policy staff response time was addressed at these meetings.

#### Sonia Sandoval

64. In April 2012, Sonia Sandoval was appointed as the new OIT Service Desk Manager. Sandoval was the only IT Pro III other than Complainant at the OIT Service Desk.
65. Sandoval had a long history of working under Fischer and was recruited into the position by Fischer. Sandoval had previously worked for Adams County Social Services as a food assistance policy specialist, then at HCPF to assist in developing CBMS, then as supervisor of change management at CBMS, then as CBMS training manager for five years. As CBMS training manager, she had a team of seven trainers that trained end users in all Colorado counties to use CBMS. She then became project manager over pharmacy benefits at HCPF. Sandoval does not have training or a degree in computer programming.
66. Fischer received weekly statistical reports on OIT ticket resolutions, and was concerned about the rate of SLA violations among Service Desk staff and the delays by Policy in responding on P1 tickets. She directed Sandoval to implement a Quality Assurance Review process for all CBMS tickets to eliminate the SLA violations, and identify trend problem areas in the tickets and areas for staff and end user training.



67. Fischer also directed Sandoval to eliminate the large backlog of state and medical CBMS tickets. Neither Masten nor Complainant was responsible for causing the backlog of CBMS tickets. They were both responsible for eliminating that backlog.

#### Variability of Service Desk Tickets

68. The tickets worked on by the Tier I, II and III OIT Service Desk analysts were all different in several ways: known issue; database contained a previous resolution of the issue; new issue that was easy to resolve; new issue requiring intensive staff involvement; new issue requiring that the Tier III analyst run a test panel; issue involving new regulations or a question or an NOA requiring Policy staff involvement.
69. Analysts' ability to complete tickets in a timely manner also depended upon how quickly the end user could be reached, whether and how quickly the end user needed to contact the client, and how quickly the Policy office responded.
70. Some tickets took almost no time to resolve because there were "known issues" or because the end user called back after CBMS had mysteriously approved the benefit application. Other tickets took several hours to resolve.

#### Quality Assurance Ticket Reviews; 70% Accuracy Requirement

71. Sandoval tailored the Quality Assurance ticket review form to Service Desk analysts' work on P1 tickets. In May 2012, Grace Reigh, lead worker, performed Quality Assurance reviews of Complainant's tickets. She appropriately applied the written criteria on the QA review form, and rated Complainant 100% compliance on all of his tickets.
72. One trend Sandoval found among the analysts was lack of documentation of research conducted in the "Summary" line on the tickets. Sometimes there was nothing to document; other times the documentation was critically important because future end users and other analysts would examine old tickets for resolutions.
73. Sandoval conducted monthly ticket reviews to assure that the OIT staff was appropriately researching and documenting their tickets. Sandoval held monthly one-on-one meetings with her staff to review her QA ticket reviews and other issues.
74. Sandoval held the entire Service Desk Team to a 70% accuracy rate on QA ticket reviews and planned to do so for one year while her staff became accustomed to the process. She did not impose a minimum daily or weekly number of tickets to work on the analysts.

#### 2012 FMLA Reauthorization

75. On July 10, 2012, OIT HR staff sent Complainant an annual notice to resubmit an application and medical certification form for FMLA leave. On October 16, 2012, Complainant was approved for FMLA intermittent leave for up to 7 days per month as needed.

#### July 13, 2012 One-on-One Meeting with Complainant

76. On July 13, 2012, Sandoval had her regular one-on-one meeting with Complainant. She discussed with him the same problems all Service Desk staff were having. They discussed P1 tickets not being resolved timely, and Policy staff not responding quickly enough. She noted that some of his tickets sent to Policy contained incorrect information. He responded that because he was getting the tickets to Policy so fast in order to meet the 4-hour deadline, he was making mistakes, and he would slow down.
77. Sandoval mentioned that some tickets had insufficient documentation of his research. He responded that he would put a short explanation in the ticket of what was done but did not include everything in the email.
78. Sandoval directed Complainant to "copy/paste the information into the ticket."
79. Regarding his role of providing back-up assistance on State tickets, Complainant mentioned that he did not know the Food Assistance programs and it often took him an hour to research them. Sandoval responded that an hour was too long and he should just note on the ticket that "no research was done as he is the back up."
80. Sandoval also mentioned that Complainant's tone in emails showed his frustration, and he agreed to pause before sending emails on difficult tasks.

#### July 17, 2012 Memo Regarding Old Tickets

81. On July 17, 2012, Sandoval emailed Complainant and Ben Masten concerning old tickets. Complainant had been working only the Medical tickets and Masten had been working the State tickets. She stated that she had just checked the queue and there were some very old tickets and they really needed to get them taken care of. There were 42 tickets in the CBMS Med Queue in Initial Status, oldest 6/6/12, and 59 tickets in the CBMS State Queue in Initial Status, oldest 5/7/12. She stated, "Can you not focus on the newer ones and get these older ones taken care of."
82. On August 3, 2012, Sandoval sent Complainant, Masten, and three other Service Desk staff an improved draft of the P1 ticket Resolution Process document for review. The document was color coded in green for unresolved areas she still had questions about, and yellow for added steps for the Service Desk group. She thanked the group for providing information for the form and encouraged comments and suggestions because they were the users of the process.

#### August 9, 2012 Memo to Complainant Regarding P1 Ticket Management

83. On August 9, 2012, Sandoval issued a memorandum to Complainant to formally address concerns that he was not resolving P1 tickets within four hours, in violation of the SLA, copying Fischer on the memo. She stated that in her July Quality Assurance Review of ten P1 tickets, his overall accuracy rate was 75%. While that exceeded the 70% accuracy requirement in his performance plan, the pattern of errors was a concern.
84. Sandoval provided four ticket examples of SLA violations as an attachment. Two of the tickets were legitimate SLA violations caused by Complainant. Two were not.

85. In example one, Complainant received notice from Policy at 1:37 p.m. that the issue was resolved but waited until 3:07 p.m. to enter the resolution, which caused the ticket to exceed the 4-hour resolution deadline by 14 minutes. In another, Complainant accidentally sent the ticket to the wrong email address in the Policy office on Friday, July 6, and did not follow up on it until the next work day, Monday, at 5:21 p.m. The ticket was resolved and the client received the medication on July 10, 2012.
86. In the third example, the ticket was in AWP status at the time of the SLA violation and therefore was not attributable to Complainant. In her memo, Sandoval erroneously held Complainant accountable for it.
87. In the last example, Complainant noted in the ticket that he was in a meeting, in accordance with the P1 policy.
88. After July 9, 2012, Complainant never had another four-hour SLA violation on a P1 ticket.

#### P1 Ticket Resolution Workflow Forms and Flowcharts

89. On August 13, 2012, Sandoval sent two documents to the Service Desk analysts: another updated CBMS P1 Ticket Resolution Process form, and a P1 Workflow document. She stated they would be effective on August 14, 2012.
90. On August 15, 2012, Sandoval sent another CBMS Priority 1 Ticket Resolution Process document to her staff. It was color coded again, with explanations in yellow, information to be verified in green, and revisions since the last version in blue. The form's stated purpose is "To identify and document the process followed by the OIT Service Desk for Resolving CBMS Priority 1 tickets within SLAs."
91. Under the form, upon receipt of a P1 ticket, the Service Desk Team are to "Complete research on the ticket to determine if it is a valid P1. Work with the SME [subject matter expert] of Tier III. All research completed must be documented in the ticket. This process must happen immediately to ensure quick turnaround on the ticket if it needs to be paged to another group." If a ticket needs Policy work and technical work by Deloitte, a page must be sent to both groups to ensure they are aware of the P1 that must be resolved in 4 hours.
92. Under the form, "The communication with Program Area [Policy staff] must be clear and provide all information necessary to prevent emails from going back and forth."
93. The general procedure for P1 tickets is to 1) troubleshoot the issue and work with the end user (usually by email and sometimes by phone); 2) update ticket with details of what has been done to troubleshoot the issue; 3) implement a resolution or work around within 4 hours of the incident being initially reported ("If information is not received from the Program Area, Tier III should contact the Program Area at least one time per hour to verify the status of the ticket. The communication must be documented in the ticket."); 4) if resolved, contact end user for confirmation and resolve ticket; 5) if work around is achieved, a Problem ticket is opened to troubleshoot issue to root cause; 6) if unable to resolve within 4 hours, inform Major Incident Manger and follow Major Incident Process.
94. Complainant responded that the form looked fine to him.

95. On August 29, 2012, Sandoval sent a reminder to her Service Desk staff that when they will be out of the office on unplanned leave, either coming in late or taking the day off, the message must indicate whether they are sick or taking annual leave. If no notice is given, the absence will be entered in Kronos, the timekeeping program, as annual leave.

September 14, 2012 Ticket 1536497

96. At 4:30 p.m. on a Friday afternoon, September 14, 2012, Complainant received a P2 Ticket, #1536497. Complainant was scheduled to work until 5:30. The situation involved a child who needed medication. Complainant was concerned about Policy not responding timely and the child not receiving the medicine. He did not notify Policy staff of the ticket on that day, in violation of the requirement that he at least give Policy staff a "heads up" that a P1 ticket was pending and the Policy staffer would need to be available by cell phone for the next four hours.
97. Complainant approved the end user's request to use the CHP+ program for the child's medication until Monday, and the child received the medicine immediately.
98. Complainant did not enter sufficient documentation on this ticket, and entered the wrong State ID number for the client parent, when he sent it to Policy for an NOA.
99. On Monday, Shawna Moreno, General Professional (GP) IV at HCPF, emailed Complainant stating that they had researched the ticket, found that the child was in CHP+, and that the ID for the parent was incorrect and belonged to another person. She asked, "please verify your research and get back to us."
100. Complainant responded that he had used CHP+ because the client was over income eligibility criteria for Family Medical (FM), it was late in the day, and provided another ID number. He also stated, "The client wants to continue with FM [Family Medical] and not with CHP."
101. Moreno responded that CHP could not be authorized temporarily and they could not issue an NOA for Medicaid, noting that her staff had been there until 5 p.m. to handle priority tickets, "so it would have been better to send it over and . . . opened as Medicaid for pharmacy and a NOA sent out." She also noted that he had still given her an incorrect ID number.
102. Complainant responded that the child had rolled to CHP incorrectly, it was a known issue related to the parent, and that the mother did not want her child to be in CHP+. Moreno performed additional research, finally determining that the mother should never have been eligible for FM, and the child was on CHP correctly, and explaining the process the end user should have used.
103. On September 18, 2012, Kim Elsen, HCPF policy staffer, emailed Sandoval regarding #1536497, stating, "Hi Sonia, We didn't meet the timeframe for this P1 ticket yesterday. This is an example of where we believe Mourad did not do the initial research and only sent us what the end user stated was wrong with the case. Thus, the HCPF team ended up spending a significant amount of time going through the case to determine what the issue was."

## September 27, 2012 Corrective Action Plan (CAP)

104. On September 27, 2012, Sandoval directed Complainant to attend a meeting with herself and Fischer. At the outset of the meeting, Fischer stated to Complainant that if he was not happy with his job, he should consider moving on and finding another job. Complainant was taken aback and deeply troubled by her statement.
105. At this meeting, Sandoval and Fischer issued Complainant a Corrective Action Plan (CAP) signed by them, and reviewed it with him. It was five single-spaced pages long, with four lengthy attachments. The CAP began, "This letter is to inform you that concerns regarding your performance have been identified. As a Tier III Service Desk Analyst, it is your responsibility to work with Program Areas, the Vendor, and CBMS State Staff to resolve tickets. Customer service is number one priority and must at all times be kept in high regard. Over the past few months, I have observed several areas of concern that are listed below."
106. The CAP listed some legitimate concerns Sandoval had found in her QA ticket reviews of Complainant's tickets.
107. Four of the problems Sandoval identified as errors were in fact not errors committed by Complainant.
108. The CAP discussed the extra work Complainant had caused at HCPF in his handling of the September 14, 2012 ticket, 1536497. It discussed eight problem areas revealed in the ticket reviews, including insufficient research and documentation in his tickets; copying and pasting information in tickets; failure to check his in box for follow-up comments by end users, which re-open tickets; failure to send a ticket to Deloitte for further research on what his test panel had shown on a ticket; using coding language in tickets that end users would not understand; and not working the backlog of tickets in the order they arrive.
109. Sandoval had directed Complainant to copy and paste information into tickets at their July 13, 2012 one-on-one meeting. She was now basing the CAP on his having complied with that directive.
110. The CAP erroneously faulted Complainant for requiring a police report to verify a report of identity theft before working on the ticket. The CAP also faulted Complainant for not documenting the ticket resolution in an instance where the end user called back to report that CBMS worked the second time and he had no idea why. There was nothing for Complainant to document in this instance.
111. The CAP also erroneously faulted Complainant for not meeting the 70% accuracy level on QA ticket reviews. The chart attached to the CAP showed that his ticket review results for June through September 2012 were 79%, 82%, 77%, and 82%.
112. Regarding the backlog of CBMS tickets at OIT, the CAP noted that there were 221 CBMS tickets in the State queue as of September 19, 2012 dating as far back as May 23, 2012, and 22 in the Medical queue dating as far back as February 21, 2012.
113. The last issue in the CAP faulted Complainant for not working a sufficient number of tickets each day, stating, "The Service Desk Team is expected to complete a sufficient

amount of tickets each day. While there is not a specific number that need to be completed each day, it is expected that on average, staff complete about the same amount of tickets.”

114. Attachment D: Ticket Completion, showed the following comparison of Complainant’s ticket processing compared to Masten’s ticket processing:

<u>Week</u>	<u>Mon</u>	<u>Tues</u>	<u>Wed</u>	<u>Thur</u>	<u>Friday</u>	<u>TOTAL</u>
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Week 1

Complainant	11	14	8	2	10	45
Masten	10	14	20	8	0	42

Week 2

Complainant	0	7	5	10	10	27
Masten	0	23	20	28	10	64

Week 3

Complainant	21	51	22	13	35	117
Masten	26	28	26	35	62	144

115. The chart also included Tier I and II ticket completion rates per week, with the numbers varying dramatically from 66 to 1050.
116. For example, in the first week, the total weekly Ticket Completion numbers of non-Tier III staff were: 153, 212, 258, 1050, 222, 115, 66, 226, 359, and 285.
117. The second week Ticket Completion numbers were: 143, 174, 378, 198, 242, 417, 110, 248, 264, 135, 152, and 211.

CAP Action Steps

118. The CAP provided two pages of Actions Steps with which Complainant had to comply from October 1 through November 30, 2012, including:
- Meet SLA’s “for all tickets worked”
  - Follow the P1 ticket process
  - Ticket reviews must indicate improved documentation in the ticket resolution database entries
  - Work the CBMS State and Medical queues according to date ticket received
  - Attend weekly meetings with HCPF staff to discuss questions and issues in resolving tickets
  - “Average number of tickets worked each week must be in line with what the rest of the team is completing.”
119. Under the CAP, Sandoval would meet with Complainant weekly to assess his progress and performance.

120. Complainant started attending regular meetings with a counselor at the Colorado State Employee Assistance Program (CSEAP) after he received the CAP.

#### October 1, 2012 One-on-One Meeting

121. During the month of October, Sandoval reviewed every ticket Complainant worked on every day and made a detailed chart containing the ticket number, the work Complainant performed on the ticket, Complainant's disposition of the ticket, any problems she perceived with the manner he handled the ticket, and the length of time he worked on each ticket. She then added up the total length of time he worked on tickets.
122. On October 1, 2012, Sandoval removed Masten from working on P1 tickets as a back-up to Complainant, and reassigned Masten to handle calls generated by the implementation of Google email.
123. On October 1, 2012, Complainant and Sandoval had their first one-on-one meeting. Complainant informed Sandoval that he was surprised to receive the CAP and he was writing a rebuttal to it. He said that to compare his work on Medical P1 tickets to that of other analysts was akin to comparing apples to oranges. He informed her that the average time to research a P1 ticket is 30 minutes and can take as long as two hours. Sandoval responded that this is too long to work on one ticket and she had never heard of it taking that long.
124. Complainant asked for a minimum number of tickets he was required to work on each day. Sandoval responded that there was no magic number.
125. At the meeting, Complainant informed Sandoval that he came to work every day with a disability but had not informed her of it. Sandoval responded that she was aware that Complainant had taken periodic FMLA leave and had been informed by HR staff that he had a disability and HR needed new paperwork.

#### October 4, 2012 Informal Grievance Meeting on the CAP

126. Complainant had not been informed previously by Sandoval or Fischer that he was working too few tickets. He had not had an SLA violation for 70 days. He felt he had not been provided adequate warning of work performance issues prior to the imposition of the CAP. He informally grieved the CAP.
127. On October 4, 2012, he met with Fischer and Sandoval. It was a long meeting. Complainant pointed out that he had resolved Ticket #1536497 on the date he received it. Sandoval and Fischer informed Complainant that lack of timeliness was not the issue: the problem was that he had not contacted HCPF Policy staff on Friday afternoon at 4:30 p.m. when the ticket came in. Complainant explained that it usually took two hours for Policy staff to respond to him, he felt he needed to get the medicine to the client immediately, and therefore he used his professional judgment to approve the CHP+ authorization requested by the county end user. Fischer said, if the end user informs you they are staying until the issue is resolved, then you are staying.

128. Fischer and Sandoval explained the critical importance of contacting Policy on every P1 ticket in need of Policy intervention. Complainant agreed to do so, while stating that he would “do what I need to do to save the person’s life.”
129. Complainant asked if there had been a problem with his not contacting Policy staff in the past. Sandoval said that one time he had sent an email to the wrong person by mistake. She added, “You cannot make those kinds of mistakes.” He said that it would not happen again.
130. Fischer told Complainant that in order to get HCPF Policy staff to respond, and to avoid having an SLA on his record, he should call HCPF Policy every fifteen minutes, repeatedly, and document it, if necessary. Complainant responded that the written P1 policy directs analysts to contact Policy once per hour, and asked if they could put the 15-minute directive in the policy. She responded that he was an IT Pro III and she should not have to put anything that detailed in the policy for a position at his level. “If the documentation is in the ticket, the SLA is on Policy, not us.”
131. The second issue discussed was Fischer’s comment at the beginning of the CAP meeting, when she informed Complainant that if he was not happy and didn’t like this job, he can find another one. He explained how surprised he was and that he had become speechless after it. Fischer responded, “I apologize for that,” and explained that when they first decided to bring him to the Service Desk he went down to HR and complained. Complainant asked what she had heard from HR and she said she did not know what he discussed, adding, “We worked with you to find the perfect place to sit.” Fischer said she had heard from other staff that “you are just sitting back there like this.” She stated that his volume of tickets was very low; she had pulled several of his tickets and could not tell how long he had worked on them because there was no research documentation in them.
132. Fischer said it didn’t seem like he was happy in the position based on certain things she had seen. She said, “I know you’re a great programmer” and added that if he wanted to be a Tier III on the Service Desk, great. She did not have any programming jobs, however. If he wanted to be a programmer, he needed to go talk to two specific managers, whose names she provided to him.
133. Complainant shared a survey that had been completed by his Service Desk peers, which demonstrated that they all enjoyed working with him. Fischer responded that she was not saying he was not doing a good job and that others on the team didn’t like him. She stated that they needed to see him resolve more tickets. She explained she works with 75 people and 17 agencies, and has quotas to reach every week.
134. Complainant next discussed the “completed tickets” graphs. He pointed out that he was the only one who worked on P1 tickets and that they take more time than P2 tickets. Sandoval disagreed, stating that Tier II’s do most of the research and that once he gets the ticket he just sends it to Policy staff for a Notice of Approval. Fischer said it takes no more than fifteen minutes to hear back from HCPF, and if it takes longer, he has to log that on the ticket.
135. Complainant then read a written statement by Brian Knight, who had formerly worked on P1 Medical tickets with Complainant. Complainant had asked Knight to answer the question of what is the average time to resolve a P1 ticket. Knight had responded: he



could not give a set time because there are so many factors; there is case research; making sure the benefits are correct; checking to assure that the data entered in the system is correct; working with the end user; often the end user is difficult to get in touch with; often they have to wait until the end user gets in touch with the client before he or she can resolve the ticket; sometimes Policy staff are hard to get in touch with; sometimes it takes time to correct a system issue; and, it can take one hour up to all day to resolve a P1 ticket.

136. Fischer responded that this was hearsay, because Knight was not aware of the improvements in obtaining faster responses from Policy staff since he stopped working on P1 tickets in February 2012. Neither she nor Sandoval responded to the remainder of Knight's comments.
137. Complainant asked them what was an objective number of tickets he should work every day. Fischer responded that she wants all of the tickets worked, and acknowledged that he was an expert in Medical tickets. Neither she nor Sandoval responded to this question. Fischer told Complainant that they were not comparing him to the other Tier I and II Help Desk staff. She also said that they had a couple of Tier IIs who will be ready to move up to Tier IIIs pretty soon.
138. The discussion turned next to Complainant failing to work a sufficient number of State tickets. Complainant explained that he was the only staff member working on P1 tickets, and that Masten did not work on Medical tickets. Therefore, if he allowed the number of Medical tickets to remain high, he would be held exclusively responsible for it.
139. The last issue Complainant raised was why the ticket number issue had never been raised with him before. The response was that he could have asked for this information if he wanted it.
140. At the meeting, Complainant stated that he believed they were going to fire him. They denied that this was the case.

#### October 8, 2012 Grievance

141. On October 8, 2012, Complainant submitted a written document containing his grievance concerns (not in the record).

#### October 9, 2012 One-on-One Meeting; Elimination of Tier I and II Assistance

142. Complainant worked all three days over Columbus Day Weekend, October 6 – 8, 2012, during which he completed 80 tickets.
143. At the October 9 one-on-one meeting with Complainant, Sandoval challenged Complainant on working a low number of tickets on October 1. Complainant informed her that he had spent part of October 1 working on his response to the CAP, with the permission of Fischer. Sandoval reviewed Fischer's email to verify this was true. Sandoval then challenged Complainant on the amount of travel time it actually took him to get to CSEAP for his meeting on October 1.
144. Sandoval's QA ticket review results given to Complainant on October 9 were an average 76% compliance rate (60%, 70%, 75%, 75%, and 100%). The tickets Sandoval

reviewed at the October 9 meeting had been worked appropriately by Complainant. Sandoval differed with his decision to send a request for an NOA to Policy before he had completed all of his research on the ticket.

145. At her October 9, 2012 one-on-one meeting with Complainant, Sandoval informed him that she was eliminating all Tier I and Tier II analyst work on all P1 tickets he would be working on. Sandoval also instructed Tier II Service Desk Analysts to stop assisting Complainant if they felt that it was causing them not to be able to work on their own tickets, but did not inform Complainant of this.
146. This change made Complainant's job significantly more difficult and time consuming. Tier II analysts had reviewed the entire ticket to try to find errors, worked directly with end users to identify potential income and other data entry errors, obtained all necessary attachments such as screen shots, reviewed all documentation connected with the ticket to find errors, and resolved many tickets through this process.
147. Complainant often needed to obtain information on clients from Tier II analysts who had databases he lacked. He also found it necessary to consult with Tier II analysts for guidance on State ticket issues due to his unfamiliarity with those programs.
148. During the weekly meetings with Sandoval, Complainant requested that she pull up the ticket online so that they could review it together and he could see his work and explain what he had done on the ticket as they discussed it together. He felt that this was the only way that he could point out mistakes she was making on her QA review sheets. Sandoval refused to do so.
149. The handwriting on the QA sheets looked different than her usual writing, and he questioned whether she had actually conducted the QA reviews herself. He believed that Sandoval was not performing the QA reviews.
150. Complainant stopped trusting Sandoval and believed that she intended to terminate his employment.
151. Complainant wrote on some of the October 2012 QA review sheets that "This is not my supervisor hand writing. Correction action plan privacy was not respected."

#### October 11, 2012 Meeting with Joyelle Camilli, Sandoval, and Fischer

152. On October 11, 2012, Complainant, Sandoval, Fischer, and Camilli, from OIT HR, met to discuss Complainant's claim that he felt verbally abused at the September 27 CAP meeting, he was being set up to fail, and was working in a hostile work environment.
153. At the meeting, Complainant again alleged that Sandoval was not actually performing the QA reviews of his tickets. Sandoval was offended by this accusation and assured him that she had performed the ticket reviews herself.
154. The parties agreed as an outcome of the meeting that from that date forward, Sandoval and Complainant would review the QA ticket reviews on line in her office and that he would trust she had performed the ticket reviews herself. Sandoval performed the next two ticket reviews in this manner, then stopped.

155. The parties also agreed that if he felt he was being subjected to a hostile work environment, he should bring it to Fischer's attention. The parties agreed that if any one of them felt they were not being treated with respect and trust, they would state it in a meeting so that the other person would know that feelings were being hurt.
156. Over the next few months, Complainant requested meetings with Fischer alone, so that he could discuss how he felt Sandoval was treating him unfairly. Fischer never agreed to meet with him alone.

#### October 12, 2012 Email on Amended P1 Process

157. On October 12, 2012, Sandoval sent the Service Desk team a lengthy email on the P1 process. This email was confusing and contained conflicting directives on how to treat tickets when received (as P1 or P2), who can downgrade tickets, and under what circumstances.
158. The email stated, if a P1 ticket comes in via self-service (by the client), do not call the user to see if they will be available for the next four hours, treat the ticket as a true P1, and do not automatically downgrade the ticket. The Tier III must conduct research on the ticket. After the Tier III researches the ticket, he can then call the user. If the user is not available, the Tier III can downgrade the ticket.
159. The October 12 email also stated that if a P1 ticket comes in over the phone, gather as much information as possible (who is affected, expected outcome, contact info, 4-hour availability). "Explain to the user that the ticket will be entered as a P2, so Tier III can research." The analyst is to walk, chat, or call the Tier III analyst to advise there is a possible P1, and provide the ticket number. "Tier III will look at the ticket quickly to determine if the ticket could be a P1. This review should occur within 15 minutes."
160. This email also stated that "Slowness and Performance" tickets for CBMS should all be sent to CBMS as P1s if they send them over on the same day, but as P2s if it is the next day. And, if sending the ticket to Deloitte: "with all the changes to self-service and users can put in P1s, just send over any slowness/performance to Deloitte. If the user isn't available when they call, they can downgrade if they choose to."
161. This email appeared to conflict with the August 15, 2012 CBMS Priority 1 Ticket Resolution process, which required that the first analyst document whether the user would be available for the next four hours, and which prohibited Service Desk Analysts from downgrading a ticket from P1 to P2 without the written authorization of Policy or End User.
162. The email closed by stating, "Please come to me if you have any questions about this process."

#### October 15, 2012 One-on-One Meeting

163. Sandoval reviewed Complainant's tickets during the first week of October. Complainant worked 147 tickets that week and the other Tier III analyst worked 95.
164. On October 15, 2012, Sandoval's ticket reviews indicated an 84% average accuracy rate for the tickets reviewed (90%, 80%, 75%, 75%, and 100%).

165. Sandoval informed Complainant that she would not count the 80 tickets Complainant worked on October 6-8, 2012 because he was not required to work on the weekend. On her summary of his work, she stated, "This was . . . not during work hours. The tickets for this day not reviewed in detail. There was no requirement for Mourad to work on this day."
166. At this meeting Sandoval questioned Complainant about an October 12 P2 ticket, #1558389, involving a client at University Hospital emergency room with "diarrhea, bleeding in bowel, vomiting and nutrition." Complainant requested that she pull up the ticket on his computer so that he could see it while she discussed it with him. She responded that all of the information regarding the ticket was in her notes. She ultimately agreed to pull up the ticket and challenged him on how he had handled it. Complainant had acknowledged the ticket within three minutes, had contacted Policy within nine minutes that it was a possible P1, had chatted with the lead worker regarding retaining its P2 status until he heard back on the ticket, run a test panel and sent it to Policy within an hour and eight minutes, marking it a possible P1 and Urgent, and then placed it in AWP status, and heard back from Policy after nearly two hours. Complainant's work on the ticket had been appropriate.
167. Sandoval questioned Complainant on why the ticket had not been resolved as of Monday, October 12. He explained to Sandoval that he had Policy's permission to keep the ticket as a P2, and because of the Google rollout he was not getting his emails, one of which related to this ticket. Sandoval faulted Complainant for his handling of this ticket.
168. Sandoval and Complainant reviewed the tickets in her QA review online together. They disagreed on several areas of purported error, and Sandoval did not agree to modify her conclusions.

#### October 15, 2012 Grievance Response

169. On October 15, 2012, Fischer responded to Complainant's informal grievance of the CAP. In summary, Complainant's concerns and Fischer's responses are as follows:
- Complainant had indicated that someone other than Sandoval must have performed the ticket review on this ticket. Fischer responded that while her handwriting looked different, it was Sandoval who completed all ticket reviews for June through September 2012;
  - Regarding the backlogged tickets, Complainant noted that the tickets were in re-open status. Fischer responded, "You are correct that tickets should not be re-opened, however, that does not change the fact that the tickets must be worked. The tickets cannot be ignored because of the status."
  - Complainant stated that he never refused to work on any kind of ticket, either Medical or State. Fischer responded that while he was working both types of tickets, "The concern is that you are not working them equally in order to ensure that the tickets in the state queue get the same kind of attention."

- Complainant stated that he had never seen the numbers of completed tickets before the September 27, 2012 meeting. Fischer responded that he was aware that Sandoval was collecting this information and “you were aware that the report was available.”
- Complainant informed Fischer that he had worked over Columbus Day weekend on the State Tier III tickets, because he was so busy with P1’s, Med and State tickets. Fischer responded that according to Sandoval, his numbers were still low, and “You were not requested or required to work on the weekend or Holiday.”
- Fischer reiterated, “it was the Tier III responsibility to notify them [policy staff] as much as possible and if that was every 15 minutes then do that and document in the ticket.” She declined to put this directive in the written P1 process document.
- Complainant did not know why Fischer reminded Complainant of his complaint of discrimination to HR in December 2011 at the meeting. Fischer responded, “That information is not part of the CAP and was a discussion item only during the meeting.”

170. Fischer denied Complainant’s request that the CAP be rescinded.

#### October 18, 2012 Mid-Year Evaluation

171. On October 18, 2012, Sandoval met with Complainant for his mid-year performance review. She gave him an overall rating of Level 1, “Needs Improvement.” The reasons provided were:

- Failure to resolve P1 tickets in a timely manner and with accurate information;
- Failure to adequately document information on tickets as required;
- Failure to resolve a comparable number of tickets as compared to other OIT Service Desk Analyst working Tier III incidents;
- Ability to perform the IT Pro III duties without consistent help from other team members and supervisor;
- General failure to communicate in a clear and effective manner

#### October 22 One-on-One Meeting

172. At the October 22 meeting, Complainant had an 84% average accuracy rate on tickets (85%, 75%, 80%, 85%, and 95%). Sandoval faulted him for not sending a screen shot to Policy, for including comments “unrelated to the resolution of the ticket,” and for “very low number of tickets worked” compared to the other Tier III analyst, Patricia Ayon. Complainant had worked on 35, not including the tickets Complainant worked on Saturday, October 20, for which Sandoval did not credit him, and Ayon had worked on 92.

173. During that week, Complainant had a question about downgrading a P1 ticket and emailed Sandoval and Fischer about it. In her October 22 review, Sandoval listed as a concern that “Mourad sent an email to Sonia and Joetta asking how to handle a P1 ticket. This type of direction should not be needed.”

174. Sandoval also faulted Complainant in one of his October 2012 weekly reviews for reviewing a ticket to see if it was appropriate for him to work on, before accepting it in the database.
175. Complainant found it difficult and stressful to work the P1 Medical tickets without Tier I or II assistance, work on the State tickets without time to learn the programs and training, and to complete all of the work within the five-day workweek.
176. The stress of his situation triggered his Tinnitus and Hyperacusis, making it harder to focus and concentrate at work.

#### October 22, 2012 Written Grievance

177. On October 22, 2012, Complainant filed a written grievance of the CAP, stating he felt he was being targeted and singled out and was a victim of verbal abuse and a hostile work environment. He made the following points:
  - He had been treated disrespectfully by Fischer and Sandoval at the meeting where they presented him with the CAP. "As soon as I entered the meeting room, they started abusing me verbally by saying, 'if you are not happy, who don't you move and find yourself another job.' I was shocked. I did not respond, and I did not say a word. When they finished talking, I asked to be excused, and I left the room."
  - The written P1 policy requires him to call Policy once an hour. However, at the meeting, Fischer told him to call policy every fifteen minutes. "The P1 process is similar to a moving target."
  - When he requested that Sandoval to modify his work hours to end at 5:30 p.m., she informed him that she was afraid he would be surfing the internet after 5:00 p.m. The CAP imposes an unreasonable work load and deadlines. "They want quality and quantity work by mistreating and disrespecting their employee. Sonia treat[s] her team like slaves and robots and not like human beings. Humans make mistakes, and a good worker learn (sic) from his mistakes that is how people learn and excel in their job."
  - Sandoval had changed the P1 process multiple times.
  - Medical P1's are much more frequent than State P1's because they involve life or limb threatening situations that often need a high level of commitment and responsibility.
  - Complainant attached to his grievance an example of a complex P1 ticket he had resolved over October 16 – 17, 2012, which filled sixteen pages and contained over 40 separate steps from initiation to resolution.

### Valencia Investigation

178. The grievance was assigned to Christina Valencia, an HR consultant on loan to OIT from Colorado Department of Transportation, to investigate. Valencia had a two hour meeting with Complainant, at which he discussed and gave her a large stack of documents he felt supported his grievance. Valencia also interviewed Fischer and Sandoval.
179. On October 31, 2013, Valencia issued an investigative report that references exhibits but are not attached, concluding that Complainant had not been subjected to a hostile work environment.
180. When Complainant later spoke with Valencia, she informed him that she had destroyed the documents he had provided to her. Complainant lost trust in the impartiality of the investigation.

### October 25, 2012 Notice of Predisciplinary Meeting

181. On October 25, 2012, Fischer sent Complainant a notice of a predisciplinary meeting on October 31, 2012 to address "violation of the Corrective Action Plan dated September 27, 2012." At the October 31, 2012 meeting with Sandoval and Fischer, Complainant requested and was granted time to submit mitigating information.

### October 29, 2012 One-on-One Meeting

182. Complainant's average ticket accuracy rate for the October 29, 2012 meeting was 72%. One of the tickets was erroneously rated at 45%. At this meeting, they discussed two instances where Complainant failed to provide adequate information to Policy and Deloitte, necessitating that they ask him for additional information on those two tickets.
183. In addition, on October 23, Complainant sent an email to Policy requesting a "med span" identifying dates of medical coverage for a client, when the med span had already been opened. Policy pointed this out to him, and he responded by indicating he had been confused and withdrew the ticket.
184. Complainant worked on Saturday and Sunday, October 27 and 28, 2012.
185. Sandoval informed Complainant that it was not fair to resolve tickets over the weekend if it started the SLA clock for other offices. Complainant agreed. He stated that it was, however, necessary for him to work weekends to complete his work.
186. In her written summary, Sandoval indicated that she was removing two "errors" from Complainant's August 2012 tickets based on her follow-up on Complainant's feedback.
187. On October 30, 2012, Sandoval sent a long, detailed CAP Feedback memo to Fischer, summarizing her assessment of Complainant's progress in complying with the CAP. The document contained the weekly meeting information.
188. On November 5, 2012, Fischer denied Complainant's grievance, asking Complainant to continue to perform his job and to comply with the Action Steps in the CAP.

### November 2, 2012 State Personnel Board Appeal

189. On November 2, 2012, Complainant filed an appeal of the CAP at the State Personnel Board, asserting claims of disability, national origin, race, and religious discrimination, and retaliation for filing claims of discrimination. He noted that Fischer and Sandoval were giving him different instructions orally and in the CAP than what is written in the P1 document, and that to expect him to work as many tickets as others who do not work the P1 Medical tickets was unfair.

### November 8, 2012 EEOC Claim

190. On November 8, 2012, Complainant filed a claim of discrimination at the Equal Employment Opportunity Commission (EEOC), asserting claims of disability, national origin, race, and religious discrimination, and retaliation for filing claims of discrimination. He stated he was being retaliated against for requesting a quiet workspace. He also stated that although he was complying with the CAP, Sandoval and Fischer were creating a hostile environment by "overly scrutinizing my work product and by threatening that I could easily be replaced by anyone on the team," and by demanding an unreasonable amount of work from him.

### November 8, 2012 Mitigating Information

191. On November 8, 2012, Complainant submitted a detailed document to Fischer addressing his compliance with the CAP. He stated, "The biggest change was the last one where Sonia decided that all P1s go straight to Tier III. All the research has to be completed at Tier III level. As Tier III analyst, I don't have some tools that Tier I and II use for troubleshooting. One good example is to look at the med span [defining the dates of eligibility] in SIDMOD to see that the client is active in MMIS. Instead I sent this to Policy to look at MMIS since Sonia does not want me to consult with the Tier I and Tier II while working on P1s. Lacking of training using the tools Tier I and Tier II use create (sic) additional work for Policy."
192. He indicated that she was requiring only him to include all email correspondence in his tickets. "My instructions to the users, to Policy, and to the Vendor are clear and professional." Regarding Step 4, working the Medical and State queues according to the date the ticket was received, Complainant stated, "I am an expert in Medical Programs. Cash programs are new to me, however I have been learning and working State program tickets every day. I asked Sonia multiple times to give me training opportunities in State Programs, at least to attend Policy meetings and trainings, and she always refused my request by saying I need you to work tickets instead. Without zero training from my management team (sic), I was able to work many State tickets" and bring the number to a manageable level. With the help of the other new Tier III analyst, he stated, the number of State Tickets went from 270 to below 100 and the number of Medical tickets was 8.
193. Regarding the requirement to maintain the same average number of tickets as the other Tier III analyst, he stated that Medical P1 tickets took more time since Tier I and II analysts had stopped researching them, and when he was instructed to check with Policy on the status every 15 minutes. He noted that Medical tickets require deeper research, running a test panel for the majority of them requires a lot of time.



194. Complainant stated he had been asking Sandoval and Fischer to give him a specific number of tickets as a target, but had never been given a response. “[J]ust saying this is low or very low is not helping much.”

#### November 8, 2012 HCPF Policy Meeting

195. At the November 8, 2012 weekly meeting with HCPF Policy staff, Ms. Moreno discussed her frustration with Complainant emailing Policy every fifteen minutes to check on tickets, stating it was disruptive. She said that Patricia Ayon, the other Tier III analyst, didn’t do it. Complainant responded that those instructions were just for him. He became upset and defensive. Because Fischer had directed him twice, once at a meeting and once in writing, to contact Policy every fifteen minutes if he was not getting a timely response, he felt he had been set up.
196. Complainant asked to be excused from the meeting, which was almost over, and then got up and left. As he left the meeting, he slammed his chair against the table as he moved it in. Those at the meeting were taken aback by his sudden outburst, and one of them emailed Sandoval about it.

#### Coworker Complaints to Sandoval; Sandoval Email to Valencia

197. Amy Cleary, Service Desk Analyst Tier II, informed Sandoval about this incident in an email. Sandoval forwarded it to Valencia. In addition, Cleary informed Sandoval that she felt Complainant was asking her too many questions at work and was attempting to have her perform his work. Another Tier II also informed Sandoval of the same frustration with Complainant. A third Tier 1 member of the group came to Sandoval in tears because after she had recently informed him she was too busy to call an end user for him, he had sent an email to her that made it appear she had made a mistake.
198. On November 16, 2012, Sandoval sent Valencia an email advising her of the three employee complaints about Complainant. She noted, “I did instruct them to stop assisting if they feel that it is causing them to not be able to do their own tickets. Tier II is buried with tickets and they are spending a lot of time answering Mourad’s questions. I told them they could blame it on me if needed but they really need to let him work his tickets on his own.”

#### November 20, 2012 Notice of Second Predisciplinary Meeting

199. On November 18, 2012, Complainant emailed Sandoval to advise her that the other Tier III analyst, Patricia Ayon, was resolving tickets over the weekend, and gave her the ticket numbers. He questioned why Sandoval was directing him to stop doing this when it was permissible for Ayon to do so.
200. On November 20, 2012, Fischer sent Complainant a letter indicating that before she had made a decision on the October 31, 2012 predisciplinary meeting, additional information regarding his performance had come to her attention.
201. Sandoval talked to Complainant about struggling on his tickets because he was seeking information from Tier II analysts. Complainant responded by explaining that he sometimes needed to obtain information from Tier II analysts because they had access to SIDMOD and other online tools that he lacked. Sandoval was aware that this was

true. She responded by email to Complainant, "Tier II never researched P1's." She said that he had access to all the same tools other staff have, and if he needed training in SIGMOD, he should arrange for it. Complainant did so and it took two months for him to obtain access to and training on the SIGMOD program.

#### November 21, 2012 Request to Attend Weekly State Policy Meetings

202. On November 21, 2012, Complainant requested to attend the weekly Policy meetings on State Tickets because it would provide him with training on the cash and food programs. Sandoval responded that those meetings were designed to discuss ticket issues and were not formal training, and he should take the ticket issues to the staff who attend the meetings. She denied his request to attend the meetings.
203. Complainant responded to Sandoval that the other staff do not work Medical tickets on a regular basis, and he was working both Medical and State tickets; therefore, it was very important to be included in those meetings.
204. Sandoval shared Complainant's response with Ayon, who then emailed Complainant, "I'm not sure why you feel that I don't work Medicaid tickets." Complainant responded with a comparison of tickets they had each worked on.
205. Sandoval then emailed Complainant chiding him for saying that Ayon "covered" for him and it was a team effort. She later forwarded the email chain to Valencia as a "great example we can use where Mourad is pulling other employees in when it is not necessary."

#### November 26, 2012 One-on-One Meeting

206. On November 26, 2012, Complainant had a 74% average accuracy on his ticket resolutions. They had not met for several weeks due to the holiday and scheduling conflicts. Sandoval informed Complainant that she would no longer be reviewing tickets in his presence during their meetings. She would send him her QA reviews prior to the meeting and he would view them prior to the meeting.
207. Complainant resolved 85 tickets during Thanksgiving week. He resolved one on Thanksgiving Day and also worked on Saturday and Sunday following Thanksgiving. Complainant did not "resolve" the tickets during the days off, consistent with Sandoval's directive. She admonished him for working on his days off. The other Tier III analyst was assigned only Tier II tickets that week.
208. Sandoval found fault with several of Complainant's communications with Policy. On one ticket in AWP, Complainant emailed Policy for an update at 7:33 a.m. Receiving no response by 10:15 a.m., he moved it to Awaiting End User Response and did not copy Policy on the action. He had a typographical error in a ticket. Many of the comments reflected reasonable differences of opinion in how to handle a ticket, not errors.
209. Complainant prematurely resolved Ticket #158674 after an NOA was issued, when there were still outstanding issues to be addressed. He also failed to inform the end user of the ticket resolution. When Policy contacted him, he directed them to contact the help desk and open another ticket. He should have kept the ticket open.

### Conflicting Directives

210. On November 28, Complainant sent a ticket as a P1 to HCPF Policy which could have been a P2. Shawna Moreno responded the next morning that it should have been a P2. Complainant responded, "I do not downgrade P1s. You said, 'I am not sure if the ticket was ever downgraded.' If you are not sure, I don't know why you are sending this email. Per Sonia's instructions, I have to treat every P1 as a P1. This ticket was a P1." He then downgraded the ticket to P2.
211. Complainant felt he was being set up to fail by Policy and Sandoval's conflicting expectations and directives. He did not trust those with whom he worked.
212. Moreno forwarded the emails to Sandoval, who confronted Complainant by stating he had downgraded the ticket, but she was confused by his response to Moreno saying he did not downgrade tickets. Complainant responded, "I downgraded it to P2 per Policy's instructions. I don't see where the problem is. I don't see how you are confused." Sandoval emailed him back stating he was not promoting good customer service.

### December 3, 2012 Predisciplinary Meeting

213. Fischer and Complainant met on December 3, 2012. At the meeting, Fischer informed Complainant of his noncompliance with the P1 process.
214. Complainant asked Fischer to show him the tickets that were the basis for possible disciplinary action. She refused to do so. Complainant did not know what tickets Fischer was discussing. He felt he had no opportunity to provide explanation or mitigating information.
215. No specific tickets were discussed or reviewed at the meeting.

### December 2012 Promotion of Fischer

216. Fischer was promoted to be OIT Lean Process Manager in December 2012, and was replaced by Colleen Lynn in January 2013. Fischer remained Complainant's appointing authority through his termination.
217. One day in December 2012, a P1 ticket came in at 4:57 p.m. Complainant called the Policy office. They were gone for the day. He called the Policy supervisor on his cell phone, who asked Complainant if he could ask the end user to wait for resolution until the next day.
218. Complainant called the end user, who insisted that the client needed to purchase the medication right away and could not wait. Complainant gave the end user his personal credit card number to use to buy the medication for the client. The end user did not use it.
219. On another occasion, Complainant gave a county worker the cell number of a Policy staffer who was difficult to get in touch with.

### December 13, 2012 Discrimination Claim

220. On December 13, 2012, Complainant filed a claim of discrimination based on his race/national origin, Arab/Tunisian, religion, Islam, and retaliation for reporting discriminatory practices.
221. On January 10, 2013, OIT HR Manager Director Gallegos informed Complainant that Peggy Valdez Olivas, HR Director for Colorado Department of Local Affairs, would conduct the investigation of his complaints of discrimination. Complainant did not believe the investigation would be impartial because of his experience with Valencia's destruction of the documents he had provided to her. He met with her on January 11, 2013, and explained that because she worked for the State of Colorado he did not view her as being unbiased. He informed her he had filed a complaint with the EEOC on October 19, 2012, and that he would prefer that the EEOC investigate his claims.
222. On February 1, 2013, Olivas issued a report indicating that she was unable to investigate the claims of discrimination because Complainant preferred to have the EEOC address them.

### January 10, 2013 Disciplinary Action

223. On January 10, 2013, Fischer issued a disciplinary action of a 10% pay reduction for ten months to Complainant, amounting to over \$600.00 a month. The bases for the decision were the following:
- A. Mid-Year evaluation at Needs Improvement overall level on October 18, 2013;
  - B. A review of Complainant's P1 tickets from the time of the September 27, 2012 CAP forward revealed that out of ten tickets, he "failed to follow the process on 6, more than half."
  - C. The QA review of 20 of Complainant's P1 tickets between October 1 and October 26, 2012, revealed that 10 were at 75% or below. One ticket was at 45%.
  - D. A review of 10 tickets for December 2012 still demonstrates an average of only 72% accuracy. As an IT Professional III, the average accuracy rate should be over 90% at all times.
  - E. Regarding tickets in the Medical and State Queues in order received, 8 tickets assigned to Complainant March 22 through July 25, 2012 "were only resolved after constant reminders by" Sandoval.
  - F. Compared to another Tier III analyst, Patricia Ayon, between October 1 and 26, 2012, Complainant worked on 241 and she worked on 406. "This information clearly indicates you are working at a lower level as compared to your peers. In our meeting you stated that you had worked approximately 50 tickets over the weekend. Even if I added that number into your overall total noted above, this would only be 291, still significantly lower than your peers."
  - G. Three staff complained to Sandoval about not being able to complete their work because they were answering his questions about how to properly resolve tickets.
  - H. Complainant's refusal to recognize Sandoval as his supervisor. He had demonstrated this by claiming she did not have the knowledge to make the assessments noted in the QA review; insisting she was not personally conducting those reviews; interrupting her when she is speaking to him; refusing to follow her direction in resolving tickets and demanding that she review tickets in his presence.

- I. He had been insubordinate by working weekends even after being directed not to do so to resolve tickets. His response that he continued to work on them but did not "resolve" them until Monday was insubordinate. He refused to enter time worked as directed.
- J. He had engaged in unprofessional communications with Sandoval and with customers. For example, he refused to handle a ticket sent to him by Sandoval, saying the customer had told her to do it first.
- K. Sandoval received a complaint about his "storming out of a meeting angry when complaints about how you handled a particular ticket were brought to your attention."
- L. Complainant offered to give a client his personal credit card number to purchase medication. And, contrary to policy, Complainant provided the personal cell number of a HCPF supervisor to a county technician. She considered both instances to be insubordination.

224. The remainder of the letter discussed and dismissed Complainant's mitigating information submitted on November 8, 2012.
225. The disciplinary action did not credit Complainant for tickets worked on weekends.
226. The disciplinary action contained factual errors. No ticket was at 45% accuracy. The actual QA reviews of 20 tickets between October 1 and 26, 2012, showed that 19 of Complainant's tickets were above 70%.
227. On January 17, 2013, Complainant filed an appeal of the disciplinary action asserting claims of discrimination and retaliation.

#### January 2013 Intermittent FMLA Absences

228. Complainant took FMLA leave at noon on January 25; at 3:00 p.m. on January 29; at 11:30 a.m. on January 30; and called in sick for the day on January 31, 2013. He took annual leave on January 28, 2013.
229. Complainant's ticket completion numbers were 21, 31, 23, 24, 25, 30, 11, 18, 21, 15, 12, 20, and 17 on those days he worked the entire day.

#### January 30, 2013 Corrective Action Plan

230. On January 30, 2013, Sandoval and Fischer issued Complainant a new, eight-page CAP. It included the following:
  - Complainant was prohibited from asking coworkers for assistance on resolving tickets; he must go to Sandoval with all questions;
  - He "should not be working tickets in the evenings or on weekends, unless specifically requested to do so by an OIT Service Desk Supervisor or Manager."
  - The average of daily tickets completed by staff working Tier II and III CBMS tickets would be 17-20 per day. Sandoval would take into account trainings and time out of the office.
  - Complainant should not assign tickets to himself until he is ready to work the ticket.

- When Policy requested a test panel for a P1 ticket, he would deliver it within one hour of the request and on the same day for P2 tickets;
- It stated, "You are currently expected to have at least 70% accuracy. However, effective April 1, 2013, the expectation will increase for all staff on the team. Beginning on April 1, 2013, you will be expected to have at least 90% overall accuracy on QA reviews each month";
- QA reviews will continue monthly and she would provide them five days prior to their meeting so that he could review and respond prior to the meetings; she would not pull the ticket up during the meeting and re-review it again;
- He will participate in all meetings with her in a positive and professional manner;
- He may not copy and paste language from emails into tickets.

231. The CAP imposed several requirements for notice of leave.

- He must give no less than 2 business days in advance for all "changes to work schedules that do not involve taking leave;"
- Annual leave or time out of the office must be requested no less than 2 business days in advance and approved before the time is taken;
- Annual leave must be entered in KRONOS before leave is taken;
- If he is sick or needs to be out of the office he must leave her a voice mail by 8:00 a.m.;
- Sick leave must be entered into KRONOS by close of business the day he returns to the office;
- He must follow all instructions and if they are not clear he must ask for clarification.

#### FMLA Absences

232. Complainant felt isolated from his peers on the Service Desk team because he had now been prohibited from communicating with them about his work. The stress of his work situation exacerbated Complainant's Tinnitus and Hyperacusis and made it impossible to work for an entire day.
233. On February 4, 5, 6, 8, 11, 12, 14, 19, 21, 22, 26, 27, and 28, 2013, Complainant sent emails to Sandoval between approximately 2:30 p.m. and 3:30 p.m., informing her that he was not able to focus because of his hearing problems and needed to leave early, using FMLA leave.
234. On February 4, 2013, at 3:33 p.m., Complainant emailed Sandoval stating that "the heating fans are bothering my existing condition extremely bad. I was not able to focus on my tickets. I looked at more than 30 tickets, I worked only 3 tickets since I came in this morning. I'm losing (sic) focus and concentration. The ringing in my ears is being amplified by the heating fans from other working stations around me. I'm leaving for the day. I'm using FMLA for the missing time. Thanks."
235. At 3:47 p.m. the same day, Sandoval sent an email to Gallegos, Fischer, and Colleen Lynn, who had replaced Fischer, suggesting that Complainant move to a quiet spot right outside of her office with no service desk staff nearby, replacing another staffer, and indicating she had walked around and looked at the cubicle on the other side of the wall where Forest [another analyst] works. She indicated there was no heater or fan there,

and that a microwave in that vicinity could be moved. She concluded, "We really need to do something. He has been out of the office every day since January 22<sup>nd</sup> for part or the entire day. Today is the 3<sup>rd</sup> day that he has taken due to the FMLA."

236. Gallegos responded the next morning that she would reach out to Complainant as the ADA coordinator and have her staff send Complainant the necessary re-certification paperwork for FMLA, "as he is using more leave than he had been using."
237. Later that day, Gallegos wrote again that she pulled a FMLA report and it did not appear he was using excessive FMLA for his condition. She asked about why he had five recent instances of administrative leave.
238. On February 4, 2013, Sandoval emailed her entire staff requesting that if they will be out of the office or running late, to leave her a voice mail at least one hour in advance.
239. On February 5, 2013, Complainant emailed Sandoval, advising her of a meeting with his lawyer that afternoon from 3:00 to 5:30. He stated that his attorney advised him he could use Administrative Leave for the meeting, and he asked if he could adjust previous meetings to Administrative Leave. Sandoval responded that his attorney was not correct and he can take the time off as Annual Leave and she would ask someone else to cover P1 tickets. Complainant responded by explaining that he and his attorney were going to the Colorado Civil Rights Division office, and copied his attorney's email, "Mourad, the administrative leave would be to go to the CCRD as instructed by the State Personnel Board, not to meet with your attorney."
240. Sandoval responded that he had to use annual leave if it was within regular work hours. He responded that it should be administrative leave, but agreed to use annual leave.

#### February 5, 2013 Request for Reasonable Accommodation

241. On February 5, 2013, Ms. Gallegos emailed Complainant and stated that as the designated ADA coordinator, she was responding to his inquiry, provided him with the Colorado disability discrimination policy, and attached the Request for Reasonable Accommodation form. Later the same day, Complainant emailed Gallegos thanking her for the quick action and attached his Request for Reasonable Accommodation form. He stated, "My condition is worsening by the hour." The Request form listed the portions of his job he could no longer perform were: "I can't do anything, in the wrong work station"; Major Life Activities affected by his condition were: hearing; reading; seeing; working; and concentration and focus; regarding the extent to which his impairment limits his ability to perform work activities, he stated, "From my doctor: Chronic tinnitus with Hyperacusis – when flares d/t ambient noise he is unable to focus and do any work. Background noise such as fans, AC vents, even computer fans will clearly make this worse and should be limited to allow him to stay at work."
242. Complainant requested as an accommodation that: "The office in PSP [Pearl Street Plaza at 18<sup>th</sup> and Pearl] was the best fit for my condition. I never complained when I was at that office. Working from home 2 days a week will help. An area where the AC fans are down 100%. A computer with a silent fan."
243. On February 8, 2013, Gallegos requested additional information on why cancellation headphones are no longer an acceptable form of accommodation. Complainant

responded that OIT had never purchased the headphones because "With the deterioration of my Tinnitus and Hyperacusis conditions, those headphones make me hear my own ear ringing louder. Therefore I loose (sic) focus and concentration. I'm not sure what other information or questions you may have about my requests. If you still need more information, please send me more detailed questions. Thanks for looking into this."

#### February 11, 2013 Grievance Meeting on Second CAP

244. Complainant was happy with the new ticket target of 17-20 per day. He grieved most of the rest of the CAP. Fischer and Sandoval met with Complainant on February 11, 2013 to discuss his concerns. At this meeting, Complainant asked Sandoval if she had received any complaints about his work from end users. She responded that she had not.
245. Sandoval informed Complainant that his coworkers were frustrated with his work, primarily because of the amount of time he was absent from work. Complainant asked if she considered it negative performance feedback when someone cannot perform his job due to a health condition and that was the reason for leaving work. Sandoval responded that she had heard things such as he was slamming the cabinet at his desk when he is frustrated. Complainant responded that he had not slammed any cabinet at work and that was not a true statement.
246. Complainant was very concerned about the allegation about him slamming a cabinet at work, because he believed it constituted a profiling of him as a violent Muslim.

#### Fischer Email Regarding Accommodation Request

247. On February 12, 2013, Fischer emailed Gallegos informing her that if she would like to discuss the request for accommodation, let her know. She stated, "The building is the building and we can move him into a different cubicle but with his work ethics allowing him to work at home would not be recommended. Rhonda had stated they moved him several times at Pearl Plaza and he would disappear for hours and they would not be able to find out where he went so they had to make sure he was somewhere to be able to watch when he came and went. This is the big issue of him not getting his work done. I guess that is my two cents."

#### February 12, 2013 One-on-One Meeting

248. On February 12, 2013, Sandoval reviewed January 2013 ticket reviews with Complainant. Sandoval had a 27-page, single-spaced document prepared for this meeting, containing comments on every ticket Complainant had worked. Some of her comments were legitimate critiques, some were not.
249. On the first page of her summary, she reminded Complainant that he "should not be assigning a ticket in his name until he is ready to work the ticket." At the October 22 meeting, she had directed Complainant to stop reviewing tickets to assure he was ready to work on them, prior to assigning them to himself.
250. On February 14, 2013, Complainant emailed Colleen Lynn, Fischer's replacement, requesting to meet with her. After consulting with HR, on February 19, 2013, Lynn



asked Complainant what was the nature of the discussion he sought to have. Complainant stated that he would like to “report a pattern of accusations coming from my supervisor. It started with performance accusations. Lately, this has been escalated to violence accusations. I have a recording from meeting where Sonia is accusing me of being a violent person. Lately she said, ‘I started slamming cabinets when I get nervous.’ These accusations are getting very serious.”

251. Lynn responded that she needed to refer him to Fischer on those issues because she was still his appointing authority. “Please reach out to her with your concerns.”
252. On February 14, 2013, Complainant sent a February 12, 2012 Medical Inquiry Form in Response to an Accommodation Request, filled out by his physician. As an accommodation the doctor recommended, “Pt. reports fan noise, AC vents, computer fans etc. causes increased ringing & thus aggravates his condition. So a quieter work environment seems helpful.”
253. On February 15, 2013, Sandoval emailed Complainant, stating she had walked the entire floor area at 1575 Sherman and suggested two cubicle locations for him. One had a wall on one side and a nearby printer that could be relocated away from the cubicle. The other had no printers nearby. She asked him to assess them and determine which one would work for him. Complainant responded that he would check them and let her know. He also stated that the problem with the building was the mechanical noise came from all over the place, including AC vents, personal cooling and heating fans, and computer fans, and was not limited to the printers. He reiterated that at the Pearl Street Plaza location, the AC vents were shut 100% and “I did not complain even once for a few years until they started moving me to different workstations. When they moved me here, I have been suffering every day. My health condition has been worsening every day. I did not complain fearing termination. Please Google the word Hyperacusis to learn about the seriousness of the condition. Thanks for trying to help with this. I will get back to you on this again next week . . . .”
254. Sandoval responded that she would be out of the office so he should work with Gallegos on the cubicle location.
255. On February 15, 2013, Fischer and Gallegos issued a response to Complainant’s grievance of the CAP, denying his request to have it removed. The response contained examples of some tickets and how they believed he had not acted appropriately on them.

#### February 22, 2013 Discrimination Claim

256. On February 22, 2013, Complainant submitted his written grievance of the CAP to Fischer and Gallegos, HR Director, asserting claims of disability based on race, national origin (Arab/Tunisian), religion (Islam), disability, and in retaliation for complaining about discriminatory practices. He responded to the CAP.

#### Request for Additional Information on Accommodation Request

257. On February 22, 2013, Gallegos wrote Complainant with several questions regarding his Request for Reasonable Accommodation. Dr. Gordon’s answers, and the questions posed, were:

- Describe quieter work environment and does he need a noise free environment? "This is subjective. Pt reports prior office was better in terms of background noise (fan vent off)"
- If he is placed in a quieter environment, can he work 40 hours per week? "Yes."
- Are there multiple environments in which he can focus and concentrate? If so, what environments are those? "I have not been to his office locations so I don't know the answers"
- Is it necessary that he work from home? If so, can he work 40 hours a week? "If he works from home, he should be able to work 40 hours."
- How is a quieter environment different than using noise-cancelling headphones? Headphones can make his ringing in the ears worse, and noise cancelling headphones don't cancel that noise.
- Are Complainant's Anxiety Disorder and Depression separate disorders from his Tinnitus and Hyperacusis? If his hearing disorders are accommodated, will he still require separate accommodation of his anxiety disorder and depression? If so, what accommodations? "Not known. He is starting additional medicine for this."
- "Does Mr. Ksouri require a stress-free environment in order to function?" "No."

#### March 2013 Communication Issues

258. On March 1, 2013, Fischer denied Complainant's grievance of the CAP. She noted that with regard to his discrimination allegations, he had refused to cooperate with the investigation.
259. On March 1, 4, 5, 6, 7, 12, 14, 15, and 18, 2013, Complainant sent emails to Sandoval in the afternoon informing her that because of his health condition he was unable to work and was going home pursuant to his FMLA leave.
260. On March 4, 2013, Fisher emailed Sandoval to confirm Complainant had received the decision denying his grievance. Sandoval sent Complainant a Google chat to ask him to come to her office when he had a minute. Complainant responded, "Can I know why?" because he was fearful Sandoval would say or do something to trigger an inappropriate response from him. Sandoval responded, "Just want to verify something with you but do not want to discuss it at your desk area." Complainant responded, "Can I have Colleen with me as I don't feel safe being at your office by myself. You can email me any concern and I will reply to any questions you may have." Sandoval did not respond to this but felt offended by his response. She hand delivered the document to his cubicle.
261. Later that day, Sandoval emailed Complainant asking if his link to the test panel site had been restored. On February 27, 2013, Complainant had sent a test panel request to Deloitte because his link to the test panel program was not responding, noting that in the ticket, and asked the Deloitte staffer to complete the test panel. At 2:50 p.m. on March 4, Complainant sent Sandoval an email stating he was not able to focus on his work, the noise from the AC vents and personal fans were worsening his condition, and he needed to go home to control the situation. He stated the time would be FMLA leave.
262. Complainant did not respond to Sandoval's March 4 email.

263. On March 8, Sandoval emailed Complainant again, inquiring about his ability to perform test panel tasks and directing him to notify her on that day of any problem with completing a test panel assignment she had given him and how he planned to resolve it.
264. Complainant did not respond to Sandoval's March 4 or March 8 emails regarding test panel work until March 13, 2013, when he stated that he had just found her March 4 email. "I hope I answered your question in our today's meeting from 9:30 to 10. Please let me know if you still have a question."
265. On March 6, 2013, Sandoval needed Kronos entries to be finalized as approved on that day so that she could forward them to HR for processing. At 1:41, Sandoval asked Complainant to correct his Kronos time entries "today and let me know once they are complete." She stated he needed to modify administrative leave for a snow day on February 25, 2013, from 3 hours to 1 hour, and to input the 3 hours of sick leave for the doctor's appointment. At 1:49, Complainant responded, "How about the other individuals who usually come in at 7 AM? They log 3 hours." Sandoval responded that Complainant had arrived at 10:20 and left for a doctor's appointment at 2:30 on February 25; the Governor approved the start time as 10 AM, and 9 AM was his regular start time. Therefore, he should have shown one hour of administrative leave for weather and three hours sick or annual leave.
266. At 3:41 on March 6, Complainant sent Sandoval an email stating he felt ill and was unable to work and was going home under FMLA leave.
267. Sandoval then walked over to Complainant's work station and asked him if he had submitted the change in Kronos. He responded that he was about to leave for the day and would do it the next day. Sandoval asked why he had not done it earlier. During this discussion, she said she would have to inform HR that he did not get it done.
268. Complainant felt that HR had the power to take sides with Sandoval and was fearful that he was going to get into trouble. He then sent an email entitled, "My supervisor is threatening me at work place. Today at 3:47 PM," to Sandoval, Michael Katz, Director of Human Resources for OIT, Lynn, and Fischer. He stated, "Sonia, you came today to my work station at 3:47 PM asking me if I made the correction to Kronos. I told you I am about to leave for the day. I will do that tomorrow (I already sent you email saying I'm leaving). You also said, "I will let the HR know then." Everyone was listening to your conversation and to your threat with the HR. Rose, Mandy, Greg and Patricia were there and listening. This is getting too serious. I am asking all of you to stop these kind (sic) of threats that I am facing on a regular basis. I am escalating this to a higher level. Thanks." Sandoval responded that it was not a threat, and that she was responding to an urgent email from HR to get Kronos completed.
269. On March 7, 2013, Complainant emailed Sandoval that he had a meeting at his son's school at 3 and was checking with HR to see if the time could be Administrative leave. Sandoval responded that he needed to enter it in Kronos as Annual leave until he received permission from HR, then he could change it.
270. On March 8, 2013, Complainant returned Sandoval's QA ticket reviews for January 2013 to Sandoval, which they were scheduled to discuss on March 15. On the reviews, he had written the statement, "I disagree with this review as you did not do this online at my presence, as directed by HR. Doing this online at my presence should have been

started October 11 2012. I disagree with this review as you did not do this online at my presence, as directed by HR.”

271. Sandoval responded by email on March 8 that pursuant to the January CAP, QA reviews would not be done in his presence online. Instead, he was expected to prepare a written explanation as to why he disagreed with any of her comments, and submit documentation to support his response.

#### March 11, 2013 Monthly Meeting

272. On March 10, 2013, Complainant emailed Sandoval regarding their upcoming monthly one-on-one meeting on March 11. He stated that after consulting with his legal advisor, he had decided to request that Fischer not attend the meeting, and, “I hired 2 professionals to record this meeting. One for the Audio and one for the Video. Both professionals will be taking pictures and videos for the outside and the inside of the Pinnacle building and of course during the meeting. I can’t attend this meeting without the presence of these 2 professionals.”
273. Sandoval, after receiving guidance from others, responded by thanking him for sharing his concerns, and stating that Fischer would attend, and they would not allow other individuals to attend private meetings. She stated, “As your supervisor, I expect and require that you attend this meeting. If you choose not to attend, this will be considered another example of insubordination, which may lead to future disciplinary action up to and including termination. It is also an expectation that the results of our meetings remain private and confidential between you and members of leadership present in those meetings.”
274. Complainant attended the March 11 meeting without anyone else present. Fischer, Lynn, and Sandoval attended.
275. After the meeting, Complainant emailed Fischer and stated that he was concerned that his one on one meeting had “turned into another kind of meeting altogether . . . the accusations made at the meeting were unfounded and unfair. I will not attend any more of these meetings without my attorney present.” Fischer responded that it would be insubordinate for him to refuse to attend these meetings and he may not have a representative for day to day meetings as part of his job.
276. Complainant also sent an email to Gallegos entitled, “Very Urgent,” requesting to meet with her in person. She asked him what it was about. He indicated that at the March 11 meeting, Fischer had discussed his medical condition and accommodations, and told him that if he was waiting for the location at PSP, “it was not going to happen.” He expressed concern that his private medical information had been disclosed in violation of the ADA and sought to file a claim.
277. Complainant also stated that at the meeting, Fischer and Sandoval “kept accusing me by being a violent person who slams cabinets and chairs. Those are false accusations.” He stated he felt intimidated, harassed, discriminated against, and abused by Fischer’s statements.
278. Fischer responded on March 15 that no one had disclosed his personal health information; that Gallegos “would be remiss if she did not discuss your request for

accommodation with your immediate supervisor and your appointing authority. They are the best persons to discuss the feasibility of such requests in relation to your assigned duties and responsibilities.” She stated, “you have disclosed on a frequent and often daily basis in emails that you have a condition that requires you to leave work . . . communications from you are sent to Sonia and Ann Margaret [Gallegos] almost on a daily basis. . . As Ann Margaret and Sonia have expressed, I share their concerns with your time worked daily, including unauthorized late arrival and early departures.”

279. On March 20, 2013, Complainant emailed Sandoval, copying Fischer, Gallegos, and Lynn, re: “My condition is worsening by the hour.” He stated, I was not able to focus on my work. The noise coming from the AC vents and personal fans is worsening my condition. I tried to work many tickets. I looked at each one for a while and I go to the next. I was not able to focus. I need to go home to control the situation a little. I couldn’t focus at all. My condition is worsening by the hour. This missing time is part of the FMLA.”

#### March 21, 2013 Complainant Faints in Sandoval's Office

280. On March 21, 2013, Complainant planned a medical appointment for very early in the morning and expected to be at work on time at 9 a.m. When he learned he would be late, he called Sandoval at 7:42 a.m. to inform her of this.
281. Sandoval did not receive Complainant's voice mail message. Complainant emailed Sandoval at 9:45 a.m. to inform her that he had arrived at work.
282. After Complainant arrived at work, Sandoval emailed him, stating she was not aware of a doctor visit and asking when he had scheduled the appointment. He responded that he had called her prior to 8:00 a.m. and asked if she received the message. She responded that she did not have a message from him, and asked again when the appointment was scheduled. He responded that he still had her number showing on his phone from his 7:42 call, informing her that the appointment was at 8. She asked again when was the appointment made, saying that she wanted to understand why he was just letting her know about the appointment that day, and had not notified her in advance. He responded, “Did you get the message?”
283. Sandoval responded again that she was asking when the appointment was scheduled and why did he not notify her in advance. He responded, “How come you did not get the message?” She then repeated her question and stated, “Please respond to this email with an answer to my question. Do not question again whether I got the message as I have already verified that I did not get it.” He responded he thought he had answered her questions. She responded, “Please come to my office before 12:00 today to discuss this since it (sic) you have not answered my questions.” She then sent him another email directing him to come to her office. He responded, “I am coming now.”
284. Complainant came to her office. Sandoval was angry. She asked him why he had not followed her instructions, expressing frustration that she needed coverage and had no prior notice of it.
285. Complainant was so traumatized by the situation that he fainted in her office. Sandoval called 911, an ambulance arrived, and took Complainant to the emergency room.

## Decision on Reasonable Accommodation Request

286. On March 22, 2013, Gallegos responded to Complainant's requests for reasonable accommodation. She stated that he was approved to work at home two days a week on a trial basis; that there was no space available at PSP, it was being leased by Deloitte and there was a waiting list for space there; that it was not possible to place him in an area where the AC was 100% closed because of the adverse impact to other tenants and personnel; and that OIT was pricing a computer with a silent fan. On March 19, 2013, Hewlett Packard provided OIT a quote for \$868 for a computer with a silent fan.
287. Regarding the work from home agreement, the letter stated that his position was a critical and essential one and that working from home would be disruptive to OIT customers and would substantially change the purpose and intent of the position. Nonetheless, in the spirit of the interactive process, OIT would agree to try out the request, under the conditions that: he comply with and sign the Acceptable Use of State and Personal Assets agreement; he be available by phone during regular work hours; enable remote access to his computer; and, if the trial does not meet the needs of agency customers and/or OIT team members, business needs of the unit may require termination of the trial effort.
288. The letter advised, "Even if we are able to purchase a computer with a silent fan, we are unable to accommodate your requests reasonably in your current job (other than those identified above as reasonable accommodations OIT has offered to provide). We will notify you if there are any position vacancies for which you qualify and can be accommodated. If there is no vacant position within the OIT for which you qualify, or you refuse the offer, you will be administratively separated pursuant to State Personnel Board Rules and Administrative Procedures."
289. Complainant grieved the decision denying his request to relocate to the PSP location, asserting disability discrimination.
290. Stipulated Fact. Respondent attempted to accommodate Complainant by relocating him to the PSP building. However, his previous space was no longer under the control of OIT, had been remodeled, was populated by more people and additional AC vents had therefore been installed there, and there was no space available for him.
291. Complainant scheduled a meeting with Cindy Kong, Statewide Leave of Absence and FMLA Coordinator, Department of Personnel and Administration, for April 19, 2013. He asked her what type of leave could be used for the meeting, and she stated normally it is annual leave, and the agency at their discretion may grant administrative leave.
292. On April 18, 2013, Complainant emailed Sandoval about the meeting the next morning at 9:00 a.m. with DPA HR. He stated, "I am planning to use this time as Admin Leave."
293. Sandoval emailed Gallegos asking it if was acceptable to use administrative leave. Gallegos recommended saying no, and attached a guidance document on when to use administrative leave. Gallegos also stated, "This is another example of insubordination, i.e., "telling" you or demanding time off and then telling you it will be admin leave or fmla. He has demonstrated this type of behavior prior to 3/31/2013."

294. On April 18, 2013, Sandoval responded that he could take the leave but it must be annual leave. He complied with this directive.
295. On April 18, 2013, Fischer hand delivered a letter noticing a predisciplinary meeting on April 22, 2013, to address "insubordination towards immediate supervisor and appointing authority."
296. On April 22, 2013, at 4:13 p.m., Complainant emailed Sandoval that he was not able to focus on his work, the noise from the AC vents and personal fans was worsening his condition, his condition was worsening by the hour. He stated he was still working on the 20 tickets from the April 22 task and that he was planning to work at home the next day.
297. Sandoval responded that the approval had not yet been completed for him to work from home, he was expected to be in the office at his regularly scheduled time, and if he did not come in he would be required to take annual leave.

#### Predisciplinary Meeting April 22, 2013

298. On April 22, 2013, Complainant, his previous attorney Nora Kelly, Camilli, from HR, Sandoval, and Fischer attended a predisciplinary meeting. The meeting was tape recorded.
299. Fischer ran the meeting and outlined the issues forming the basis for potential discipline. She stated that all of the issues were related to a pattern of insubordination by Complainant towards his direct supervisor.
300. The first issue concerned Complainant's recent submission of QA reviews back to Sandoval, stating, "I disagree," and insisting that they must be conducted in his presence. Fischer pointed out that the January CAP had stated that the QA reviews would not need to be performed by Sandoval in Complainant's presence.
301. Complainant responded that he was relying on the October 11 and 19, 2012 documents and that he had received so many CAP's that he was not paying adequate attention to the specific language of the latest CAP.
302. The second issue was Complainant's refusal to come to Sandoval's office as requested on March 4, 2012. Fischer explained that she had asked Sandoval to confirm with Complainant that he had received documents relating to the CAP. Sandoval had sent a Google chat to Complainant asking him to come to her office. Complainant had responded that he was concerned about his safety due to the intimidation and accusations against him that Sandoval made every time he came to her office. He informed Fischer that Sandoval expected him to react. He stated that he did not believe he was being insubordinate.
303. At the meeting, Complainant explained that when he stated he would be using Administrative leave to meet with DPA HR, he felt he was complying with Sandoval's directive to all staff to indicate the type of leave they sought to use prior to going on leave.

304. They discussed Complainant's refusal to enter Kronos on March 6, 2012. Complainant stated that he had felt ill and had advised Sandoval of this.
305. The fourth issue was that directions on tasks to perform are given to Complainant on a daily basis and he is not completing them. Fischer reviewed the February 9 directive by Sandoval to run a test panel. Complainant had not performed this task by February 15 and had to ask for an update several times. Complainant had not responded to her.
306. Complainant explained that every day he had emailed Sandoval stating that because of his disability, and the lack of focus and concentration he was experiencing, he was having difficulties with the work assigned. Sandoval never responded to those emails. He explained that test panels are over 1000 pages and it takes him "forever to figure out what is going on" when he is feeling ill; however, when he is "in the right place" it takes him a few minutes to work it. Complainant's attorney clarified that Complainant was not refusing to follow directions, but instead his disability caused his inability to perform the test panel work. He concurred, "Absolutely, every day."
307. Fischer then discussed HR staff's request that he not copy their office on emails, citing his March 6 email claiming he was being harassed. Complainant responded that this was not a directive from Sandoval or Fischer and therefore it was not insubordination. He also explained that because he felt he was being abused and treated unfairly by Sandoval, and because Fischer always took Sandoval's side as her close friend, he felt he needed to protect himself by copying HR.
308. The next issue raised was Complainant's email stating he would not attend a meeting without his attorney present. He explained that his attorney had told him to do that, and that after Sandoval objected; he attended meetings without his attorney.
309. Fischer next addressed a mistake Complainant had made in 21 tickets, by typing in the wrong year, 2013 instead of 2012. Sandoval directed him to correct the tickets and had to ask him to do it several times, and it had taken him a very long time to do it. Complainant responded that he had explained to Sandoval that the mistake was a good example of his lack of concentration, and that it was very hard for him to make the corrections because he did not want to make the same mistake again. He agreed that it had taken a long time.
310. At the end of the meeting, Kelly requested that Complainant be transferred to the Business Analyst group. Fischer responded there was no job vacant at that time but if something opened up he could apply for it.
311. Kelly and Complainant also asked if he could work from a different location in addition to working from home two days per week. Fischer responded that this was an ADA issue and he would have to work with HR Manager Gallegos on it.
312. Kelly closed by stating that she felt Complainant had not been willfully refusing to follow directions. Complainant stated that he felt he was still being retaliated against.

#### Termination of Employment

313. On April 24, 2013, at 4:29, Complainant emailed Sandoval stating that he was not able to focus on his work, the noise from the AC vents and personal fans was worsening his



condition, and his condition was worsening by the hour. He stated that the time off was FMLA and asked when he could start working from home. She responded by asking for the information on the personal fans that were worsening his condition, and she asked him to schedule a meeting to make a plan to work from home once he had complied with the conditions outlined in Gallegos' decision letter, which she copied into her email.

314. On April 26, 2013, Complainant provided mitigating information. He noted that for the past three months, he had been sending Sandoval emails on a daily basis letting her know he has concentration and focus issues because of his medical condition and his productivity was very low. He was unable to complete many tasks.
315. He stated, "I don't know why Ms. Joetta is considering this as an insubordination when it is a medical condition I am dealing with. It got worst (sic) when I got transferred to this workstation. I didn't have any intention to refuse or disobey Ms. Joetta or Sonia's instructions."
316. On April 30, 2013, Fischer sent Complainant the letter terminating Complainant's employment. The letter cited Complainant for insubordination towards Sandoval and Fischer. Examples were the following:
  - Failing to properly communicate with Sandoval regarding his schedule by dictating his schedule and stating he would not be in until a specific time and leaving work for appointments before the end of his work schedule;
  - Directing Sandoval to authorize administrative leave instead of consulting with her about it;
  - Making false accusations that Sandoval had threatened him in the work place when she had asked him to enter his time in Kronos;
  - Refusing to meet on the QA reviews, stating, "I disagree with this review as you did not do this online in my presence." The January 30, 2013 CAP stated that the reviews would no longer be in Sandoval's presence;
  - Refusing to attend any meetings with Sandoval or Fischer without his attorney;
  - Stating he would not attend one-on-one meetings without two audio and video professionals;
  - Failing to complete and communicate with his supervisor the status of tickets;
  - Forcing his supervisor to assign him specific tasks with directions since January 2013; as an IT Pro III he should be self-directed and not require micromanaging;
  - Failing to complete test panels and to research and document tickets.
317. Complainant timely appealed his termination of employment at the Board, asserting claims of national origin/ancestry, religious, and disability discrimination.
318. After Complainant was fired, the Tier III Service Desk Analyst positions at OIT were eliminated and moved back to Policy at HCPF.
319. By the time Sandoval left the OIT, there were no Tier III Analysts in the OIT.

## DISCUSSION

### I. GENERAL

This case is a consolidated matter involving Complainant's appeals of a September 27, 2012 corrective action, a January 10, 2013 disciplinary reduction in pay and related January 30, 2013 CAP, and the April 30, 2013 disciplinary termination of his employment.

#### A. Burden of Proof

##### i. Corrective Action

Imposition of a corrective action does not adversely affect a certified employee's pay, status, or tenure. Therefore, it does not implicate his or her property right to employment. Complainant bears the burden of proof in challenging the corrective action as being discriminatory on the basis of his national origin, race, religion, and disability, and in retaliation for protected conduct under the Colorado Anti-Discrimination Act (CADA). *Department of Institutions v. Kitchen*, 886 P.2d 700, 706 (Colo. 1994); *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

##### ii. Disciplinary Actions

With regard to the two disciplinary actions, certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. XII, § 13(8); § 24-50-125, C.R.S.; *Kitchen*, 886 P.2d at 706. Respondent bears the burden to prove by preponderant evidence that Complainant committed the acts and omissions upon which the disciplinary actions were based, and that just cause warranted the discipline imposed. *Id.* The Board may reverse the disciplinary actions of the appointing authority if it finds the actions to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

### II. HEARING ISSUES

#### A. September 27, 2012 Corrective Action

Complainant asserts that the decision to impose the CAP in September 2012 violated the Colorado Anti-Discrimination Act (CADA), § 24-34-402, C.R.S., and Board Rule 9-3, 4 CCR 801, which prohibit discrimination on the basis of race, religion, national origin, and disability.

##### i. Status-Based Discrimination Claim

In enforcing the CADA, Colorado courts utilize the shifting burdens analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and its progeny. *Colorado Civil Rights Common v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997); State Personnel Board Rule 9-4, 4 CCR 801, "Standards 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." *See also Ward v. Dept. of Natural Resources*, 216 P.3d 84, 92 (Colo.App. 2008)(federal law is considered in determining whether discrimination has occurred under CADA).

To prove intentional discrimination, an employee must establish, by a preponderance of the evidence, a prima facie case of discrimination: a) he or she belongs to a protected class; b)

was qualified for the position; c) suffered an adverse employment decision despite his or her qualifications; and d) the circumstances give rise to an inference of unlawful discrimination. *Big O Tires*, 940 P.2d at 400. The burden next shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. *Id.* If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the prima facie case is rebutted and drops from the case. *Id.*

The burden then shifts back to the employee to prove that the employer's proffered reason was not the true reason for the employment decision and instead was a pretext for intentional discrimination. *Big O. Tires, Inc.*, 940 P.2d at 401; *Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1095 (1981). Pretext may be proven indirectly through circumstantial evidence "by showing that the employer's proffered explanation is unworthy of credence." *Id.*

Complainant belongs to protected classes. His national origin is Tunisian/Arab. He is a Muslim. Complainant was qualified for his position. It is assumed but not decided that the September 27, 2012 CAP was an adverse action under the CADA. *Hillig v. Rumsfeld*, 381 F.3d 1028, 1032-33 (10<sup>th</sup> Cir. 2004).

With regard to the fourth element, the critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred under circumstances which give rise to an inference of unlawful discrimination. *Plotke v. White*, 405 F.3d 1092, 1100 (10<sup>th</sup> Cir. 2005). There must simply be a logical connection between each element of the prima facie case and the inference of discrimination. *Id.* There is no unbending or rigid rule about what circumstances allow an inference of discrimination. *Id.* Courts have enumerated a variety of circumstances that can give rise to an inference of discriminatory motive, including "actions or remarks made by decision makers that could be viewed as reflecting a discriminatory animus . . . , preferential treatment given to employees outside the protected class . . . or, more generally, upon the timing or sequence of events leading to" the adverse action. *Id.*

Sandoval was the new supervisor of the OIT Service Desk analysts. She was under an express directive to eliminate the SLA's and improve the documentation in the tickets sent to Policy. Having identified some mistakes that were common to all of her Service Desk staff, it was appropriate for her to closely track the tickets worked by her staff and hold them all, including Complainant, accountable for their mistakes.

In this role as enforcer of standards, however, it was equally if not more important for Sandoval to avoid making mistakes. Sandoval's August 9 memo to Complainant on SLA violations was correct on two of the incidents, but wrong on the other two. Aware that Policy was not responding timely on P1 tickets, Sandoval should have exercised extra vigilance to avoid holding Complainant responsible for SLA violations caused by Policy.

Five weeks later, on September 18, 2012, Sandoval received an email from a Policy staffer alerting her to the extra work Complainant had caused in handling Ticket #1536497. This email again raised the issue of Complainant not contacting Policy on a Friday evening because he had no confidence he would hear back timely from Policy. However, Complainant had clearly erred in handling the ticket and caused Policy to have to spend extra time researching the issue. Under these circumstances, as Complainant's new supervisor, it was appropriate for Sandoval to take action.

If the CAP had encompassed only the actual performance problems Complainant evinced, there would be no reason to question its intent. However, the document punished Complainant for following Sandoval's written directive to copy and paste information into tickets. It held him in error for several mistakes he did not make. Despite the 70% accuracy level in QA ticket reviews required of all Service Desk Analysts, it concluded without factual basis that Complainant was not complying with that standard. And, it imposed an arbitrary requirement of working a "sufficient" number of tickets daily without providing a number. Lastly, aware that Complainant worked the most complex and time-consuming tickets in the section, Fischer and Sandoval required him to work the same number of tickets as the other Tier III analyst.

Additionally, Fischer opened the meeting by telling Complainant if he did not like his job he should find a new one. When Complainant asked why she said this, she referred him to his discrimination complaint to HR. If these statements had accompanied an appropriate CAP that did not punish Complainant for mistakes he had not made, they could perhaps be disregarded as a lapse of discretion. However, in view of the obvious errors in the document, and the severe punishments imposed on Complainant in October 2012, it appears that the CAP and the meeting were designed to prompt Complainant to resign.

These facts establish an inference of retaliatory animus, as is discussed below. However, they do not give rise to an inference of discrimination based on Complainant's race, religion, or national origin. There is simply no logical connection between each element of the prima facie case and an inference of discrimination based on Complainant's national origin or religion. Complainant has therefore failed to establish a prima facie case of race, ethnic, or religious discrimination in the imposition of the CAP.

ii. Retaliation Claim

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." § 24-34-402(1)(e)(IV), C.R.S. This language is identical to 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. *Big O Tires, supra*.

To establish a prima facie case of retaliation under the Act, Complainant must establish he: engaged in protected activity of opposing discriminatory conduct or filing a charge of discrimination; was subjected to adverse employment action; and a causal connection exists between the protected activity and the adverse action. *Berry v. Stevinson Chevrolet*, 74 F.2d 980, 985 (10<sup>th</sup> Cir. 1996).

Opposition activity is broadly defined and is protected when it is based on a mistaken good faith belief that the Act has been violated. *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 385 (10<sup>th</sup> Cir. 1984). Those who "informally voice complaints to their superiors or who use their employers' internal grievance procedures" are protected under the Act. *Robbins v. Jefferson County School Dist. R-1*, 186 F.3d 1253, 1258 (10<sup>th</sup> Cir. 1999). Complainant stated to Fischer and others in the December 2011 meeting that he believed his transfer to OIT was discriminatory. He informed HR of this and Fischer was aware of it. Complainant has therefore

established that he engaged in protected conduct and met the first element of the prima facie case of retaliation.

Adverse action under Title VII and the CADA is defined as an action that would dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 - 70 (2006). *Burlington* involved the reassignment of an employee from forklift duty to standard laborer tasks, both of which were within the employee's job description. Rejecting the argument that such an action is not materially adverse under Title VII, the Supreme Court stated, "We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable." *Id.* at 70. The Court went on to classify retaliatory work assignments as a widely recognized example of forbidden retaliation.

A corrective action is the first step in state employment to a disciplinary action. State Personnel Board Rule 6-2, 4 CCR 801, generally requires imposition of a corrective action prior to a disciplinary action. A CAP is a formal document retained in the employee's personnel file and often forms the basis for a negative performance evaluation, as it did in this case. The threat of receipt of a corrective action would dissuade a reasonable state employee from making a charge of discrimination. *Id.* Therefore, Complainant has met the second element of a prima facie case of retaliation.

The last element of the prima facie case requires the employee to show that a causal connection exists between the protected activity and the adverse action. In June 2013, the U.S. Supreme Court announced a new standard of proof for the causation element in retaliation claims under Title VII, as amended in 1991, and hence the CADA. *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013). Under *Nassar*, a plaintiff must prove that "his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Id.* "A plaintiff making a retaliation claim . . . must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Id.*

Unfortunately, the *Nassar* Court did not discuss how the new but-for standard of causation fits into or impacts the *McDonnell Douglas* shifting-burdens framework for proving retaliation. However, there is ample precedent in the Tenth and other Circuit courts, implementing the but-for causal standard in the age discrimination context (on which *Nassar* was based). See *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273, 1277 (10<sup>th</sup> Cir. 2010)(applying but-for causation standard to age claim). The but-for causation standard does not require proof that retaliation was the only cause of the employer's adverse action, but only that the adverse action would not have occurred in the absence of the retaliatory motive. *Id.*

The preponderance of evidence in this matter establishes that if Complainant had not complained of discrimination at the time of his transfer to OIT, Fischer and Sandoval would not have imposed the CAP. Fischer as much as stated this at the time she handed Complainant the CAP, most of which was erroneous and punitive. Complainant has thus established a prima facie case of retaliation.

Respondent has met its burden of producing evidence of a legitimate nonretaliatory reason for imposing the CAP, because there were some continued instances of Complainant not following the P1 process and sending insufficient information in his tickets to Policy.

The last question is whether Complainant has proven that Respondent's proffered legitimate reasons were in fact a pretext for retaliation. Pretext is most often 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 v. United Air Lines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999). In determining whether the proffered reason for a decision was pretextual, "we examine the facts as they appear to the person making the decision. Thus, 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." *Luster v. Vilsack*, 667 F.3d 1089, 1093 (10<sup>th</sup> Cir. 2011). A plaintiff can establish pretext by discrediting each of the employer's objective explanations for the adverse action, leaving only subjective reasons to justify its decision. *Jaramillo v. Colo. Judicial Dept.*, 427 F.3d 1301, 1310 (10<sup>th</sup> Cir. 2005).

The CAP contained many factual errors that were known and obvious to Sandoval and Fischer. It found Complainant in violation of the 70% standard for ticket accuracy, when his numbers, cited in the CAP, far exceeded 70%. It punished Complainant for following Sandoval's own written directive to cut and paste information into his tickets. It faulted Complainant for making errors that he did not make.

When a supervisor directs her subordinate to perform a specific task and then penalizes the employee for doing it, the supervisor loses credibility and her good faith is called into question. When a CAP holds an employee to a specific numerical standard and the CAP itself demonstrates that the employee meets that standard, but concludes that the employee violated that standard, the good faith of the authors of the CAP is called into question.

Respondent's imposition of a new requirement that Complainant work the same number of tickets as the other Tier III, without providing a number, knowing that Complainant worked tickets that were far more complex and time consuming than the other Tier III analyst, also demonstrates a lack of good faith.

The purpose of a corrective action is to help the employee improve his performance and provide a clear roadmap on how to succeed in the position. The CAP imposed on Complainant was not designed to achieve either of these goals. The preponderance of evidence demonstrates rather that Fischer and Sandoval viewed Complainant as a complainer that Hocker wanted to get rid of. Once he complained of discrimination at the time of his transfer to Fischer and to HR, this may have confirmed their negative opinions about him. The evidence thus establishes that Respondent's reasons for imposing the CAP were a pretext for retaliation.

Complainant has proven by preponderant evidence that the CAP was not imposed in good faith but was motivated by retaliatory animus. For the reasons set forth above, it is concluded that the CAP was retaliatory in violation of the CADA.

**B. January 2012 Disciplinary and Corrective Action**

**i. Complainant committed some, but not all, of the acts upon which the discipline was based**

The September 27, 2012 CAP was to be in effect through November 30, 2012. Prior to its completion date, on October 25, Respondent issued a notice of predisciplinary meeting for

noncompliance. At the time that letter was sent, Complainant's ticket accuracy rates were 76%, 85%, and 84%, well exceeding the 70% standard, he was working weekends to keep up with the extra work, and he was following all directives.

The disciplinary action held Complainant to a new 90% standard that had never previously been imposed, stating, "As an IT Professional III, the average accuracy rate should be over 90% at all times." Demonstrating this internal inconsistency, the January 30 CAP accompanying the disciplinary action stated, "You are currently expected to have at least 70% accuracy. However, effective April 1, 2013, the expectation will increase for all staff on the team . . . to have at least 90% overall accuracy on QA reviews each month." And, Respondent failed to prove that Complainant had one ticket at a 45% accuracy level.

There is no basis in the record for disciplining Complainant for failing to meet and exceed the 70% ticket accuracy level.

The disciplinary action also cited Complainant for not working a sufficient number of tickets. Respondent had never defined that number for Complainant; therefore, there is no basis, no measurable standard, upon which to criticize his ticket production. Every Help Desk ticket is different in myriad ways: the nature of the problem; the amount of information that must be obtained from the end user or the client; the amount of time it takes to contact necessary parties such as the end user, client, or Policy; and the amount of research necessary to resolve the issue. These differences all result in vastly different amounts of time to resolve the tickets.

For these reasons, ticket numbers were necessarily random and Complainant was not in control of the number he was able to resolve daily. Complainant worked the hardest and most complex tickets, the P1 and Medical tickets. Moreover, Respondent refused to give Complainant credit for the tickets he worked on the weekends and ultimately prohibited him from doing so. Respondent has not met its burden of proving by preponderant evidence that Complainant failed to work on an adequate number of tickets.

Complainant was also disciplined because other analysts in the office complained about him seeking guidance and assistance on his tickets. Sandoval was aware that Complainant needed information from databases he lacked and that only Tier II staff possessed. She knew that he was still learning State programs. Perhaps most significantly, in October 2012 Sandoval directed Complainant's peer analysts "to stop assisting if they feel that it is causing them not to be able to do their own tickets." When a manager directs employees to stop assisting a co-worker, it divides the workforce, isolates the employee from his peers, and sends a signal that complaints about that employee are welcome.

The disciplinary action concluded that Complainant had been insubordinate in working weekends after being directed not to do so. The evidence demonstrates that Complainant did not resolve tickets on weekends after being directed not to by Sandoval, because it unfairly started the SLA clock in other offices. The other Tier III analyst worked weekends, and Complainant did so only to keep up with a workload that was impossible to complete during the normal workweek. Having stopped resolving tickets, as a professional exempt employee, it should have been within Complainant's discretion to do so.

Complainant did leave the November 8, 2012 weekly Policy meeting shortly before it ended, shoving his chair into the table as he departed. However, the circumstances under which this occurred do not render it a violation of performance standards subject to disciplinary action. Fischer instructed Complainant twice to call Policy every fifteen minutes. He apparently

complied with this directive on more than one occasion; the evidence does not demonstrate how often this occurred. Policy predictably became irritated with these calls because they were distracting. However, having ordered Complainant to make the calls, Fischer cannot discipline Complainant for becoming frustrated by the situation she created.

Complainant did give his personal credit card to an end user on a Friday afternoon when no Policy staff were available to approve medication for a needy client. This was a judgment error on his part. Complainant also gave the personal cell number of a Policy staffer to an end user, in violation of clear standards of conduct.

In conclusion, Respondent has not met its burden of proving by preponderant evidence that Complainant committed the majority of acts on which the January 2013 disciplinary action was based. Therefore, no just cause warranted the disciplinary action.

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 the evidence before it in imposing the disciplinary pay reduction on Complainant. As noted above, it ignored its 70% accuracy criterion for QA reviews, imposed a new 90% level retroactively, and ignored the fact that Complainant consistently exceeded the 70% ticket accuracy requirement.

Respondent also failed to give appropriate consideration to mitigating information provided by Complainant in the predisciplinary process. In his November 8 submission of information, Complainant pointed out that he no longer had Tier I or II assistance; he lacked tools that they use for troubleshooting; he was still learning the State programs with no training and his requests for training were refused; and, despite requests for a daily number of required tickets to resolve, he had not received one. All of these arguments were based in fact and had a real impact on his ability to perform his job. Fischer and Sandoval failed and refused to give them the consideration they deserved.

Another element of Respondent's arbitrary and capricious conduct in this matter is its conflicting directives to Complainant. In July, Sandoval directed Complainant in writing to copy and paste information into his tickets. In the October CAP, Respondent punished him for doing so. In the October 12 email to the analysts, Sandoval provided new and confusing directives on when to downgrade P1 tickets and invited her staff to ask her questions. When Complainant did so, Sandoval admonished him for it by stating, "This type of direction should not be needed."



Fischer and Sandoval erected hurdles to Complainant's ability to perform his work effectively, imposed arbitrary rules erroneously and inconsistently, and penalized him for working above and beyond the call of duty to comply with their directives. Under these circumstances, no reasonable appointing authority fairly and honestly considering the evidence would conclude that disciplinary action was warranted. The decision was arbitrary and capricious. *Lawley*.

For the reasons set forth above, it is further concluded that the discipline was not within the range of reasonable alternatives available to the appointing authority.

**iii. Respondent violated Board Rule 6-10**

State Personnel Board Rule 6-10, 4 CCR 801, requires that at the predisciplinary meeting, the appointing authority present the information upon which discipline may be based, so that the employee has a meaningful opportunity to discuss, rebut, and provide mitigation on that information. One of the bases for the disciplinary action was Fischer's conclusion that, "A review of Complainant's P1 tickets from the time of the September 27, 2012 CAP forward revealed that out of ten tickets, he "failed to follow the process on 6, more than half." Complainant requested to view and discuss the tickets with Fischer at the meeting, but she did not present them. Complainant was therefore unable to discuss or defend himself, in violation of the rule.

**iv. The discipline constitutes retaliation under the CADA**

Complainant asserts that the disciplinary action and the CAP were imposed in retaliation for protected conduct under the CADA. Complainant engaged in protected conduct by opposing discriminatory conduct and filing a charge of discrimination. In early October 2012, he grieved the September 2012 CAP as discriminatory and retaliatory. Once his grievance was denied, he appealed the decision by filing claims of discrimination and retaliation with the Board on November 2, 2012, and with the EEOC on November 8, 2012. The disciplinary reduction in pay and the January 30, 2012 CAP constitute adverse actions. Complainant must next prove that his complaints of discrimination were the but-for cause of the adverse actions.

Immediately following the issuance of the CAP, Sandoval withdrew all of Complainant's support on P1 tickets, causing his job to be far more difficult, time consuming, and isolated from the team. In October, Complainant started working weekends in order to meet her new expectations. Sandoval, aware that Complainant had received permission from Fischer to spend work time on his CAP response, then refused to give him credit for the make-up time he spent trying to keep up with the work load.

Sandoval also refused to provide Complainant with necessary training in State programs or access to the programs Tier II staff had, which were necessary to resolution of some of his tickets. This pattern of imposing new job requirements and taking away the tools to comply with them continued over the next few months and is evidence of retaliatory animus. Respondent would not have disciplined Complainant in January 2013 if he had not had the history of making complaints about discriminatory and unfair treatment. Complainant has established a prima facie case of retaliation in the imposition of the disciplinary action.

Respondent has not met its low burden of producing evidence of a legitimate, nonretaliatory reason for imposing the discipline. As discussed above, Respondent failed to prove Complainant fell below the 70% ticket accuracy level, failed to prove he did not work a

sufficient number of tickets, and failed to prove that he was insubordinate by working weekends. While Complainant did demonstrate some errors in judgment in giving his personal credit card number, and the cell phone number of a Policy staffer, to an end user, these are not sufficient to warrant a ten percent reduction in pay for ten months, amounting to over \$5000.

Assuming *arguendo* that Respondent had met its burden of production, the evidence establishes that Respondent's purported reasons for disciplining Complainant were a pretext for retaliation. When Complainant tried to discuss why it was more difficult to work without the preliminary research conducted by Tier II analysts, Sandoval responded, in writing, that Tier II's had never done research. At the October 4, 2012 meeting, she had stated to Complainant that Tier II analysts did most of the research. Therefore, at the time she made this statement, she knew it was not true. Every witness at trial, including Sandoval, testified that Tier II analysts performed a significant amount of research on P1 tickets prior to escalating them to the Tier III analyst. Sandoval's willingness to make this bold misstatement of fact to Complainant is one example of her bad faith in dealing with him.

Sandoval also treated Complainant differently than the other Tier III analyst by permitting Ayon to resolve tickets on weekends. When Complainant provided ticket numbers demonstrating this to Sandoval, she simply did not respond.

To prohibit Complainant from working weekends also shows bad faith on Sandoval's part. A supervisor interested in creating the conditions for success does not pile on the work and then bar the employee from working extra hours to get it done. Complainant was an exempt professional employee and there was no legitimate business reason for barring him from working weekends to meet the high work demand, so long as he did not resolve them and start the SLA clock ticking in the Policy office.

**v. The discipline does not constitute discrimination under the CADA**

The same analysis of the claim of status-based discrimination above, relating to the CAP, applies herein to the disciplinary action. The evidence in the record does not establish an inference of discrimination based on Complainant's national origin, ethnicity, or religion.

**C. April 30, 2013 Termination of Employment**

**i. Complainant committed some, but not all, of the acts upon which the termination was based**

Complainant was terminated for insubordination. Respondent has proven by preponderant evidence that Complainant did engage in acts of insubordination towards Sandoval. These acts were taken in the context of a supervisor/employee relationship that had failed largely due to Sandoval's unfair and punitive treatment of Complainant.

Beginning in September 2012, the conditions of Complainant's employment deteriorated rapidly. Respondent noticed a predisciplinary meeting less than one month after the first CAP, and imposed unwarranted disciplinary action on January 10, 2013. On January 30, 2013, Sandoval prohibited Complainant from discussing work with the other analysts, directing him not to ask coworkers any questions about tickets and to go to Sandoval only with such questions. Sandoval had previously punished Complainant for asking her a reasonable question about her confusing October 12 email on the P1 process. The January 30, 2013 CAP therefore isolated Complainant from his peers at work.

At the February 11, 2013 meeting to discuss Complainant's concerns about the second CAP, Sandoval and Fischer confronted Complainant about slamming cabinets in his work area. Lacking a reason to trust their motives, he believed that they were accusing him of being a violent Muslim and trying to trigger an angry response. Sandoval also informed him at the meeting that his absences were causing frustration among his peers on the work team. This meeting placed additional pressure on Complainant, again feeding the cycle of his disability being triggered.

The conflicting directives continued. On February 12, 2013, Sandoval wrote in Complainant's performance summary that he "should not be assigning a ticket in his name until he is ready to work the ticket." At the October 22 meeting, she had directed him to do the opposite, to stop reviewing the tickets before assigning them to himself.

By March 4, 2013, Complainant was leery of being in any meeting with Sandoval alone because it often resulted in a corrective action or other admonition. Therefore, when she asked him to come to her office and would not tell him why, he asked her if he could bring Lynn and told her that she could just email him her concerns. This was not appropriate behavior for an employee towards his direct supervisor, even if, in the context of this case, it is understandable.

Complainant failed to timely respond to Sandoval's March 4 and March 8 emails regarding his restoration of the test panel link on his computer and a specific test panel task she had given him. Complainant had a duty to respond to Sandoval regarding her specific inquiries about work matters and to comply with her directives. He did not respond until March 13 and did not comply with her directives on this matter. Complainant asserts that his afternoon emails to Sandoval indicating he was leaving early under FMLA somehow constituted a sufficient response. However, this argument is unavailing, as he had the remainder of the day while he was at work to respond to her. Respondent has also proven by preponderant evidence that Complainant failed to perform a test panel as directed in March 2013.

Complainant was also terminated in part for "Failing to properly communicate with Sandoval regarding his schedule by dictating his schedule and stating he would not be in until a specific time and leaving work for appointments before the end of his work schedule." Complainant did fail to timely enter Kronos as directed by Sandoval on March 6. Once Sandoval clarified the basis for her directives regarding his February 25 entry on the snow day, he should have made the modification. Complainant also failed to provide Sandoval with adequate notice of the meeting at his son's school on March 7, and inappropriately directed Sandoval to approve him for Administrative leave for a meeting with DPA HR staff.

With regard to Complainant's March 6 email asserting that "his supervisor was threatening him at his work place," when Sandoval informed Complainant she would inform HR that he was not going to enter his Kronos time until the following day, Complainant was honestly frightened that Sandoval was going to get him into trouble. Complainant viewed HR as a separate arbiter of work conflicts with the power to influence action taken against him, and he was intimidated by Sandoval. His March 6, 2013 email claiming to be harassed at work was not a false accusation. It was an expression of his belief he was being treated unfairly in front of his peers at his work station, and an attempt to seek objective third party assistance.

Notwithstanding Complainant's fear of Sandoval, he should have and could have made the Kronos entry during the early afternoon on March 6, and his failure to do so was insubordinate.

Two of Complainant's purported acts of insubordination were attempts to protect himself from what he experienced as a harassing work environment. On March 10, Complainant informed Sandoval and Fischer that after consulting with his legal advisor, he had decided to bring two people to the March 11 meeting to tape and video record it. Sandoval rejected that demand and informed him that it would be insubordinate for him to not attend the meeting alone. He complied with her directive. After the March 11 meeting, attended by Fischer, Sandoval, and Lynn and at which he felt outnumbered, he stated he would not attend any more of those meetings without his attorney present. Sandoval informed him that he had to attend work meetings without a representative. He did so.

Respondent asserts that Complainant's emails constitute insubordination. However, Complainant was not defying a directive at the time he sent them; he was attempting to defend himself. Once he received the decision rejecting his demands, he attended the meetings, complying with Respondent's directives. Respondent has failed to prove that these emails constituted insubordination.

In summary, Respondent has not proven that Complainant made false accusations against Sandoval or was insubordinate in insisting to have third parties present at meetings. However, Complainant did fail to communicate professionally with Sandoval on several occasions, failed to timely respond to her emails regarding work issues, and was unable to perform some of his work tasks during the last two months of employment. This inability to perform his work was due more to his serious health condition than to any willful refusal to do so.

#### After-Acquired Evidence

Respondent based part of its case supporting termination on after-acquired evidence consisting of computer printouts purportedly showing how Complainant spent his time on his computer. These documents were created after Complainant's termination of employment.<sup>2</sup>

The after-acquired evidence rule does not apply to Board proceedings. Certified state employees are entitled to procedural due process prior to termination of employment. *Berumen v. Dept. of Human Services*, 304 P.3d 601, 607 (Colo.App. 2012); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985). With respect to predisciplinary meetings, procedural due process entitles an employee to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. Board Rule 6-10 is designed to satisfy these requirements of procedural due process. *Berumen*, 304 P.3d at 607. In the predisciplinary process, Respondent never advised Complainant that internet use was a concern. Therefore, utilization of this after-acquired evidence as a basis to support Complainant's termination would constitute a violation of his procedural due process rights.

#### **ii. Termination was arbitrary and capricious and was not within the range of reasonable alternatives**

The Board may affirm, modify, or reverse the action of the appointing authority. § 24-50-125(4), C.R.S. In view of the previous determinations that Respondent lacked just cause to impose the January 2013 disciplinary action, the findings of retaliation against Complainant for engaging in protected conduct, and Respondent's failure to prove that Complainant committed

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<sup>2</sup> These exhibits were admitted with no objection by Complainant's counsel.

many of the acts upon which termination was based, the decision to terminate Complainant's employment was arbitrary and capricious and lacked just cause. *Lawley v. Dep't of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Under Board Rule 6-9, 4 CCR 801, "The decision to take corrective and 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." *Id.*

Respondent failed to adequately consider Complainant's employment history when it terminated his employment. Prior to Complainant's transfer to OIT and the egregious manner in which he was treated there, Complainant was a highly valued member of the team that created the CBMS system. At HCPF, he displayed exceptional talents, was committed to his work, and was rated well on his performance evaluations. There was no trace of insubordination in his performance history.

Additional mitigation is the fact that Respondent's mistreatment of Complainant caused him to experience stress which exacerbated his disability. Complainant's difficulty focusing at work in March and April was a factor in his deteriorating performance.

Considering all of these factors, to impose termination is not within the range of reasonable alternatives. Complainant's acts of insubordination towards Sandoval, and his generally lower performance level when he was at work during the last two months of employment, do warrant some type of disciplinary action, short of termination. Therefore, the termination is modified to a lesser discipline to be determined in the discretion of Respondent.

**iii. Complainant has not proven discriminatory harassment**

Complainant asserts that Respondent created a hostile work environment in violation of the CADA. The CADA prohibits discrimination based on race, national origin, and/or religion which creates a hostile or abusive working environment. § 24-34-402(1)(a), C.R.S. To prevail on a claim of hostile work environment, a plaintiff must prove that he:

- a) Is a member of a protected group;
- b) Was subjected to unwelcome harassment;
- c) The harassment was based on a protected trait, such as race, national origin, and/or religion; and
- d) Due to the harassment's severity or pervasiveness, the harassment altered a term, condition or privilege of employment and created an abusive working environment.

*Harsco Corp. v. Renner*, 475 F.3d 1179, 1186-87 (10<sup>th</sup> Cir. 2007).

In determining whether a workplace is hostile or abusive, a court considers the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance; and the context of the conduct. *St. Croix v. Univ. of Colo. Health Sciences Center*, 166 P.3d 230, 243 (Colo.App. 2007)(internal citations omitted).

Complainant is a member of a protected group as an individual of Tunisian/Arab descent and as a Muslim. The conditions of his employment became increasingly harsh and abusive over time. However, Complainant has not proven that he was subjected to harassing conduct that actually “stemmed from racial . . . animus.” *Id.* (emphasis added).<sup>3</sup> To prove a harassment claim, Complainant must demonstrate that hostile conduct directly relates to his Arab national origin and his Muslim religion. There is no evidence in the record establishing this. Therefore, his hostile work environment claim fails.

**iv. Respondent did not discriminate on the basis of disability**

Complainant asserts that Respondent discriminated against him on the basis of his disability. The CADA prohibits an employer from terminating an employee because of his or her disability. § 24-34-402(1)(a), C.R.S. The Tenth Circuit has adopted the *McDonnell Douglas* burden-shifting framework to analyze wrongful termination claims under the ADA. *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10<sup>th</sup> Cir. 1995).<sup>4</sup> The elements of the prima facie case of disability discrimination are: plaintiff has a disability as defined by the law; plaintiff is otherwise qualified for the job, i.e., can perform the essential functions with or without reasonable accommodation; and the plaintiff suffered an adverse employment action based on disability. *Id.*

The Act defines disability as, "a physical impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." § 24-34-301(2.5)(a), C.R.S. Complainant has Tinnitus and Hyperacusis which are lifelong conditions that substantially limit him in the major life activities of hearing, reading, seeing, concentrating, and focusing.

Respondent does not contest that Complainant is a disabled person within the meaning of the CADA. When Complainant made a request for a reasonable accommodation of his Tinnitus and Hyperacusis on February 5, 2013, it responded not by questioning his disability but by initiating the interactive process to determine whether a reasonable accommodation of it was possible.

Implementation of the reasonable accommodation aspect of the ADA is an interactive process that requires participation by both parties. *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10<sup>th</sup> Cir. 1998). The interactive process begins with the employee providing enough information about his limitations and desires to convey the employee's desire to remain with the employer despite his disability and limitations. *Smith v. Midland Brake*, 180 F.3d 1154, 1172 (10<sup>th</sup> Cir. 1999). Once the employer's responsibilities to engage in the interactive process are triggered, both the parties are obligated to engage in good-faith communications with each other. *Id.*

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<sup>3</sup> See *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10<sup>th</sup> Cir. 1994); *Riske v. King Soopers*, 366 F.3d 1085, 1091 (10<sup>th</sup> Cir. 2004) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] ...because of. . . sex.' "(quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 1002, 140 L.Ed.2d 201 (1998))). "If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment." *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10<sup>th</sup> Cir. 1994).

<sup>4</sup> Although the Colorado Supreme Court adopted a modified version of *White* in *Community Hospital v. Fail*, 969 P.2d 667 (Colo.1998), *Fail* is limited to circumstances wherein the employer admits to having terminated the employee because of the disability. *Fail* is therefore inapposite.

This interactive process started on February 22, 2013, and continued through Respondent's March 22, 2013 issuance of a decision. This decision contained two parts. First, it listed Complainant's specific requests, granting two of them and denying the remaining ones. Respondent offered to permit Complainant to work from home two days a week, and to consider paying for a computer with a silent fan in the office. It denied Complainant's request to close the AC vents due to the adverse impact on other personnel, and denied his request to work at the PSP office because it was not available.

The second part of the decision informed Complainant that notwithstanding the accommodations offered, Respondent had concluded that it was unable to reasonably accommodate Complainant's condition in his current position, and it would notify Complainant if there were any position vacancies for which Complainant qualified and in which he could be accommodated.

A failure to reasonably accommodate an employee's disability is a violation of the CADA. *Ward, supra*. At trial, Complainant withdrew his claim of failure to reasonably accommodate him by moving him to the PSP building. The only remaining basis for a failure to accommodate claim would be the issue of working from home. It appears that Complainant's grievance put the prospect of working from home on hold. Complainant mentioned it to Sandoval on April 22, but by that time neither he nor his then-attorney had taken steps to sign the work-from-home agreement. Thus, the interactive process had not yet been completed at the time of Complainant's termination.

Complainant has not established that Respondent failed to reasonably accommodate his disability or terminated his employment based on his disability.

**v. Complainant is entitled to a partial award of attorney fees**

Complainant requests an award of attorney fees and costs. The Board's enabling act provides for an award of attorney fees and costs upon certain findings. § 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. . . ."

The Board has implemented the attorney fee statute in Rule 8-38, 4 CCR 801. The rule defines an action taken in bad faith, maliciously, or as a means of harassment as one pursued to annoy harass, made to be abusive, stubbornly litigious, or disrespectful of the truth. Rule 8-38(A)(2).

Respondent's decisions to issue the first CAP and the January 2013 disciplinary action and CAP were made in bad faith and were patently disrespectful of the truth. Contrary to her obligation to support her employees in succeeding under her leadership, Sandoval took a series of actions she knew would make it increasingly difficult for Complainant to succeed, and isolated

him from his peer Service Desk analysts. Her conduct towards Complainant was abusive. Therefore, Complainant is entitled to the attorney fees and costs incurred in appealing the September 2012 CAP and the January 2013 disciplinary and corrective actions.

Complainant is not entitled to attorney fees incurred in appealing the termination of his employment, because there was evidence of insubordination supporting this action.

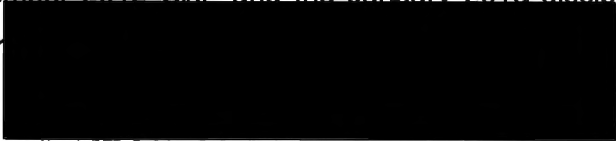
### CONCLUSIONS OF LAW

1. Complainant did not commit most of the acts upon which the January 2013 disciplinary action was based; Respondent therefore lacked just cause to impose the discipline;
2. The January 2013 disciplinary action was arbitrary and capricious and violated Board Rule 6-10;
3. Respondent's September 2012 Corrective Action, and the January 2013 disciplinary and corrective actions, were retaliatory in violation of the CADA;
4. Complainant did not commit some of the acts upon which the April 2013 disciplinary termination was based; Respondent therefore lacked just cause to impose termination;
5. The April 2013 disciplinary termination was arbitrary and capricious and was not within the range of reasonable alternatives; therefore, it is modified to lesser disciplinary action to be determined by Respondent;
6. None of Respondent's actions was motivated by discriminatory animus based on Complainant's national origin, ethnicity, or religion;
7. Respondent did not create a hostile work environment based on Complainant's national origin, ethnicity, or religion;
8. Respondent did not discriminate against Complainant on the basis of his disability;
9. Complainant is entitled to a partial award of attorney fees and costs;
10. Complainant is entitled to reinstatement, back pay and benefits.

### ORDER

The September 2012 CAP, and the January 2013 disciplinary and corrective actions, are rescinded. The April 2013 termination of employment is modified to lesser discipline at the discretion of Respondent. Complainant is reinstated to his IT Pro III position with back pay and benefits, minus appropriate offsets. Respondent is ordered to pay Complainant's attorney fees and costs incurred in appealing the September 2012 CAP and the January 2013 disciplinary and corrective action.

Dated this <sup>26</sup> day  
of February 2014.

  
Mary McClatchey  
Senior Administrative Law Judge  
State Personnel Board



1525 Sherman St.  
Denver, CO 80203

**CERTIFICATE OF MAILING**

This is to certify that on the 28<sup>th</sup> day of Feb, 2014, I electronically served a true copy of the foregoing **AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS**, as follows:

Lisa Sahli Esq.

[REDACTED]

Davin Dahl A.A.G.

[REDACTED]

Denver, CO 80202

[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 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-63, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

### RECORD ON APPEAL

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

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

### BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-67, 4 CCR 801.

### ORAL ARGUMENT ON APPEAL

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

### PETITION FOR RECONSIDERATION

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