STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2013B142(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JENNIFER RENO,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF REGIONAL CENTER OPERATIONS, PUEBLO REGIONAL CENTER,
Respondent.

Senior Administrative Law Judge (ALJ) Denise DeForest held the commencement hearing on November 21, 2013, and the evidentiary hearing in this matter on April 22, May 28, and July 9, 2014, at the State Personnel Board, 1525 Sherman St., Courtroom 6, Denver, Colorado. The record was closed on July 14, 2014, after the exhibits were reviewed and redacted for inclusion in the record. Bradford Jones, Assistant Attorney General, represented Respondent. Respondent's advisory witness was Valita Speedie, the Director of Pueblo Regional Center and Complainant's appointing authority. Complainant appeared and was represented by Stephen Johnston, Esq.

MATTER APPEALED

Complainant appeals the imposition of discipline that returned her duties from an Administrative Assistant II to Health Care Technician I, along with a 6% salary reduction for six months. Complainant also files a claim of State Employee Protection Act violation in the imposition of discipline and the content of her 2012 – 2013 annual performance review. Additionally, Complainant challenges Respondent's decision to administratively separate her from employment for exhaustion of leave. Complainant asks for the discipline to be rescinded, to be returned to the position of Administrative Assistant II and the position reallocated to reflect additional duties, for her personal leave to be returned, and for the same fair and equitable treatment as her peers.

Respondent argues that the disciplinary change in Complainant's position was warranted because of Complainant's timekeeping practices over an extended period of time, and that Complainant exhausted her leave by not returning to work once she was disciplined. Respondent asks that the Board affirm the decision to discipline Complainant and to administratively separate her once her leave was exhausted.

For the reasons presented below, the undersigned ALJ finds that Respondent's

decision to discipline Complainant and administratively discharge her from employment is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;

2. Whether Respondent's disciplinary action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the range of reasonable alternatives;

4. Whether Respondent's decision to administrative separate Complainant from employment was arbitrary, capricious or contrary to rule or law;

FINDINGS OF FACT

1. The Pueblo Regional Center (PRC) provides housing and care for residents with developmental disabilities. PRC is located approximately five miles outside of Pueblo, CO.

2. In 2012 – 2013, PRC consisted of two main administrative buildings, know as Core buildings, and a series of group residences. The number of group residences was in the process of being downsized from 11 residences to 10 residences. In 2013, PRC cared for 77 residents. By 2014, that number had been reduced to 68 residents.

3. PRC residences are known by individual names, such as Latimer, Galatea, or Hahns Peak. Each PRC residence houses 6 to 8 residents. PRC staffs each residence 24 hours a day for seven days a week. The staffing ratio for each home was generally kept at 1:4, which meant that each shift includes at least two staff persons at each residence. At least one of those staff members was a Health Care Technician (HCT) I. HCT I are licensed to pass medications. The second staff member on a shift may also be a HCT I or a client care aide. The primary function of the staff members at each residence is to provide direct care for the residents of that home.

4. PRC has administrative staff assigned to the Core buildings. One of the administrative offices is a scheduling office run by HCT III's who are in charge of overseeing staff coverage at the residences. The scheduling office also directs the staff runners who take materials between PRC and other facilities, as needed.

5. PRC is a separate facility than the Colorado Mental Health Institute in Pueblo (CMHIP). PRC utilizes some administrative support services that are housed at CMHIP, such as financial accounting services for PRC resident accounts. CMHIP is located in Pueblo at a location that is approximately 10 miles from PRC and a 15 – 25

minute drive from PRC depending upon traffic. Parking at CMHIP during business hours is generally difficult to find. When estimating the time that it will take to travel from PRC to CMHIP, find parking, and arrive at one of the CMHIP buildings, an estimate of 25 minutes is a reasonable estimate.

Complainant's Employment with PRC:

6. Complainant was initially hired by PRC as a state services trainee in early 2008. While in the trainee position, Complainant passed the state licensure requirements as a licensed psychiatric technician, which qualified her for a HCT I position. Once she was licensed in September of 2008, Complainant held a HCT I position for a year. Complainant worked as part of the PRC pool staff and provided direct care at residences to cover for staff absences and other staffing needs.

7. Complainant did a very good job as a HCT I.

8. In 2009, PRC recognized that its system of shopping for the residences had to be improved in order to reduce the associated costs. PRC, therefore, created job duties to perform the shopping tasks on a more centralized basis. Complainant took on shopping duties initially as part of her HCT I position in the fall of 2009.

9. By the spring of 2010, PRC had created the new position of grocery shopper as an Administrative Assistant II. Complainant accepted a voluntary demotion from HCT I to AA II to take the position. Another person, Romeo Casso, was hired as a second PRC shopper shortly after Complainant moved into her AA II position.

10. The primary function of the shopper positions was to keep the costs in each residence within the food budget for that residence. The shoppers also took care of general shopping needs for the residents.

11. As a shopper for PRC, Complainant had a desk in one of the PRC Core buildings. Most of her day, however, was expected to be spent out in the community shopping for six PRC residences or at PRC residences on coverage assignments.

Complainant's Duties as a Shopper:

12. As an AA II performing shopping duties, Complainant's primary function was to coordinate the food shopping needs for six residences, maintain the spending for groceries within the budget for that residence, and to obtain the necessary groceries for the planned menus in those residences. Complainant also bought other non-grocery items for residents when necessary. This work would require Complainant to gather information on the items required by the residents and then locate the items at stores in the Pueblo area. Complainant would then bring her purchases back to the residences.

13. On most days, Complainant would complete her shopping work by approximately 1 PM.

14. Complainant had arranged with her supervisors that she would work four days per week for ten hours each day. Complainant's workday started at 7 AM and ended at 5 PM. Complainant normally worked Mondays through Thursdays.

15. Given that Complainant had previously worked as a HCT I in the residences, the plan for Complainant's position was that her afternoon hours would be spent completing whatever HCT I task was necessary. Complainant was to check in with the scheduling office or her direct supervisor, Laura Tafoya, and make her herself available to perform coverage at the residences.

16. Complainant was expected to use the KRONOS timekeeping system to log in and out of work each workday to account for 40 hours of week each week. KRONOS is a timekeeping system used by state agencies, including divisions within the Colorado Department of Human Services such as PRC.

17. PRC's timekeeping policy, Policy Number: 4.1.M1, "Timekeeping System – Kronos" sets out a series of timekeeping requirements that were applicable to Complainant:

> Non-exempt employees are responsible for reporting hours worked and leave taken. Non-exempt employees pay will be reduced if the hours recorded in the Kronos system are less than the required hours for each week. Non-exempt employees are required to use the automated time collection devices as assigned.
> ...
> Procedure
>
> A. General Timekeeping procedures
>
> 1. All non-exempt employees shall record a proper "in" time, utilizing proper Kronos timekeeping equipment immediately before the commencement of work for a shift. (Immediately before means within a few seconds.)
> ...
> 3. All non-exempt employees shall record a proper "out" time immediately before completion of a shift or leaving the facility for a scheduled and approved leave.
> ...
> DISCIPLINARY ACTION
>
> 1. Forgery or intentional inappropriate recording of time worked may result in disciplinary action at the Appointing Authority / Administrator's discretion, which may include unpaid work, disciplinary write-up, or termination. The forgery or falsification of

time worked shall be considered the legal equivalent of a misappropriation of State assets.

18. In order to log in or out, Complainant would swipe her badge at a KRONOS reader, and the KRONOS system would record the identity assigned to the badge, the time of the swipe, and the place of the swipe. There were KRONOS readers at every PRC residence and the PRC Core buildings. There are also KRONOS readers at the CMHIP buildings.

Complainant's Work Assignments and Hours:

19. Complainant's direct supervisor, Laura Tafoya, was a Health Professional IV. Ms. Tafoya directly supervised twenty PRC employees.

20. During 2012, Ms. Tafoya became concerned that Complainant's shopping duties were usually completed by noon or 1 PM, but that she had little idea of where Complainant was working in the afternoons until 5 PM. Ms. Tafoya spoke with her supervisor, Valita Speedie, about the issue. Ms. Speedie recommended that Ms. Tafoya institute a calendar requirement to help track Complainant's assignments.

21. In the fall of 2012, Ms. Tafoya instituted a system of calendar submissions from Complainant. Each month, Complainant was expected to submit a calendar that noted where and when she had been working during that month in order to document her work.

22. Complainant submitted eight monthly calendars to Ms. Tafoya as her documentation of the work she had been performing.

Complainant's Calendar Submissions:

23. Complainant submitted calendars to Ms. Tafoya for her work in September 2012 through April 2013. During these months, Complainant logged work for all or at least a part of the day on a total of 120 days.

24. A typical entry that Complainant placed on a calendar showed that she had worked at a specific residence from 7 AM – 9 AM, shopped from 9 AM until noon or 1 PM, returned to the Core building from the time she returned from shopping until approximately 2 PM, and then worked at another residence from approximately 2 PM until 5 PM.

25. Some of Complainant's calendar entries show that Complainant was performing work at CMHIP. Complainant's calendars indicated 17 trips on Wednesday afternoons to CMHIP. These trips were typically noted as occurring from 1 PM until 3 PM. Complainant would then indicate that, after her return from CMHIP, she worked at a residence from 3 PM until 5 PM.

26. Complainant's calendars also reflected mid-afternoon trips to CMHIP on Tuesdays as well. In her calendars for September 2012 through April of 2013, Complainant included 14 entries where she was at CMHIP in the mid-afternoon. Of these 14 entries, two entries from October 2 and 23, 2013, noted that Complainant was working at a combination of the PRC Core building and CMHIP from 3 PM until 5 PM. The other 12 entries that reference a visit to CMHIP on a Tuesday noted that the CMHIP visit was followed by Complainant working for several hours at one of the PRC residences to finish out her hours for the day.

27. Complainant's trips to CMHIP on her calendar were consistent with Complainant assisting with patient funds requests. The patient fund accounting office was located at CMHIP. When a patient required access to funds, a withdrawal slip would be generated and delivered to the accounting office at CMHIP. This drop-off normally occurred on Tuesday before the accounting office closed for the day. On Wednesdays, the accounting office would have the funds available for pick up at its account window between the hours of 1 and 4:30 PM. A Wednesday trip to CMHIP would include picking up the requested funds in the afternoon and delivering those funds and records to the appropriate places at PRC.

The Reallocation Process:

28. On or about February 13, 2013, an upward reallocation announcement for Mr. Casso's position was announced as a promotional opportunity. Mr. Cassio's position had been reclassified by human resources from an AA II to an AA III position.

29. Complainant was upset to see that her co-worker had received an upward reallocation. She immediately went to her supervisor, Ms. Tafoya, and demanded an immediate meeting with Ms. Speedie to have her position reallocated as well. She also asked for, and received, a copy of the new position description for Mr. Casso's position. Ms. Tafoya told Complainant that she and Mr. Casso had been working on the reallocation process for approximately a year.

30. Complainant asked Ms. Tafoya and Ms. Speedie if she could have her position reallocated. Ms. Speedie's response was that anyone could have their work considered for reallocation, but the decision on whether she was working outside of her current job duties would be made by Human Resources and not by Ms. Tafoya or Ms. Speedie. Ms. Speedie also warned Complainant that there were times that a review of a position led to the conclusion that the position should be downwardly allocated to a lower classification, rather than receive an upward allocation.

31. Complainant used the revised job description submitted by Mr. Casso as the start of a revised job description for her position. She provided multiple drafts to Ms. Tafoya for comment during March and April 2013. Ms. Tafoya provided Complainant with some written feedback on her drafts. Complainant was upset that neither Ms. Tafoya nor Ms. Speedie made the time to meet with her in person to go over her drafts.

Observation of Complainant Driving Into CMHIP in April 2013:

32. On or about April 24, 2013, the PRC Director of Quality Assurance, Mary Jo Kountz, contacted Complainant's appointing authority, Valita Speedie, to tell Ms. Speedie that Complainant had been seen driving into CMHIP on the previous day at a time when it a time when Complainant should have been at PRC. Ms. Speedie called up Complainant's KRONOS records for April 23, 2013, and saw that Complainant had ended her KRONOS record on that date by swiping out at CMHIP.

Investigation Into Complainant's KRONOS Reports:

33. Ms. Speedie decided to investigate Complainant's timekeeping practices once she saw that Complainant had swiped out at CMHIP rather than PRC. She asked Ms. Tafoya to provide Complainant's calendar reports to her. She pulled Complainant's timekeeping records from KRONOS for the prior year.

34. Ms. Speedie pulled Complainant's KRONOS records from January 2012 through April of 2013. She found that Complainant had clocked out at CMHIP a total of 102 times during that period.

35. Driving the distance between PRC and CMHIP, along with the need to find parking at CMHIP and to go to a KRONOS machine to log out, reasonably requires approximately 25 minutes to accomplish. When that period of time is added to the times that Complainant clocked in or out of KRONOS at CMHIP, KRONOS records document that Complainant clocked in or out at CMHIP at times that were inconsistent with the work that Complainant had listed on the calendars she had submitted to Ms. Tafoya on at least 40 occasions between September 2012 and April 2013:

Day of the Week and Date		Complainant's KRONOS timestamp	Complainant's Calendar Entry for that Date and Time
T	Sept. 4, 2012	Clock out at 5:19 PM at CMHIP	Galatea 2 PM – 5 PM
W	Sept. 12, 2012	Clock out at 4:35 PM at CMHIP	Galatea 2:30 PM – 5 PM
W	Sept. 19, 2012	Clock out at 4:23 PM at CMHIP	Hahns Peak 2 PM – 5 PM
T	Sept. 25, 2012	Clock out at 4:54 PM at CMHIP	Galatea 2 PM – 5 PM

M	Oct. 1, 2012	Clock out at 4:48 PM at CMHIP	Hahns Peak 2 PM – 5 PM
W	Oct. 3, 2012	Clock out at 5:48 PM at CMHIP	Latimer 2 PM – 5:30 PM
R	Oct. 4, 2012	Clock out at 4:41 PM at CMHIP	Latimer 2 PM – 5 PM
T	Oct. 9, 2012	Clock out at 5:00 PM at CMHIP	Clarion 3 PM – 5 PM
R	Oct. 11, 2012	Clock out at 4:59 PM at CMHIP	Galatea 3 PM – 5 PM
M	Oct. 22, 2012	Clock out at 4:59 PM at CMHIP	Latimer 3:30 PM – 5 PM
M	Oct. 29, 2012	Clock out at 4:53 PM at CMHIP	Mather 2:30 PM – 5 PM
R	Nov. 8, 2012	Clock out at 4:59 PM at CMHIP	Bayfield 2 PM – 5 PM
M	Nov. 12, 2012	Clock out at 2:05 PM at CMHIP	CORE noon – 2 PM, then holiday hours
M	Nov. 26, 2012	Clock out at 4:56 PM at CMHIP	Wiggins 2 – 5 PM
R	Dec. 6, 2012	Clock out at 5:03 PM at CMHIP	272 Harmony 3 PM – 5 PM
T	Dec. 11, 2012	Clock out at 4:59 PM at CMHIP	Latimer 3 PM – 5 PM
W	Dec. 12, 2012	Clock out at 4:59 PM at CMHIP	Wiggins 2 PM – 5 PM
R	Dec. 13, 2012	Clock out at 4:58 PM at CMHIP	272 Harmony 1:30 PM – 5 PM
M	Dec. 31, 2012	Clock out at 4:53 PM at CMHIP	Latimer 1 PM – 5 PM

T	Jan. 15, 2013	Clock out at 4:56 PM at CMHIP	272 Harmony 1 PM – 5 PM
R	Jan. 17, 2013	Clock out at 4:54 PM at CMHIP	Bayfield 1 PM – 5 PM
T	Jan. 22, 2013	Clock out at 4:54 PM at CMHIP	272 Harmony 3 PM – 5 PM
W	Jan. 23, 2013	Clock out at 5:02 PM at CMHIP	Bellflower 3 PM – 5 PM
M	Feb 4, 2013	Clock out at 5:03 PM at CMHIP	Bayfield 3 PM – 5 PM
T	Feb. 5, 2013	Clock out at 4:56 PM at CMHIP	Galatea 3 PM – 5 PM
T	Feb. 12, 2013	Clock out at 5:09 PM at CMHIP	Latimer 2:30 PM – 5 PM
R	Feb. 14, 2013	Clock out at 5:11 PM at CMHIP	Latimer 3 PM – 5 PM
R	Feb. 21, 2013	Clock out at 3:53 PM at CMHIP	887 Bellflower 3 PM – 5 PM
T	Feb. 26, 2013	Clock out at 4:53 PM at CMHIP	Bayfield 2:30 PM – 5 PM
M	March 4, 2013	Clock out at 4:57 PM at CMHIP	Bayfield 3 – 5 PM
T	March 5, 2013	Clock out at 4:56 PM at CMHIP	Latimer 2:30 PM – 5 PM
Sun	March 10, 2013	Clock out at 6:09 PM at CMHIP	Latimer 3 PM – 6 PM
T	March 19, 2013	Clock out at 4:59 PM at CMHIP	Galatea 3 PM – 5 PM
W	March 20, 2013	Clock in at 8:04 AM at CMHIP	CORE 8 AM – 1 PM

M	March 25, 2013	Clock out at 5:10 PM at CMHIP	Hahns Peak 3 PM – 5 PM
M	April 1, 2013	Clock out at 4:59 PM at CMHIP	Galatea 3 PM – 5 PM
T	April 2, 2013	Clock out at 5:15 PM at CMHIP	Mather 3 PM – 5 PM
W	April 3, 2013	Clock in at 6:59 PM at CMHIP	Latimer 7 AM – 10 AM
R	April 4, 2013	Clock out at 5:25 PM at CMHIP	Galatea 2 PM – 5 PM
M	April 15, 2013	Clock out at 4:02 PM at CMHIP	Galatea 2 PM – 4 PM

36. When Complainant clocked out at CMHIP, she had travelled there using her own personal vehicle rather that the state vehicle available to her for PRC work. If Complainant was performing any state work on that trip, the use of Complainant's personal vehicle would be contrary to state policy.

37. Complainant's appearances at CMHIP that are inconsistent with her representations of her coverage work also constituted unauthorized travel to CMHIP. If there was state work performed during those trips, that work had not been requested by Complainant's supervisor, authorized by Complainant's supervisor, or disclosed to Complainant's supervisor.

April 30, 2013 PMAP and PMAP Dispute:

38. On April 30, 2014, Complainant received her annual performance (PMAP) review from Ms. Tafoya for the fiscal year 2012 – 2013.

39. Complainant received an overall score of "2" on a three-point scale from that review. A review with an overall rating of "2" is a successful review.

40. In the specific core competency sections of the review, Ms. Tafoya included several competency areas which were rated at a level of 1.7 – 1.9. These competency areas included communications, interpersonal skills, and accountability. Complainant received a 2.0 rating in the areas of customer service and job knowledge. These results provided Complainant with an average of 1.9 overall, which placed Complainant's rating within the overall range of 1.8 – 2.5 for an overall "2" rating.

41. While receiving an overall successful score on her 2012 – 2013 PMAP, Complainant received some negative comments within her review. The negative

comments noted that Complainant had made some statements to other staff that were not sufficiently professional, and that Complainant was not obtaining approval to perform tasks but was volunteering herself to help with client activities. The review also noted that Complainant had allowed several of her homes to go and remain over budget for period of time. The review noted that there were two homes that were overspent for five consecutive months, and another home that had been overspent for four consecutive months before Complainant brought it back within budget. The review also noted that there had been some trouble using the appropriate individual resident benefit cards, and that Complainant's submission of work calendars to Ms. Tafoya had not been timely.

42. On April 30, 2013, Complainant disputed her PMAP review, and noted in the employee comment section that she felt that the PMAP did not reflect her work, that her previous reviews had been very positive and that the negative comments were the direct result of her requesting an reallocation of her position.

43. Complainant's dispute of her PMAP was not specifically addressed by Ms. Tafoya or Ms. Speedie either during, or in parallel to, the Board Rule 6-10 process involving Complainant's time entries.

The Board Rule 6-10 Process:

The 1st Board Rule 6-10 meeting -

44. Ms. Speedie sent Complainant a letter dated April 29, 2013, informing Complainant that there would be a Board Rule 6-10 meeting held on May 7, 2013, to discuss "concerns regarding your schedule and work times."

45. Complainant attended the meeting with a representative from Colorado WINS, Pam Cress. Ms. Speedie attended with the Human Resources Director for Respondent's southern region, Nancy Smeltzer.

46. During the meeting, Ms. Speedie asked Complainant to describe her work and her days. Complainant agreed that her position was half as a shopper and half as an HCT I.

47. Complainant told Ms. Speedie that she had been clocking out of CMHIP because she had been dropping off requests on her way home. Complainant also told Ms. Speedie that she had often taken requests and other information over to CMHIP without her supervisor, Laura Tafoya, knowing about the work and without Ms. Tafoya's authorization for the work.

48. Complainant admitted that her calendars that she provided to her supervisor were expected to track where she was working in the afternoons after she completed her shopping duties. She admitted to Ms. Speedie that her calendars did not account for all of her trips to CMHIP.

49. After the conclusion of the meeting, Ms. Speedie contacted the supervisor at patient accounts at CMHIP to ask when documents required by patient accounts

could be dropped off. Ms. Tafoya also contacted four staff members who worked the second shift at four different PRC residences to ask if Complainant working in their residences in the afternoon. Ms. Tafoya was told that Complainant had not been at the residences for more than 5 - 10 minutes, except for a cooking class in April in one residence.

The 2nd Board Rule 6-10 meeting –

50. Ms. Speedie sent Complainant another notice dated May 14, 2013, announcing a follow-up Board Rule 6-10 meeting for May 21, 2013.

51. Complainant attended without a representative. Ms. Speedie and her representative, Ms. Schmelzer, also attended the meeting.

52. Ms. Speedie told Complainant that she had checked with patient accounts about what types of materials were dropped off at that office, and that the answers she had received created more questions for Complainant. Complainant told Ms. Speedie that she had been dropping off withdrawal slips from all of the homes, purchase orders, and receipts for patient account spend-downs.

53. During this meeting, Complainant told Ms. Speedie that, at the conclusion of her shopping, she would go to the PRC schedulers and would ask if they needed assistance in a home and then go to that home to provide coverage. Complainant also told Ms. Speedie that other staff clocked out at CMHIP, and provided Ms. Speedie with three staff names for her to check on the practice.

54. Complainant asked Ms. Speedie to check with specific staff at Galatea, 272 Harmony, Wiggins, Bayfield, Bellflower, and Hanhs Peak about her work at those PRC residences. Complainant also told Ms. Speedie that three other PRC staff members had clocked out at CMHIP.

55. After the May 21, 2013 Board Rule 6-10 meeting, Ms. Speedie contacted three of the staff members in various PRC residences to determine the time and duration of the work performed by Complainant at those residences. The reports she received were that Complainant was rarely at these residences. Ms. Speedie spoke with the two PRC schedulers to determine if Complainant took her direction from them as to her afternoon work. The schedulers told Ms. Speedie that Complainant did not come to them to ask them where to work. They also told Ms. Speedie that they had utilized Complainant a few time for staff coverage. Ms Speedie also checked eight months of KRONOS records for the three staff that Complainant had mentioned were clocking out at CMHIP. She found that, during that period of time, two of the staff had not clocked out of any facility other than a PRC facility, and that one of the staff members had clocked out at CMHIP one time with supervisor permission. Ms. Speedie also conducted inquiries into how various types of purchasing expenses and receipts were to be handled.

The 3rd Board Rule 6-10 meeting –

56. By letter dated May 31, 2013, Ms. Speedie notified Complainant of a third Board Rule 6-10 meeting to be held on June 6, 2013.

57. Complainant attended the meeting with her representative, Ms. Cress. Ms. Speedie and Ms. Schmelzer also attended.

58. Ms. Speedie presented Complainant with the documentation and information she had collected concerning Complainant's use of CMHIP KRONOS, the information concerning staff use of KRONOS, and information from the other staff members about her appearances at PRC residences and the purchasing record information. Ms. Speedie provided Complainant with a chance to offer mitigating information for her consideration. Complainant asked to be placed on paid leave until Ms. Speedie could make a decision.

59. Ms. Speedie made the decision to place Complainant on paid administrative leave based upon her concerns that Complainant had engaged in fraudulent timekeeping activities. Ms. Speedie notified Complainant of her administrative leave status by letter dated June 7, 2013. The administrative leave was effective June 6, 2013, and was to stay in effect while Ms. Speedie finished her investigation and decision-making process.

Disciplinary Decision:

60. Ms. Speedie recognized that Complainant had performed very well as a HCT I prior to becoming a shopper for PRC.

61. By letter dated June 10, 2013, Ms. Speedie issued her disciplinary decision to Complainant.

62. Ms. Speedie found that Complainant had used KRONOS at CMHIP to check in or out a total of 102 times between January 2012 and April 2013. She additionally found that Complainant's explanations for what she had been doing at CMHIP after she had completed her shopping duties had produced no substantially no supporting evidence.

63. Ms. Speedie found that Complainant's use of KRONOS at CMHIP constituted a violation of three policies. She found that Complainant's use of KRONOS at CMHIP was a fraudulent timekeeping practice, in violation of PRC Policy 4.1.M1, "Timekeeping System – Kronos;" Colorado Dept. of Human Services Policy V-4, "Financial;" and the Colorado Department of Human Services Policy 1-2.7 "Fraud Policy."

64. The Colorado Department of Human Services Policy V-4, "Financial," requires non-exempt employees to use KRONOS as the timekeeping system for Colorado Department of Human Services employees. The policy requires that: "Non-exempt employees are responsible for reporting hours worked and leave taken. Non-exempt employees are required to use automated time collection devices when available."

65. The Colorado Department of Humans Services Policy 1-2.7, "Fraud Policy," reads in relevant part:

> Occupational fraud, meaning fraud that occurs in the workplace, is defined as 'the use of one's occupation for personal enrichment through the deliberate misuse or misapplication of the employing organization's resources or assets.' Behavior and actions that may be considered fraudulent broadly include, but are not limited to, those that:
>
> - Commit for the purposes of direct or indirect financial or personal situational benefit to the perpetrator or an associate of the perpetrator.
> - Commit for the purposes of receiving kickbacks, secret commissions, or payment of any kind outside of the CDHS remunerative policies.
> - Violate the perpetrator's fiduciary duties to the CDHS.
> - Cost the CDHS assets, revenue, or reserves in any manner inconsistent with current fiscal policies and procedures.
>
> The difference between errors and fraud is that the fraud is intentional; meaning, the perpetrator knowingly committed a wrongful action or achieved a purpose inconsistent with law or public policy. Intent must be proven in fraud matters and is typically demonstrated through a pattern of activity, such as having no legitimate motive for the activities, repeatedly engaging in the same or similar activities of an apparent wrongful nature, making conflicting or clearly false statements, making admissions, and/or impending the investigation of the alleged offense. ...
>
> In the instance that potentially fraudulent actions have occurred, yet the perpetrator had no intent to cause financial harm to the CDHS or its employees, clients, or community partners, that action will be deemed a mistake and should be resolved by the CDHS management and/or Executive Management Team.

66. Ms. Speedie determined that, while Complainant's CMHIP KRONOS timekeeping entries were fraudulent, the activity did not directly impact the welfare and/or wellbeing of the residents served by PRC.

67. Ms. Speedie knew that the shopper position would always provide a significant amount of freedom to the employee insofar as the employee would be in control of the structure of their day and specific duties to be performed each day. She

concluded that Complainant's activities did not create the level of trust that she had to have with the employee who was serving as a grocery shopper.

68. Ms. Speedie decided that the appropriate sanction would be to reclassify Complainant back to a HCT I position, and to assess a 6% reduction in pay for six months. The pay reduction changed Complainant's base pay from $2,688 to $2,526.27 per month from June 1, 2013 through December 31, 2013. The decision to return Complainant to a HCT I classification resulted in the reversal of Complainant's prior voluntary demotion.

First Board Appeal:

69. On June 21, 2013, Complainant filed a timely appeal of the demotion with the Board. In her appeal, Complainant asserted a claim of Whistleblower Act violation based upon her argument that her attempts to have her position reallocated had resulted in discipline being administered in the form of the demotion and pay reduction, as well as a poor performance review in April of 2013.

Complainant's Inability To Return To Work And Administrative Leave Status:

70. On or about June 20, 2013, Complainant reported to Ms. Speedie that she could not report as an HCT I because she had developed a medical issue that prevented her from performing direct care for residents.

71. Ms. Speedie responded to Complainant's notification that she could not return to work as a Health Care Technician by sending Complainant the paperwork to request Family and Medical Leave Act leave, a fitness-to-return certification form, a medical certification form and the job duties description for an HCT I.

72. Complainant's statements in June of 2013 that she could no longer perform direct care for residents was the first time that Complainant had informed any of her managers that she had any limitation with regard to providing patient care.

The Search For Alternative Positions:

73. Lauren Moody was the ADA coordinator for Respondent at the time Complainant informed her supervisors that she could not return as a HCT I because of a medical condition. Ms. Moody sent a letter to Complainant dated July 10, 2013, informing her of the process to request an accommodation under the Americans with Disabilities Act (ADA). As part of the interactive process required under the ADA, Ms. Moody also spoke with Complainant about the restrictions for her work.

74. Complainant provided Respondent with a completed job application form, an ADA accommodation request form, and a statement from Complainant's nurse practitioner that stated that the stress of a full-time medical technician position would not be good for Complainant's current medical problems and that she should stay as an

Administrative Assistant II. Complainant also provided a note from her chiropractor that stated that she should perform no direct patient care.

75. In her ADA accommodation request form dated July 12, 2013, Complainant told Ms. Moody that she had "left direct care due to stress four years ago. I am unable to perform the physical aspects of holds, transfers, and passing meds due to the meds I would need for stress and permanent spinal injuries."

76. Complainant's job application was evaluated by human resources to determine the job classifications that Complainant was qualified to hold, or may be qualified to hold. That list of possible job classifications was sent to Ms. Mooney. Ms. Mooney evaluated that list of possible job classifications and eliminated the classifications related to health care trainee and health care technician positions because those positions would require Complainant to perform direct patient care.

77. Ms. Mooney then looked in Respondent's jobs database for vacant positions in Respondent's facilities that involved positions that Complainant could potentially fill.

78. Ms. Mooney's practice was to perform a total of four job searches for available vacant positions in a thirty-day period. Ms. Moody was out of the office for several weeks during August and September of 2013, so Ms. Moody extended the time period for the search beyond the normal thirty-day period. In August and September 2013, Ms. Moody ran four searches for vacant positions that Complainant could fill. She found no vacant positions that fit within Complainant's qualifications.

79. By letter dated September 24, 2013, Ms. Moody informed Complainant that Respondent had determined that she was a qualified individual with a disability, but that there was no reasonable accommodation that would assist Complainant in performing the essential functions of an HCT I. Additionally, Ms. Moody informed Complainant that the search for vacant positions that Complainant was qualified to fill had identified no available vacant position for Complainant.

80. Complainant had been on administrative leave while the ADA process was on going. Even after Ms. Moody issued her letter, Complainant remained on administrative leave.

81. Ms. Moody learned that Complainant was still an employee of Respondent in January 2014. She conducted one last vacant position search for Complainant.

82. The January 2014 vacant position search indicated that there were no vacant positions meeting Complainant's criteria in Pueblo, but that there were some possibilities in Denver, Monte Vista and Colorado Springs. Complainant declined these possibilities because they were too far from Pueblo.

Decision to Administratively Separate Complainant's Employment:

83. Ms. Speedie met with Complainant on October 1, 2013, to discuss Complainant's work status. Ms. Schmelzer also attended the meeting.

84. Ms. Speedie told Complainant that she would be taken off administrative leave as of October 2, 2013. She also discussed with Complainant that the result of the ADA accommodation search was that there was no reasonable accommodation that would assist her in performing the essential functions of the HCT I position.

85. Ms. Speedie told Complainant that they could talk about Complainant's dispute of her PMAP review. Complainant told Ms. Speedie that her attorney had advised her not to discuss the matter. The PMAP dispute was not addressed at the meeting.

86. Complainant was also told that, given that her administrative leave would be ending, that she would need to complete FMLA paperwork if she was not returning to work.

87. Ms. Speedie took Complainant off of administrative leave as of October 2, 2013.

88. Ms. Speedie completed a personnel action form on October 8, 2013, changing Complainant's position from AA II to HCT I.

89. Complainant applied for the short-term disability benefit by applying to The Standard for the benefit. Complainant provided documentation from her health care provider that she could not work in her job as a Health Care Technician because of anxiety.

90. By decision dated December 11, 2013, The Standard denied Complainant short-term disability benefits because it found that Complainant had not demonstrated that she met the definition of having a disability for purposes of the benefit.

91. On January 13, 2014, Complainant met with Ms. Speedie and Ms. Schmelzer for an employee status meeting. At this meeting, they discussed that Complainant's compensatory time had been exhausted as of October 25, 2013, that her sick leave had been exhausted as of November 1, 2013, that her annual leave was exhausted as of November 4, 2013, and that her holiday leave had been exhausted on November 28, 2013.

92. Respondent's leave calculations also showed that Complainant's FMLA leave had been exhausted on October 1, 2013. Respondent reached this conclusion

because it had counted the time Complainant spent on paid administrative leave as FMLA leave beginning in July 2013.

93. By letter dated January 22, 2014, Ms. Speedie terminated Complainant's employment for exhaustion of leave pursuant to Director's Procedure 5-6, effective January 24, 2014. The letter provided Complainant with a correct statement of her Board appeal rights and a contact phone number for her retirement plan.

Board Appeals and Process:

94. Complainant filed a timely appeal of her administrative separation with the Board on January 29, 2014. Complainant's appeal challenged the decision to administratively separate Complainant. This appeal was consolidated for trial with Complainant's June 21, 2013 appeal of the imposition of discipline.

DISCUSSION

I. BURDENS OF PROOF:

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

1. failure to perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
5. final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 704.

Complainant challenges more than just the discipline in this case, however. She raises a claim that the State Employee Protection Act (Whistleblower Act) has been violated in this case, and she challenges the decision to administratively separate her from employment for exhaustion of leave. Complainant bears the burden of proof on these non-disciplinary claims. See *Ward v. Industrial Commission*, 699 P.2d 960, 967 - 968 (Colo. 1985)(applying the initial burden of proof to the employee in a Whistleblower Act claim to establish that the employee's expression was protected by the

Whistleblower Act). *See also* Section 24-4-105(7), C.R.S. ("Except as otherwise provided by statute, the proponent of an order shall have the burden of proof...")

The Board may reverse or modify Respondent's decision if the discipline or the decision to administratively separate Complainant from employment is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES:

A. Complainant committed the acts for which she was disciplined:

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses and to determine whether Respondent has proven the historical facts which are the foundation of any disciplinary decision by a preponderance of the evidence. *See* Charnes v. Lobato, 743 P.2d 27, 32 (Colo. 1987)("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing"); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo.App. 2009)(holding that "[w]here conflicting testimony is presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer").

1. Timekeeping Violations –

The record at hearing demonstrated that Complainant had been routinely clocking out at CMHIP rather than PRC without permission or authorization. Moreover, at least 40 of the documented instances were inconsistent with the representations that Complainant provided as to her actual work.

It is not clear from the evidence what Complainant was doing at CMHIP at the times she had clocked in or out there. Complainant argued at hearing that she was always dropping off something that was needed by PRC staff, even if that meant she had to knock to gain entrance to a department that had closed for the day or had to slide a request under the door of the administrative office. This explanation was not supported by a preponderance of the evidence at hearing, and has not been adopted in the findings of fact. Respondent, on the other hand, did not demonstrate that there was no PRC work at all being performed, or that Complainant was simply leaving work early. While Respondent presented evidence that these trips to CMHIP that had not been disclosed in Complainant's calendars and were not authorized trips, Respondent did not present sufficient evidence to rule out that there was at least some PRC purpose behind the trips.

Even without a factual conclusion as to the purpose of Complainant's unauthorized trips to CMHIP, however, it is clear that Complainant was not following the standards of performance for her timekeeping, which required her to use the proper KRONOS timekeeping machinery to record both her start of the shift and end of the shift

within seconds of the appropriate time. Complainant's authorized assignments at the start and end of her workdays meant that the timekeeping standards required her to be at her authorized PRC location and using PRC KRONOS machine. Additionally, Complainant was submitting calendars to her direct supervisor to document her assignments, and her calendars were inaccurate at least on 40 occasions because she was failing to disclose that she was at CMHIP at the end of her shift (or, in the case of the two documented occasions when Complainant clocked in at CMHIP, that she had started her shift at CMHIP rather than the residence that was listed on her calendar.) These actions violate the applicable timekeeping and accountability performance standards in place for Complainant's work and warrant the imposition of corrective or disciplinary action by Respondent.

2. Fraud Allegations -

Respondent's appointing authority, however, concluded that Complainant's timekeeping at CMHIP was also evidence of fraudulent timekeeping, as opposed to timekeeping that was in violation of policy or otherwise infirm.

This type of allegation invokes the concepts of common law fraud, which requires that the actor have knowledge of the falsity of a statement and the intent to induce reliance on that false statement. *See Shaw v. 17 West Mill St., LLC*, 307 P.3d 1046, (Colo. 2013)(holding that "a person commits fraud when (1) the person makes a false representation of a past or present fact; (2) the fact was material; (3) at the time the representation was made, the person knew the representation was false; (4) the person made the representation with the intent that another person would rely on the representation; (5) the other person relied on the representation; (6) that other person's reliance was justified; and (7) the reliance caused damages"); *Colorado Motor Vehicle Dealer Board v. Butterfield*, 9 P.3d 1148 (Colo.App. 2000)(defining "fraudulent" in the applicable statute as to require proof of common law fraud, which means "the following elements had to be proven: (1) respondent made a false representation or failed to disclose a material fact; (2) respondent knew the representation was false or that a disclosure should be made; (3) the party to whom the representation was made did not know of its falsity or was unaware of the undisclosed fact; and (4) respondent's conduct was undertaken with intent that it be acted upon").

The question of whether Complainant's timekeeping was actually fraudulent was not persuasively answered at hearing. Proving that Complainant's timekeeping record reflected unauthorized and unsupervised activity is not sufficient to also prove fraud. Respondent needed to present additional, more specific evidence that Complainant made a false statement of fact concerning her timekeeping for PRC, that she knew at the time she made the statement that the statement was false, and that she intended Respondent to rely on that false statement. Ms. Speedie was able to check generally on whether Complainant was performing the work that she represented she had been doing, and she received reports that Complainant was not appearing at the residences regularly. These reports, however, were not sufficiently detailed to be persuasive evidence that Complainant was indeed falsely claiming to have been performing work for PRC when, in fact, she was not performing any work for PRC.

Notwithstanding that fraud has not been established in this matter, Respondent has successfully shown that Complainant's actions in repeatedly going to CMHIP without approval were violations of the standards of conduct for PRC employees. That finding justifies Respondent's conclusion that Complainant has failed to perform competently as a shopper, and warrants disciplinary intervention by Respondent.

B. Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law:

1. The decision to impose discipline was neither arbitrary nor capricious -

In determining whether an agency's decision is arbitrary or capricious, a reviewing tribunal must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

In this case, Ms. Speedie conducted a thorough investigation. She provided Complainant with multiple opportunities to present an explanation of her job duties and to describe the functions that would result in Complainant ending her shift at CMHIP. She asked Complainant for sources of corroboration and, to a significant extent, checked with the individuals named by Complainant. She made the effort to understand Complainant's specific job duties. At the end of her investigation, Ms. Speedie reached the reasonable interpretation that Complainant's repeated clocking out at CMHIP represented a violation of the timekeeping and accountability expectations for an employee holding the shopper position. As a result, Respondent in this case made reasonable efforts to gather the relevant evidence that it required in order to decide the issue, gave honest and candid consideration to that gathered evidence, and reached the type of reasonable conclusion that a fair and honest review of that evidence would reach.

Accordingly, Respondent's decision to discipline Complainant was neither arbitrary nor capricious.

2. Respondent's disciplinary action was not contrary to rule or law -

a. Progressive Discipline -

Board Rule 6-2, 4 CCR 801, provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." The purpose of this rule is to require that an employee be warned and corrected on an improper activity before any formal discipline is

implemented, unless the activity is sufficiently troubling to warrant an immediate disciplinary reaction.

In this case, there was no prior corrective action issued for Complainant's violation of timekeeping and accountability standards. In order for the imposition of immediate discipline to be proper under Board Rule 6-2, therefore, the actions warranting discipline must meet the "flagrant or serious" standard.

This case does not present that there were a few lapses in judgment by Complainant. Respondent documented that Complainant had travelled to CMHIP 102 times in a 16-month period without obtaining authorization for such activity or telling her supervisor what she was doing. Even in the absence of a supported fraud finding, Complainant's extensive pattern of leaving PRC early and without an authorized reason to go to CMHIP is sufficiently serious to warrant the imposition of immediate discipline.

b. State Employee Protection Act Claim -

Complainant has alleged that the imposition of discipline and the 2012 – 2013 performance review were issued in violation of the State Employee Protection Act (Whistleblower Act).

The purpose of the Whistleblower Act, C.R.S. § 24-50.5-101 *et seq.,* set forth in the legislative declaration, is to encourage "state employees . . . to disclose information on actions of state agencies that are not in the public interest." Section 24-50.5-101, C.R.S.; *Lanes v. O'Brien*, 746 P.2d 1366, 1371 (Colo.App. 1987). The Whistleblower Act "protects state employees from retaliation by their appointing authorities or supervisors because of disclosures of information about state agencies' actions which are not in the public interest." *Ward*, 699 P.2d at 966.

In determining whether there has been a violation of the Whistleblower Act, "[i]t must be initially determined whether the claimant's disclosures fell within the protection of the 'whistle-blower' statute and that they were a substantial or motivating factor in the [action taken by the agency]. If the claimant's evidence establishes that his expression was protected by the 'whistle-blower' statute, then the [reviewing adjudicator] must determine whether [the agency's] evidence established, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968 (adopting the procedure in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)).

The initial issues, therefore, are whether Complainant has proven by a preponderance of the evidence that her disclosures "fell within the protection of the whistle-blower statute" and that her disclosures "were a substantial or motivating factor" in the decision to terminate her employment. *Ward*, 699 P.2d at 968.

(1) Protected Disclosure of Information -

In order to show that her disclosures fall within the protection of the Whistleblower Act, Complainant must be able to prove that: 1) she made a disclosure of information, as that term is defined in section 24-50-102(2), C.R.S., and applicable case law; and 2) that Complainant has made a "good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." Section 24-50.5-103(2), C.R.S.

The record is undisputed that Complainant voiced her concerns over the re-allocation issue to both her direct supervisor, Ms. Tafoya, and her appointing authority, Ms. Speedie. Therefore, if Complainant's concerns met the test to be disclosures of information under the Whistleblower Act, then Complainant will have met these two criteria as a disclosure of information. We turn, therefore, to the definition of the necessary content for the "disclosure of information."

The Whistleblower Act defines "disclosure of information" as the provision of evidence "regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." Section 24-50.5-102(2), C.R.S. "[D]isclosures that do not concern matters in the public interest, or are not of 'public concern', do not invoke this statute." *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo.App. 2007).

(a) Public concern -

First Amendment protections also depend, in part, upon the analysis as to whether statements were of "public concern." First Amendment precedent, therefore, is helpful in understanding the contours of the similar requirement in the Whistleblower Act that the disclosure address a matter of public concern. *See Ward*, 699 P.2d at 968 (adopting the First Amendment allocations of burden of proof in *Mt. Healthy* as the template for a whistleblower analysis).

The Supreme Court has characterized a matter of "public concern" as one "fairly considered as relating to any matter of political, social, or other concern of the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690, quoted in *Rankin v. McPherson*, 483 U.S. 378, 385, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987).

The statements also do not need to be made in public in order to warrant a finding that the statements were of public concern. *See Handy-Clay v. City of Memphis, TN*, 695 F.3d 531, 544 (6th Cir. 2012).

On the other hand, statements which have "the ring of internal office politics" do not present matters of public concern. *Handy-Clay*, 695 F.3d at 543. "While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, speech that seeks to expose improper operations of the

government or questions the integrity of governmental officials clearly concerns vital public interests." *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996)(internal citations and quotation omitted).

(b) Complainant's contentions -

At hearing, Complainant testified that she had told her supervisors that Ms. Casso's position description included false information about his work and was not correct. That version of events was not adopted in the findings of fact; instead, the preponderance of the evidence supported that Complainant had objected to the fact that she had not been part of a reallocation process while Mr. Casso, a more junior employee, had received an upward re-allocation. The record also supported that Complainant had used Mr. Casso's revised position description as a base or template for the draft of her proposed revisions.

Complainant's interest in this matter was one concerning the internal management of her position, and the fairness to her with relation to how the second shopper had been treated. This is an internal management dispute that does not touch upon any interest beyond Complainant's personnel interests. Complainant has, therefore, failed to prove that she had disclosed to her supervisors any information regarding a matter of public concern or public interest.

(2) Substantial or Motivating Factor in the Imposition of Discipline -

(a) Discipline -

The Whistleblower Act prohibits the imposition of "any disciplinary action against any employee on account of the employee's disclosure of information." Section 24-50.5-103(1), C.R.S. "Disciplinary action" is construed broadly in the Act, and includes "any direct or indirect form of discipline or penalty" including termination of employment, withholding of work, unsatisfactory or below standard performance evaluations or the "threat of any such discipline or penalty." Section 24-50.5-102(1), C.R.S.

While there is some question whether removing the prior voluntary demotion by reinstating Complainant as a HCT I would qualify as a form of penalty, Complainant also received a temporary 6% salary reduction in this case which would clearly qualify as a form of "discipline" under the Whistleblower Act. A poor annual review may also qualify as a penalty under the Whistleblower Act.

(b) Substantial or motivating factor -

The Whistleblower Act also requires that the employee demonstrate that there is a causal connection between a disclosure and the imposition of discipline. The Act would not be violated unless there is proof that the person imposing disciplinary action knew of the employee's disclosure of information. See *Maestas v. Segura*, 416 F.3d

1182, 1189 (10th Cir. 2005).

Beyond that threshold factual issue of knowledge, the question of causation may also be established through temporal proximity, or temporal proximity combined with other evidence such as opposition to the disclosure of information:

> Adverse action in close proximity to protected speech may warrant an inference of retaliatory motive. But temporal proximity is insufficient, without more, to establish such speech as a substantial motivating factor in an adverse employment decision. ... Other evidence of causation may include evidence that the employer expressed opposition to the employee's speech, or evidence that the speech implicated the employer in serious misconduct or wrongdoing. On the other hand, evidence such as a long delay between the employee's speech and challenged conduct, or evidence of intervening events, tend to undermine any inference of retaliatory motive and weaken the causal link.

Maestas, 416 F.3d at 1189.

In this case, Complainant objected on or about February 13, 2013, to Mr. Casso's reallocation to the position of AA III. She also asked to have her own position reviewed for possible reallocation at the same time as she complained about Mr. Casso's reallocation.

Such a request does not implicate any of her supervisors in wrongdoing or other matter that would potentially embarrass her supervisors or constitute evidence of wrongdoing by the administration. Reallocation decisions are also decisions ultimately made by human resources, rather than directly by Complainant's supervisors. Complainant did not show that her request for reallocation would be the type of request that would be likely to prompt any negative repercussions from a supervisor. Moreover, the delay of almost two months between Complainant's objection and the start of the investigation into Complainant's conduct and the issuance of her annual review does not support Complainant's contention that these events are causally linked.

Additionally, there is an intervening event on or about April 23, 2013, when Complainant is reported for being near CMHIP at a time when she should have been at PRC. Ms. Speedie's subsequent investigation into Complainant's whereabouts then revealed that Complainant had routinely been at CMHIP at times when she should have been at PRC. This type of intervening event undercuts the argument that the discipline imposed in this case was motivated in whole or part by an reallocation request made a couple of months earlier.

Complainant also did not demonstrate at hearing that the discipline or the comments in her 2012 – 2013 performance review were based upon incorrect or inflated facts. The information presented by Respondent was, in large part, proven at hearing by a preponderance of the evidence. Such a circumstance does not suggest

that there was a hidden retaliatory motive in this case.

In short, there is little in this case that suggests a connection between Complainant's objection to the reallocation process and Complainant's performance review or discipline. Complainant has, therefore, not demonstrated that her objection to the reallocation process was a substantial or motivating factor in the decision to discipline her.

As a result, Complainant has failed to meet her burden to demonstrate that there was a violation of the Whistleblower Act in this matter.

No other rule or law appeared to be violated in the process chosen by Respondent in this case. Respondent's imposition of discipline in this matter was, therefore, neither arbitrary nor capricious, and was not contrary to rule or law.

C. The discipline imposed was within the range of reasonable alternatives:

The third issue to be determined is whether a demotion and a 6% pay sanction for six months was within the range of reasonable alternatives available to Respondent. Complainant's pay reduction amounted to $161.73 per month for six months, for a total reduction of $970.38.

A change of job duties is a reasonable action to take in this case. The employee who filled the shopper position had to be someone who would remain accountable for his or her time even in the absence of a set schedule or set work location. This is a position which places a premium on a supervisor's trust that the employee is fulfilling the expected function. If the employee filling a shopper position is routinely not where he or she is expected to be, then moving that employee out of the shopper position is well within the range of reasonable disciplinary alternatives available to Respondent.

In this case, the decision to return Complainant to full-time duties as a Health Care Technician I was also a reasonable decision given that the appointing authority had determined that Complainant was not using the freedom created by the shopper position in a way that met accountability and timekeeping performance standards. In the shopper position, Complainant was already to be acting as an HCT I for roughly half of her daily shift. Complainant also had a very good reputation for her prior full-time HCT I work. The fact that Complainant had developed anxiety about performing direct care of PRC residents was not something that was known by management at the time of the decision. Under such circumstances, the decision to return Complainant to her old HCT I classification on a full-time status is a logical use of the demonstrated skills of an employee.

In returning Complainant to the HCT I classification, however, the change reversed a voluntary demotion. The assessment of a pay sanction in addition to a position change, under such circumstances, is within the range of reasonable disciplinary alternatives. In this case, a salary sanction of approximately $161 a month

for six months is not an excessive amount, and is within the range of reasonable disciplinary alternatives in this case.

D. Complainant's Administrative Discharge was not Arbitrary, Capricious, or Contrary To Rule Or Law:

1. Rules Concerning Administrative Discharge –

The rules governing when an employee can be discharged form employment for exhaustion of leave is controlled by Director's Procedure 5 -6, which reads, in relevant part:

> If an employee has exhausted all credited paid leave and in unable to return to work, unpaid leave may be granted or the employee may be administratively discharged by written notice following a good faith effort to communicate with the employee. Administrative discharge applies only to exhaustion of leave.
>
> A. The notice of administrative discharge must inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.
>
> B. An employee cannot be administratively discharged if FML or short-term disability leave (includes the 30-day waiting period) apply, or if the employee is a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship.

The rule, therefore, imposes a series of requirements before an employee can be discharged for exhaustion of leave: 1) the employee must have exhausted all paid leave; 2) the employee must be unable to return to work; 3) the employee cannot have the protection of the Family Medical Leave Act or short-term disability leave; 4) the employee cannot be a qualified individual with a disability under the ADA who can be reasonably accommodated; 5) there must be a good faith effort to communicate with the employee concerning their work status and plans; and 6) there must a written notice of the discharge issued after the communication or good faith communication effort, and this notice must have appeal rights and retirement plan information.

In this case, Respondent provided evidence that it had calculated that Complainant's paid leave had been exhausted as of November 28, 2013, and that Complainant had not been eligible for a short-term disability benefit. Respondent's evidence also demonstrated that Respondent had found Complainant to be a qualified individual with a disability under the ADA, but that her restriction on performing direct patient care meant that she could not be reasonably accommodated in her position of HCT I, and that no other vacant position for which Complainant was qualified was available.

Respondent's evidence also further demonstrated that Ms. Speedie and Complainant held a meeting on January 13, 2014, to discuss her work status. Additionally, the evidence at hearing demonstrated that there was a written notice of administrative discharge issued that included all of the necessary information for Complainant.

Complainant did not persuasively dispute any of these points at hearing. The only remaining issue, therefore, is whether the Family Medical Leave Act requirement of the rule has been met in this case.

2. Calculation of FMLA Protection –

Respondent calculated Complainant's coverage under the Family Medical Leave (FML) Act as expiring in October of 2013 because the agency considered Complainant's time on paid administrative leave beginning July 1, 2013, as concurrent administrative leave and FMLA leave.

Complainant was placed on administrative leave on June 6, 2013, as part of the investigation into her timekeeping records and disciplinary process. That administrative leave status was not ended until October 2, 2013. The issue raised by such facts is whether it was proper to count Complainant's administrative leave time concurrently as FMLA protected-leave, thereby ending Complainant's FMLA protection earlier than if the administrative leave was not run concurrently with FMLA leave.

Federal regulations interpreting FMLA leave provide that:

> If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

29 CFR § 825.207(c).

The regulation requires that the paid leave be evaluated as to whether it would meet the requirements for FMLA coverage before allowing such leave to be concurrently designated as FMLA leave. Administrative leave as part of an investigation and disciplinary process would not appear to meet the requirement that the leave be taken for an FML-qualifying event. *See* Director's Procedure 5-20 (listing six types of qualifying events for FML protection, such as the birth of a child or the serious health condition of an employee).

In the end, however, it does not matter to the outcome here whether FMLA leave can lawfully be counted concurrently with paid administrative leave because Respondent administratively separated Complainant beyond the date when any FMLA-protected leave would have expired. Director's Procedure 5-21(A) provides that full-

time employees may be granted up to 520 hours of FML per rolling 12-month period. Assuming that the 520 hours of coverage began when Complainant was taken off administrative leave on October 2, 2013, a full 13 weeks of FML protected leave would have ended about January 1, 2014.

Respondent's decision to administratively discharge Complainant for exhaustion of leave complied with Director's Procedure 5-6, and has not been shown to be arbitrary, capricious, or contrary to rule or law.

E. Complainant's Performance Management Dispute Claim is Moot:

Complainant included a request in her first appeal to the Board for a performance management dispute review by the State Personnel Director (hereinafter Director) concerning her 2012 – 2013 performance review.

When the Board receives an appeal or petition for hearing that includes both Board issues and an issue for the Director, the usual procedure is for the Board to resolve its issues first. Once those issues are resolved, the matter is then referred to the Director to address the remaining issue. For example, when a petition for hearing contains both a claim of unlawful discrimination and a request for a performance management appeal, the Board would address the discrimination claim first. Once that claim was resolved either through a decision on the merits or by dismissal, the matter would then be sent to the Director to address the performance management dispute.

In this case, a referral to the Director for a performance management dispute would appear to be a moot issue. Complainant has been administratively separated from employment by Respondent and has not been successful in her appeal to be returned to the agency. Under Director's Procedure 8-87(C), "[i]n the event that an employee with a pending dispute separates from the state personnel system, the dispute is dismissed."

Complainant's performance management appeal claim, therefore, will not be referred and is, instead, dismissed pursuant to Director's Procedure 8-87(C).

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined;

2. Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law;

3. The discipline imposed was within the range of reasonable alternatives; and

4. The decision to administratively separate Complainant from employment was not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's decision to discipline and to administratively separate Complainant's employment is **affirmed.** Complainant's appeal is dismissed with prejudice.

Dated this 28th day of August, 2014 at Denver, Colorado.

Denise DeForest
Senior Administrative Law Judge
State Personnel Board
1525 Sherman St., 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 29th day of August, 2014, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Stephen Johnston, Esq.

[redacted]

Bradford C. Jones

[redacted]

[redacted]

Andrea Woods

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65,4 CCR 801.