STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2016B021**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAMIAN MACIAS,
Complainant,

v.

UNIVERSITY OF NORTHERN COLORADO,
Respondent.

Administrative Law Judge (ALJ) F. J. "Rick" Dindinger II held the commencement hearing on May 1, 2017, and ALJ Susan J. Tyburski held the evidentiary hearing on September 18, 19, 20, and 21, 2017, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on September 27, 2017, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared *pro se.* Respondent appeared through its attorneys, Lucia Padilla, Esq., and Jack Patten, Esq., Assistant Attorneys General. Respondent's advisory witness was Marshall Parks, Director of Human Resources.

MATTER APPEALED

Complainant, a former certified employee, seeks review of Respondent's termination of his employment on September 30, 2015. Complainant alleges that this termination was arbitrary, capricious and contrary to rule or law, and was motivated by discrimination on the basis of race/ancestry, age, disability and organizational membership, as well as retaliation directed against him as a whistleblower in violation of the State Employee Protection Act, § 24-50.5-101, *et seq.*, C.R.S. (Whistleblower Act). Complainant seeks reinstatement with full back pay and benefits.

Respondent seeks affirmance of its termination of Complainant's employment, and denial of Complainant's discrimination claims and whistleblower complaint. Respondent also seeks an award of attorney fees and costs due to Complainant's pursuit of a frivolous and groundless appeal.

The following exhibits were admitted into evidence: Respondent's Exhibits 2, 9-12, 15, 16, 18-29, 31, 35, 37-44, 47-49, 51, 56, 62-66, and Complainant's Exhibit A.

For the reasons discussed below, Respondent's September 30, 2015 decision to terminate Complainant's employment is **affirmed.**

ISSUES

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

2. Whether Respondent's September 30, 2015 termination of Complainant's employment was arbitrary, capricious or contrary to rule or law;

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

4. Whether Respondent discriminated against Complainant on the basis of disability, race, age or organizational membership;

5. Whether Respondent retaliated against Complainant in violation of the Whistleblower Act, and

6. Whether Respondent is entitled to an award of attorney fees.

FINDINGS OF FACT

Background

1. Complainant began his employment with the University of Northern Colorado (UNC) on August 24, 2009. (Stipulated Fact[1])

2. Complainant was an Information Technology (IT) Professional I within UNC's Information Management and Technology Department. (Stipulated Fact) He was part of the IT Audio-Visual (AV) team. Complainant's duties primarily involved remotely programming classroom AV systems and troubleshooting AV system problems that other IT technicians could not resolve.

3. At all times relevant to this appeal, Complainant was an active union steward for the employees' labor organization, Colorado WINS.

4. Prior to May 5, 2015, Marshall Parks, Respondent's Human Resources Director, had been delegated as the Appointing Authority for all of Respondent's classified positions pursuant to his Human Resources position description.

5. Effective May 5, 2015, UNC President Kay Norton reconfirmed her delegation of Michelle Quinn, Senior Vice President for Finance and Chief Financial Officer, as the Appointing Authority for all of Respondent's classified positions, and directed Ms. Quinn to sub-delegate this authority to Mr. Parks "to reconfirm the sub-delegation that has been in place as part of the Human Resources Director position description."

6. Effective May 5, 2015, Ms. Quinn reconfirmed her "prior sub-delegation" of Mr. Parks as Complainant's Appointing Authority, for all of Respondent's state classified positions and encompassing "all personnel matters at UNC consistent with the job duties of your position description."

The AV Team's History of Drinking Alcohol During Extended Lunches

7. From approximately November 2009 through December 2010, the AV team consisted of Complainant, Heath Moore and Nick Stratton. Mr. Stratton served as the team's work lead. Their manager was Jeff Michie, who reported to IT Director Paul Sharp.

8. The AV team regularly went to extended lunches together, drank alcohol, and returned to

[1] The parties stipulated to a number of facts, as identified with parenthetical notes.

work. Both Mr. Stratton and Mr. Michie invited their employees to these lunches and encouraged everyone to drink.

9. After Mr. Moore joined the AV team in November 2009, he was invited to join his co-workers in their extended lunches. He did not always drink alcohol. When Mr. Moore did not join his co-workers in drinking alcohol during lunch, Mr. Stratton and Mr. Michie mocked him. For example, Mr. Michie would ask, "How can we trust you if you don't have a drink with us?"

10. Complainant's first extended lunch outing with Mr. Michie occurred in December 2009; Mr. Stratton, Mr. Moore and Mr. Sharp also participated. During this 3 ½- to 4-hour lunch, Mr. Michie bought everyone two rounds of "Bazookas," which were alcoholic drinks in 34-ounce glasses. Mr. Michie informed Complainant that he and Mr. Sharp had been "doing this for twenty years," and said he should have asked Complainant if he drank beer before offering him the job.

11. In approximately February 2011, Mr. Michie retired. At some point afterwards, Phil Wyperd became the AV team's manager.

12. In January 2012, Bill Nauroth joined the AV team as a student technician. He was hired full time in October 2013. Mr. Nauroth has known Complainant since 2002, and they are very close friends.

13. In September 2013, Bobby Resch joined the AV team as a part-time student worker, assisting Mr. Nauroth with setting up "smart" classrooms. Mr. Resch knew Mr. Nauroth from their work together for a former employer.

14. The AV team continued to have regular extended lunches at a number of local restaurants, including the Roma restaurant and the Road Kill Sports Grill, which became the Double Play Sports Grill (Double Play). The AV team was well known to, and developed friendships with, the waitresses and bartenders at these restaurants.

15. Mr. Stratton had a special alcoholic drink created for him at the Roma restaurant called the "Wet Nick." At some restaurants, the AV team would not even have to order drinks; the waitresses would know their preferred alcoholic beverages and would have them ready shortly after the AV team walked in the door. UNC vendor representatives would regularly join the AV team at these extended lunches, and would pay for the AV team's drinks.

16. In April 2014, Brad Sharp became UNC's Director of Infrastructure and Support Services. At some point, Mr. Sharp instructed Mr. Wyperd to instruct Mr. Stratton to inform his AV team that they could no longer drink alcohol during lunch and return to work.

17. In July 2014, Mr. Stratton told the AV team that they could no longer drink alcohol during lunch and return to work. As a result, the dynamic in the AV office changed. Mr. Moore and Mr. Stratton no longer went to lunch with Complainant and Mr. Nauroth.

18. Complainant believed that it was his "right as an American" to drink alcohol during his lunch breaks and return to work.

<u>August 26, 2014 Corrective Action</u>

19. Complainant received a written Corrective Action (CA) on August 26, 2014. (Stipulated Fact)

20. The August 26, 2014 CA was issued by Phil Wyperd. Mr. Wyperd identified the following "Area(s) Needing Improvement":

> In July, Nick Stratton (your work leader) met with you to clarify the expectation that leaving work early and consuming alcohol during the workday would no longer be tolerated.
>
> On Friday, August 16[2], 2014, I approached you at Roma restaurant where you acknowledged that you had been drinking since 2:00 PM.[3] Upon consultation with Nick Stratton you were scheduled to work until 7:00 PM and had not requested nor been granted personal time off.

21. In the CA, Mr. Wyperd explained "Why Performance/Behavior is a Problem":

> Working while under the influence of alcohol provides safety and liability concerns and is not tolerated at UNC.
>
> In order to provide a high level of support to campus and to ensure adequate coverage of technology resources, you are required to work a predefined schedule totaling 40 hours per week. Leaving work unauthorized prior to the completion of your shift provides a gap in coverage. Additionally, by leaving work prior to the completion of your shift you are not fulfilling the time you are required to work per week.

22. In the CA, Mr. Wyperd informed Complainant: "Effective immediately, you will no longer consume alcohol during working hours." Mr. Wyperd warned Complainant: "Failure to comply with this Corrective Action may result in further corrective, possibly disciplinary action up to and including termination."

23. Complainant grieved and filed a State Personnel Board Appeal of his August 26, 2014 CA. (Stipulated Fact)

24. On January 22, 2015, ALJ Susan Tyburski issued a Preliminary Recommendation denying Complainant a hearing on his appeal of the August 26, 2014 CA. (Stipulated Fact)

25. On February 18, 2015, the State Personnel Board upheld and adopted Judge Tyburski's Preliminary Recommendation and denied Complainant's petition for hearing with respect to his August 26, 2014 CA. (Stipulated Fact)

Complainant's Requests for Accommodations and Complaints

26. On November 7, 2014, Complainant provided Mr. Parks documentation regarding surgery scheduled for November 21, 2014. (Stipulated Fact)

27. Complainant's last day of work prior to his surgery was November 14, 2014. (Stipulated Fact)

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[2] During review of this CA in the subsequent grievance process, this date was corrected to Friday, August 15, 2014.

[3] During review of this CA in the subsequent grievance process, the CA was amended to reflect that Complainant arrived at Roma restaurant at 2:30, rather than 2:00, p.m.

28. On November 12, 2014, Complainant submitted a request for accommodation to work a flexible schedule and to work from home for sleep apnea. (Stipulated Fact)

29. On November 14, 2014, Mr. Parks emailed Complainant stating when Complainant returned from his medical leave they would meet to discuss his accommodation request. (Stipulated Fact)

30. In November 2014, Complainant had surgery, which limited his ability to eat and drink.

31. Sometime in November 2014, Complainant emailed Brad Sharp about using Family Medical Leave (FML) while he was recovering from his surgery.

32. On or about December 12, 2014, Complainant emailed a complaint to Mr. Sharp about Complainant's medical information being shared by Mr. Sharp with Mr. Stratton. Mr. Parks reviewed this complaint and determined that no personal medical information was shared with Mr. Stratton.

33. On December 16, 2014, Complainant's surgeon submitted documentation to UNC stating that Complainant could return to work with no restrictions on January 5, 2015. (Stipulated Fact)

34. On January 12, 2015, Mr. Parks and Complainant met to discuss Complainant's reasonable accommodation request. (Stipulated Fact)

35. On January 12, 2015, Mr. Parks sent Complainant a memo approving Complainant's request for accommodation for a flexible shift start time of up to 2 hours and flexible break times. (Stipulated Fact)

36. On January 22, 2015, Complainant's physician sent UNC a letter about Complainant working 12-hour shifts and less frequent days and occasionally working from home. (Stipulated Fact)

37. On February 17, 2015, Complainant's physician sent UNC a Fitness to Return Certification indicating Complainant could work 12-hour shifts. (Stipulated Fact)

38. In March 2015, Complainant received, for the first time, an unsatisfactory performance evaluation from his new manager, Andrew Wood. Because of this unsatisfactory performance evaluation, Mr. Wood denied Complainant's request to serve on a classified staff council. Mr. Wood approved Mr. Narouth's request to serve on this council.

39. After Complainant filed a grievance, his performance evaluation was changed to satisfactory in April 2015.

40. On April 6, 2015, Complainant and Mr. Parks met a second time to discuss Complainant's accommodation requests. (Stipulated Fact)

41. On April 6, 2015, Mr. Parks issued Complainant a memo approving Complainant's request to work a flexible three-day work schedule of 13.5 hours per day, Tuesday, Wednesday and Thursday each week. (Stipulated Fact)

42. In April 2015, the AV team learned that its offices in McKee Hall were moving to an open office area in the Michener Library, surrounded by windows and surveillance cameras, and that the

team would no longer have private offices. Complainant and Mr. Nauroth protested this move to Mr. Parks, stating that it would exacerbate a post-traumatic stress disorder (PTSD) from which they both suffered, and requested accommodation of this condition with private work spaces.

43. Mr. Parks conferred with Mr. Wood about the new work space, which had a mixture of active and inactive surveillance cameras. Mr. Parks informally resolved the request by Complainant and Mr. Nauroth by asking Mr. Wood to remove all cameras in the new office, with the exception of surveillance cameras aimed at the entrance, and creating work spaces without windows.

The Events of May 22, 2015

44. On May 18, 2015, Complainant sent Mr. Wood an email stating that Complainant's work schedule for the coming week would be Monday May 18, Thursday May 21, and Friday May 22.

45. On May 22, 2015, Complainant, Mr. Nauroth and Mr. Resche were the only AV team members working.

46. Complainant is Hispanic; Mr. Nauroth and Mr. Resche are Caucasian. In May 2015, Complainant was 40 years old; Mr. Nauroth was 30 years old and Mr. Resche was 28 years old.

47. On May 22, 2015, Complainant began work at 7:00 a.m. Mr. Nauroth and Mr. Resche worked together installing AV equipment in classrooms for the upcoming semester.

48. The IT department has access to three golf carts used by its employees to drive to locations around campus where they perform work. When a cart is in use by IT employees, it is left outside of Michener Library. When IT employees are done with the cart, they lock it up in a garage.

49. On the morning of May 22, 2015, Mr. Nauroth was using the golf cart designated for the AV team. At approximately 1:00 p.m., he returned to Michener Library in the golf cart and left it outside, on the east side of the Library.

50. On May 22, 2015, Complainant took a lunch break with Mr. Resch and Mr. Nauroth from approximately 12:45 p.m. to 5:00 p.m. at the Double Play. (Stipulated Fact) Mr. Resch drove them to the Double Play.

51. At the time Complainant left for lunch on May 22, 2015, he had worked almost 36 hours that week.

52. At the Double Play, Complainant ordered "cranberry juice" and tacos. The bartender recognized Complainant. At some point, a bar regular offered everyone in the bar area a shot. Complainant stood up and was talking with people at the bar; he then accepted, and drank, something out of a styrofoam cup.

53. During the course of a 4 ½ hour lunch break at the Double Play, Complainant drank 3-4 glasses of "cranberry juice," and became increasingly unwilling to leave. Mr. Resch observed that Complainant displayed slurred speech and overly friendly behavior, and smelled of

alcohol.

54. After lunch on May 22, 2016, at or around 5:00 p.m., Complainant returned to the UNC campus to complete his work duties. (Stipulated Fact)

55. Mr. Resch drove Mr. Nauroth and Complainant back to the UNC campus. Mr. Nauroth and Mr. Resch left campus and did not return to work that day.

56. After being dropped off by Mr. Resch, Complainant entered Michener Library. Complainant, like other UNC employees, had a badge that was used to enter locked rooms and buildings to which he was granted access. Electronic badge records, as well as video footage recorded from the Library, show Complainant in Michener Library between 5:10 and 5:17 p.m.

57. Complainant left Michener Library to go to Carter Hall to meet with two employees, Lucinda Sanchez and Carlos Zamarron, to discuss a petition regarding their supervisor, Karl Zimmerman.

58. The McKee building is located just east of the Michener Library. Around approximately the same time that Complainant left Michener Library to go to Carter Hall, a custodial employee, Joseph Alirez, was outside the McKee building near an outdoor breezeway, known as the "McKee breezeway," waiting for his supervisor, Mr. Holder, to arrive for the evening shift. The McKee building is located just east of the Michener Library. Mr. Holder usually arrived between 4:45 and 5:00 p.m., but sometimes arrived as late as 5:15 p.m. Mr. Alirez could not remember exactly when Mr. Holder arrived that evening.

59. Mr. Alirez saw Mr. Holder drive up to the McKee building and began walking out to meet him. As he walked towards Mr. Holder's car, the IT golf cart went past Mr. Alirez. He did not see the driver, and only saw the back of the driver's head, which appeared to be bald.

60. In May 2015, Complainant had a bald or closely shaved head.

61. Shortly afterwards, Mr. Alirez heard a "big bang" and turned around. He saw the golf cart heading east out of the McKee breezeway. Carter Hall is located northeast of the McKee breezeway, approximately 7-10 minutes away by golf cart.

62. Mr. Alirez and Mr. Holder walked over to a pillar that appeared to have been hit by the golf cart. The pillar had scrapes or gouge marks on it, and some debris was scattered nearby.

63. Complainant attempted to enter Carter Hall with his badge at 5:27 p.m. He subsequently gained access to Carter Hall, and met with two custodial employees: Lucinda Sanchez and Carlos Zamarron.

64. Ms. Sanchez and Mr. Zamarron met with Complainant in Mr. Parks' office in Carter Hall. They did not have permission to use this office.

65. Complainant met with Ms. Sanchez and Mr. Zamarron for an hour and a half. Neither Ms. Sanchez nor Mr. Zamarron observed anything about Complainant that indicated he was intoxicated.

66. Around 7:00 p.m., as Complainant was leaving Carter Hall, he encountered Mr. Zimmerman. Mr. Zimmerman noticed that Complainant, who he initially believed was an IT employee

named "Bill," appeared intoxicated, with red eyes and slurred speech, and smelled of alcohol. He did not think Complainant was working, so he did not report this encounter.

67. Complainant returned to Michener Library. Badge records and video recordings show Complainant in the Library between 7:26 p.m. and 10:09 p.m.

68. After encountering Complainant in Carter Hall, Mr. Zimmerman joined Mr. Holder at a campus event they were working. Mr. Holder told Mr. Zimmerman about an IT employee who ran into a pillar in the McKee breezeway while driving a golf cart. As Mr. Zimmerman and Mr. Holder walked across campus after the event, they noticed an IT golf cart sitting outside of Michener Library. Mr. Zimmerman became concerned that an IT employee was driving the IT golf cart while intoxicated, and contacted the UNC police.

69. Officer Stephanie Baker, a UNC police officer, met Mr. Zimmerman and Mr. Holder in the McKee breezeway at approximately 10:04 p.m. They showed her the pillar that had been hit by the golf cart. The pillar had two fresh gouges on it and clumps of grass around it. None of the other pillars had clumps of grass near them.

70. Officer Sean Menard arrived at the McKee breezeway shortly after Officer Baker. Mr. Zimmerman informed Officers Baker and Menard that a golf cart was parked outside the lower entrance to Michener Library, and that the driver might be inside the Library.

71. Officers Baker and Menard went to Michener Library. As they approached, they saw a male come out of the Library and sit in the driver's seat of a golf cart parked on the sidewalk.

72. The male identified himself as the Complainant. He had red, watery eyes and slurred speech, and smelled of alcohol. Officer Baker asked Complainant how much he had to drink, and Complainant replied "a beer." Complainant refused to take a portable breath test or perform roadside maneuvers.

73. At the request of and termination of contact with the UNC police officers, Complainant gave the officers a key to the golf cart on the night of May 22, 2015. (Stipulated Fact)

74. The officers instructed Complainant to call someone to pick him up, as he could not drive home. Complainant contacted his wife, who had a friend drive her to campus. Complainant's wife then drove Complainant home in his car.

75. The officers took the golf cart to the McKee breezeway and compared it with the damaged pillar. The fresh gouges on the pillar were the same height as a damaged metal bar on the golf cart, and the golf cart's tire wells had grass clumps similar to the ones found around the pillar.

76. Officer Menard subsequently informed Brad Sharp about these events.

77. On May 27, 2015, Complainant was placed on administrative leave with pay.

<u>Mr. Parks' Decision to Terminate Complainant's Employment</u>

78. Complainant attended two Rule 6-10 meetings with Mr. Parks on June 22, 2015 and August 18, 2015. (Stipulated Fact)

79. Mr. Parks sent Complainant written notice of the June 22, 2015 Rule 6-10 meeting via certified mail on June 16, 2015, and sent written notice of the August 18, 2015 Rule 6-10 meeting via certified mail on August 5, 2015.

80. At both Rule 6-10 meetings, Bret Naber served as Mr. Parks' representative and Pam Cress from Colorado WINS served as Complainant's representative. (Stipulated Fact) No issues were raised about insufficient notice of either of these meetings prior to or at the meetings.

81. Both Rule 6-10 meetings were audio recorded. (Stipulated Fact)

82. After the initial 6-10 meeting on June 22, 2015, Mr. Parks received information from Complainant on June 29, 2015. Mr. Parks then interviewed Mr. Nauroth, Mr. Resch, Mr. Zimmerman, Officer Baker, Officer Menard, Mr. Alirez, Mr. Holder, Ms. Sanchez and Mr. Zamarron. Mr. Parks shared what he learned from these individuals, as well as available video footage, with Complainant, and gave Complainant an opportunity to respond at the second Rule 6-10 meeting.

83. On September 28, 2015, Mr. Parks issued a Notice of Disciplinary Action terminating Complainant's employment, which contained the following conclusions concerning the events of May 22, 2015:

- The circumstances surrounding your previous corrective action and the proceeding involved with that corrective action provided you with specific knowledge of the expectation prohibiting the consumption of alcohol during the workday.
- You subsequently admitted to consumption of alcohol to police officers on 5/22/15.
- You flagrantly disregarded campus safety by operating a work vehicle after such consumption.
- The observations of the police officers attest to the level of your intoxication and you have provided no information from which a reasonable person could conclude that the officers' observations were in error, or alternatively, a result of certain medical conditions about which you provided information.
- The other eyewitness accounts of your behavior on 5/22/15 are consistent with the information gathered by the police officers.
- Your evasive behavior with the police officers when they were questioning you and your refusal to submit to a breath test or roadside maneuvers are inconsistent with your assertions that you were not under the influence of/impaired by alcohol. By way of example, had you submitted to a breath test, the results would have provided evidence that you were not under the influence of/impaired by alcohol.
- The fact that you had to leave your vehicle and request a person to pick you [sic] after your encounter with UNC police indicates that you were under the influence of/impaired by alcohol.
- Your inappropriately long meal break during the work day in violation of Administrative Procedure 5-1 demonstrates your willful disregard for your agreed upon working hours without supervisor approval.
- You blatantly disregarded your scheduled work hours by not working on a scheduled workday from 12:30 until 7:00.

84. Mr. Parks decided to terminate Complainant's employment because Complainant's behavior constituted "serious and flagrant willful misconduct pursuant to Board Rule 6-12 because [Complainant] knowingly violated reasonable work rules and policies regarding alcohol consumption and work hours."

85. Complainant was terminated on September 30, 2015. (Stipulated Fact)

Complainant's Appeals to the State Personnel Board

86. Complainant timely appealed the September 30, 2015 termination of his employment to the Board, alleging discrimination on the basis of age, disability, race/color and union membership, and retaliation as a whistleblower.

87. Complainant's discrimination claims were referred to the Colorado Civil Rights Division (CCRD) for investigation. Complainant filed a charge of discrimination with the CCRD on November 10, 2015. On March 1, 2017, the Board received the CCRD's no probable cause determination. Complainant timely appealed this no probable cause determination, as required by § 24-50-125.3, C.R.S.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. XII, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 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 705. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED.

Mr. Parks terminated Complainant's employment because Complainant "knowingly violated reasonable work rules and policies regarding alcohol consumption and work hours." He also concluded that it was "more likely than not" that, on May 22, 2015, Complainant drove the AV golf cart in an intoxicated condition and ran into a pillar in a breezeway outside McKee Hall.

A. Complainant's Consumption of Alcohol and Return to Work While Intoxicated on May 22, 2015.

Mr. Resch clearly and credibly testified that Complainant became visibly intoxicated during their long lunch on May 22, and this testimony was consistent with prior statements Mr. Resch provided to the UNC police officers and to Mr. Parks. Mr. Zimmerman observed Complainant in an intoxicated condition around 7:00 p.m. that evening, and his testimony was also consistent with statements he previously provided. Officers Baker and Menard, who were both extensively trained in detecting intoxication levels, clearly and credibly testified that Complainant was visibly intoxicated when they confronted him outside Michener Library around 10:00 p.m. on May 22, 2015. The Officers also testified that Complainant admitted to consuming "a beer."

In contrast, Complainant provided testimony about the events of May 22, 2015 that was, at times, evasive, implausible, and inconsistent with his prior statements. While Complainant denied drinking any alcohol that day, he adamantly stated that he believed he had a right "as an American" to drink alcohol during his lunch break and return to work. Complainant testified that he drank cranberry juice at lunch because, after his stomach surgery, he could not drink soda. Complainant also testified that, following that surgery, he could not eat and drink at the same time, and had to pace himself, resulting in an extended lunch. He questioned whether alcohol had an odor that could be detected, and suggested various reasons that his eyes would appear bloodshot that day, including the presence of cottonwood in the air and performing programming work on multiple computer screens. Complainant explained that he sometimes stumbled over his words and appeared to slur them, especially when he was nervous about being confronted. He also suggested that certain medical conditions, such as diabetes, could cause some or all of the symptoms described by Mr. Resch, Mr. Zimmerman and Officers Baker and Menard. However, Complainant did not indicate that he suffered from any of these medical conditions.

Complainant also testified that he was confused by the Officers' questions and that their aggressive approach triggered his PTSD, causing him to "shut down." Complainant explained that, when he was asked by Officer Baker about how much he had to drink on May 22, 2015 and responded "One beer," he meant that he was going to have a beer, not that he had already had one. He also testified that he had a right to refuse to take a portable breath test or perform roadside maneuvers when requested by Officers Baker and Menard. Complainant's refusal of these tests raises questions about whether he had something to hide; at the very least, it resulted in the absence of exculpatory evidence.

Complainant's testimony was rife with shifting explanations for his observed condition and behavior on May 22, 2015. When weighed against the clear and consistent testimony provided by Mr. Resch, Mr. Zimmerman and Officers Baker and Menard, Complainant's testimony is not credible.

Mr. Nauroth, who admitted to being a close friend of Complainant for many years, testified that he did not observe Complainant drink alcohol during their extended lunch break on May 22, 2015, and that Complainant did not appear intoxicated. Mr. Nauroth admitted to being very close friends with Complainant for a number of years, and that the two of them frequently socialized outside of work. Compared to the specific and consistent eyewitness accounts of Mr. Resch and Officers Baker and Menard, none of whom had any apparent reason to distort or fabricate what they observed, the testimony of Mr. Nauroth was less than credible. Similarly, the brief statements offered by Ms. Sanchez and Mr. Zamarron, who met with Complainant between 5:30 and 7:00 p.m. on May 22, 2015, was not as convincing as the specific observations provided by the four eyewitnesses. Further, their secretive and unauthorized use of Mr. Parks' office for their meeting

with Complainant suggests a propensity for deception and does not enhance their credibility. Therefore, the preponderance of the evidence establishes that, on May 22, 2015, Complainant drank alcohol during a 4 ½ hour lunch break and returned to work in an intoxicated condition.

B. The Golf Cart Incident

Complainant also denied driving the AV golf cart on May 22, 2015. He testified that he drove his car to Carter Hall for his meeting with Ms. Sanchez and Mr. Zamarron; before returning to Michener Library, he went to pick up dinner from Santiago's. Complainant did not offer this explanation during either of the Rule 6-10 meetings with Mr. Parks, when UNC security camera footage could have been reviewed to verify these statements. Complainant was the only IT employee who stayed on campus after 5:00 p.m., the AV golf cart was found outside Michener Library later that evening, and Complainant was sitting in that golf cart, with the cart's key in his possession, when Officers Baker and Menard confronted him a little after 10:00 p.m. The key card records and security camera footage show that Complainant left Michener Library after 5:17 p.m. and attempted to enter Carter Hall at 5:27 p.m. Mr. Nauroth, who regularly drove the AV golf cart around the UNC campus, testified that driving that golf cart from Michener Library to Carter Hall would take approximately ten minutes.

Mr. Alirez credibly testified that he saw someone with a bald head drive an IT golf cart drive past him when he was waiting outside McKee Hall for his supervisor, Mr. Holder. In May 2015, Complainant had a bald or closely shaved head. Mr. Alirez testified that Mr. Holder usually arrives by 5:00 p.m., but that he sometimes arrives as late as 5:15 p.m. The IT golf cart Mr. Alirez saw was heading in the general direction of Carter Hall. It takes about ten minutes to drive a golf cart from Michener Library through the McKee breezeway to Carter Hall; the key card records reflect about a ten-minute period of time from Complainant's exit from Michener Library and his attempt to enter Carter Hall. When all of these facts are weighed against Complainant's unreliable testimony, it does appear more likely than not, as Mr. Parks concluded, that Complainant, in an intoxicated state, drove the AV golf cart from Michener Library through the McKee breezeway on his way to Carter Hall, hitting a pillar in the breezeway. Regardless of whether Complainant actually drove the AV golf cart that evening, however, the preponderance of the evidence establishes that, on May 22, 2015, Complainant drank alcohol during a 4 ½ hour lunch break and returned to work in an intoxicated condition, in direct violation of the directives he was given in his August 26, 2014 CA.

C. Complainant's Failure to Complete a 40-Hour Work Week

The preponderance of the evidence establishes that, as a result of his extended lunch and subsequent meeting with the custodial employees, Complainant failed to complete a 40-hour work week on May 22, 2015. The 2014 CA specifically instructed Complainant that, in order to fulfil his work time requirements and to avoid gaps in IT coverage, he was required to work 40 hours per week. Complainant testified that, at the time he left for lunch on Friday, May 22, 2015, around 12:45 p.m., he had already worked almost 36 hours that week, and only had to work an additional four hours for his required total of 40 hours. Complainant admitted that, upon returning to campus following his extended lunch break, he went to Carter Hall to talk with two custodial employees. He did not return to Michener Library until 7:26 p.m. and, according to his own testimony, only worked until around 9:15 p.m., at which time he stopped working and played his guitar. Thus, by Complainant's own account, he only worked about an hour and 45 minutes after returning to campus, and was still at least two hours and 15 minutes short of the required 40 hours.

Complainant testified that he was able to respond to messages and emails via his phone

while he was on lunch breaks. However, no evidence was presented establishing whether or how long he may have engaged in such tasks while he was at the Double Play. Mr. Resch did not observe Complainant performing work while they were there, and testified that, as their extended lunch dragged on, he was concerned about all three of them returning to campus to finish their work that afternoon. Therefore, the preponderance of the evidence establishes that, because of the extended lunch break Complainant took on May 22, 2015, he failed to work a full 40 hours that week, and thus violated Respondent's rules and policies regarding work hours, including the specific direction Mr. Wyperd gave him in the 2014 CA. Therefore, Respondent has established that Complainant committed the acts for which he was disciplined on September 30, 2015.

III. RESPONDENT'S TERMINATION OF COMPLAINANT'S EMPLOYMENT WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

A. THE DECISION TO TERMINATE COMPLAINANT'S EMPLOYMENT WAS NOT ARBITRARY OR CAPRICIOUS, AND WAS WITHIN THE RANGE OF REASONABLE ALTERNATIVES.

In determining whether an agency's decision to discipline an employee is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion, or 3) exercised its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001). In addition, the Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within the range of reasonable alternatives. In deciding to take disciplinary action, Respondent is required to consider "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." Board Rule 6-9.

Respondent's actions in this case were neither arbitrary nor capricious, as those terms are defined in *Lawley*, 36 P.3d at 1252. Mr. Parks held two Rule 6-10 meetings with Complainant to allow him time to review and respond to the allegations concerning the events of May 22, 2015. Mr. Parks described a thorough and thoughtful review of the information he received, including information from Complainant, and reviewed Complainant's work history, before reaching a decision to terminate Complainant's employment on September 30, 2015. The Rule 6-10 transcripts reflect courteous and respectful treatment of Complainant by Mr. Parks, and an ample opportunity for Complainant to proffer his explanations for the events of May 22, 2015.

Mr. Parks did not simply rely on the written statements of the nine witnesses to the events of May 22, 2015. Instead, Mr. Parks conducted face-to-face interviews with all of these witnesses, including witnesses suggested by Complainant, and reviewed available video footage from that evening, thus using reasonable diligence and care to procure all relevant evidence. Mr. Parks shared that evidence with Complainant, providing him an opportunity to respond. Mr. Parks carefully and honestly considered all the evidence he was provided before reaching his decision to discipline Complainant; thus, this decision was not arbitrary or capricious.

Less than one year prior to the events of May 22, 2015, Mr. Wyperd issued Complainant a CA after he was observed taking an extended lunch and consuming alcohol. In that CA, Mr. Wyperd instructed Complainant that he was not allowed to consume alcohol and return to work, and that he was required to complete a full 40 hours of work each week. Complainant's consumption of alcohol and return to work in a state of intoxication on May 22, 2015, not only demonstrates a flagrant disregard of management directives, but constitutes a serious safety risk. As Complainant adamantly maintained during his testimony, he believed it was his "right as an American" to drink alcohol during his lunch break and return to work. This statement indicates that Complainant did not believe he had to comply with Respondent's directives. Under these circumstances, the termination of his employment was justified and well within the range of reasonable alternatives.

Complainant argued that Mr. Parks was not properly delegated as his Appointing Authority and therefore could not discipline him. Mr. Parks had served as Complainant's Appointing Authority for a number of years pursuant to his Human Resources position description. A May 5, 2015 written confirmation of a delegation of authority from President Norton to Ms. Quinn, and from Ms. Quinn to Mr. Parks, clearly established his responsibilities as Complainant's Appointing Authority prior to Mr. Parks' investigation of the events of May 22, 2015 and subsequent termination of Complainant's employment. Therefore, Complainant's argument is without merit.

In his written closing argument, Complainant alleged, for the first time, that he was not provided with timely notice of the Rule 6-10 meetings as required by Board Rule 6-10(A). At the close of the hearing, Complainant was specifically instructed that the evidentiary portion of the record was closed, and that he could not attempt to introduce new or additional facts via his closing argument. Because Complainant attempts to introduce new facts about the Rule 6-10 meetings not offered in evidence during the hearing, these alleged facts will not be considered by the ALJ. Even if these facts were considered, the evidence in the record reflects that Mr. Parks sent Complainant written notice of the June 22, 2015 Rule 6-10 meeting via certified mail 4 business days before that meeting, and sent written notice of the August 18, 2015 Rule 6-10 meeting via certified mail 9 business days before that meeting. Rule 6-10(A) requires that such written notice be sent via certified mail "at least 3 business days prior to the meeting." Therefore, the certified notices of both Rule 6-10 meetings sent by Mr. Parks complied with Rule 6-10(A).

Respondent has met its burden of establishing that, under *Lawley*, it did not act arbitrarily or capriciously in terminating Complainant's employment on September 30, 2015. In addition, this termination was within the range of reasonable alternatives, as required by Board Rule 6-9.

B. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF DISABILITY, RACE, AGE, OR ORGANIZATIONAL MEMBERSHIP.

Complainant claimed that the termination of his employment constituted discrimination on the basis of age, race, disability and organizational membership. CADA provides, in pertinent part: "It shall be a discriminatory or unfair employment practice ... [f]or an employer ... to discharge ... any person otherwise qualified because of disability, race [or] age ..." § 24-34-402(1)(a), C.R.S. To establish a *prima facie* case of discrimination in employment on the basis of one of these protected classes, Complainant must demonstrate that: (1) he belongs to the protected class, (2) he was qualified for the job at issue, (3) he suffered an adverse employment decision despite his qualifications, and (4) all the evidence in the record supports or permits an inference of unlawful discrimination. *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 297 (2000), citing *Colorado Civil Rights Comm'n v. Big O Tires*, 940 P.2d 397, 400-01 (1997).

Complainant established that he is disabled, is Hispanic and, at the time he was terminated, was forty years old; thus, he belongs to a protected class on the basis of disability, race and age. Complainant was qualified for the job he held, and Respondent's decision to terminate his employment constitutes an adverse employment action. Thus, Complainant has met the first three elements of a *prima facie* case of discrimination on the basis of disability, race and age. *Bodaghi*, 995 P.2d at 297.

To establish the fourth and final element of a *prima facie* case, Complainant must proffer evidence that supports or permits an inference of unlawful discrimination. *Id.* Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. *George v. Utah Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). Direct evidence is "[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). However, as the Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi*, 995 P.2d at 296. To meet their burden of proof, "employees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis ... In fact, circumstantial evidence is often particularly helpful when ... a case turns on vacillating issues such as motive or intent." *Id.* In the absence of direct evidence, a claimant's burden of proof may be met through "evidence of actions" or "existing conditions from which a fair inference of such discrimination [can] legitimately be drawn." *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Differential treatment of an employee who belongs to a protected class and another employee who does not belong to that protected class may constitute sufficient evidence of discriminatory intent. *Big O Tires*, 940 P.2d at 401-402. If a claimant is able to show such disparate treatment, the burden of production then shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its selection decision. *Id.* at 399. Once the employer meets this burden of production, the Complainant must then demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination. *Id.*

Complainant argued that he was treated differently than Mr. Nauroth or Mr. Resch, who were both younger Caucasian co-workers accompanying him on the extended lunch on May 22, 2015, and who are still employed by Respondent. However, in contrast to Complainant, there is no evidence that either Mr. Nauroth or Mr. Resch consumed alcohol during their extended lunch break or returned to work in an intoxicated state. Complainant also argued that Respondent's delay in granting his request for a flexible work schedule during the first few months of 2015 constituted discrimination on the basis of disability. However, Mr. Parks' explanation of his deliberative process and the need to obtain a clearly worded justification of the requested accommodation was reasonable, and established that he gave Complainant's request careful consideration. Further, there is no evidence in the record that this request for accommodation in any way motivated Mr. Parks to terminate Complainant's employment.

Complainant also failed to provide any evidence that Respondent discriminated against him on the basis of his active involvement with Colorado WINS. While Respondent's management team was aware that Complainant was an active union steward, Complainant did not provide any evidence of any links between any specific union work and the termination of his employment. While Ms. Sanchez and Mr. Zamarron indicated that they met with Complainant to discuss a petition concerning their supervisor, Mr. Zimmerman, Complainant denied that his meeting with these custodial employees involved any union business and was simply a social visit.

Mr. Parks' April 6, 2015 decision to allow Complainant to work an extremely flexible schedule, as well as the actions he took to remove or limit active security cameras in the Michener Library work space, demonstrate the absence of any discriminatory intent or animus. Similarly, the revision of Complainant's performance evaluation in April 2015, following consideration of Complainant's grievance, from unsatisfactory to satisfactory further demonstrates the absence of discriminatory intent or animus.

Respondent has proffered legitimate, nondiscriminatory reasons for its decision to terminate Complainant. In contrast, Complainant has failed to establish that Respondent's reasons for terminating his employment were pretextual. Therefore, Complainant failed to establish, by a preponderance of the evidence, that Mr. Parks' decision to terminate his employment was motivated by discrimination on the basis of age, race, disability or organizational membership.

C. RESPONDENT DID NOT RETALIATE AGAINST COMPLAINANT IN VIOLATION OF THE WHISTLEBLOWER ACT.

Complainant alleges that Respondent targeted him for disciplinary action due to his protected disclosures, in violation of the Whistleblower Act. The purpose of the Whistleblower Act, 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." § 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 v. Industrial Comm'n*, 699 P.2d 960, 966 (Colo. 1985). To establish a *prima facie* violation of the Whistleblower Act, Complainant must demonstrate that he made disclosures that are "protected" under this statute, and that they were a substantial or motivating factor in the actions taken by the agency. *Id.* at 968.

For the first prong of a whistleblower claim, Complainant must show that he made a "disclosure of information," defined as "the written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." § 24-50.5-102(2), C.R.S. To warrant protection under the Whistleblower Act, the disclosure of information must involve a matter of public concern. Disclosures that do not concern matters in the public interest or that are not of public concern do not implicate the statute. *Ferrell v. Colorado Dep't of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007).

On or about December 12, 2014, Complainant emailed a complaint to Mr. Sharp about Mr. Stratton receiving Complainant's medical information. Because this communication reflects the broader public purpose of protecting privacy of an individual's medical information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), it meets the definition of protected disclosures under § 24-50.5-102(2), C.R.S. However, Complainant must also demonstrate that he suffered a disciplinary action by Respondent, and that his protected disclosures were a substantial or motivating factor in this action. *Ward*, 699 P.2d at 968. The Whistleblower Act prohibits the initiation or administration of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S.

There is no dispute that Respondent placed Complainant on administrative leave on May 27, 2015, and subsequently terminated Complainant's employment on September 30, 2015. However, Complainant has failed to establish that this disciplinary action was motivated by his protected disclosures. Mr. Parks credibly testified that he did not retaliate against Complainant for raising a complaint about his medical information in December 2014. Mr. Parks took this complaint seriously, investigated it, and ensured that no medical information was shared with Mr. Stratton.

In reviewing a retaliation claim, the Tenth Circuit has held: "Unless an adverse action is *very closely connected* in time to the protected activity, a plaintiff must rely on additional evidence beyond mere temporal proximity to establish causation." *Meiners v. Univ. of Kan.*, 414 F.3d 1222, 1231 (10th Cir. 2004) (emphasis in original). A period of three months or more between protected activity and an adverse action is insufficient to show the requisite causation for a retaliation claim. *Id.* Complainant was placed on administrative leave more than five months after his December 2014 complaint concerning his medical information, and his employment was terminated more than nine months after this protected communication. Complainant has offered no other evidence establishing the requisite element of causation.

As discussed above, Respondent established, by a preponderance of the evidence, that Complainant committed the acts for which he was disciplined, and that termination of Complainant's employment was well within the range of reasonable disciplinary alternatives. Complainant has failed to demonstrate that his December 2014 complaint about his medical information had anything to do with Mr. Parks' decision to terminate Complainant's employment on September 30, 2015. Thus, Complainant has failed to establish that Respondent retaliated against him in violation of the Whistleblower Act.

IV. RESPONDENT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Attorney fees and costs are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. § 24-50-125.5, C.R.S.; Board Rule 8-33. A groundless personnel action is one in which it is found that "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C). Frivolous actions, on the other hand, are actions in which it is found that "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). A personnel action made in bad faith, that is malicious, or that was a means of harassment "means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B).

Respondent argues that it is entitled to an award of attorney fees and costs pursuant to Board Rule 8-33. While the ALJ ultimately did not find Complainant's testimony or arguments to be credible when weighed against the preponderance of the evidence, the ALJ does not find that Complainant's appeal was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or that it was otherwise groundless.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Under Colo. Const. Art. XII, §§ 13-15, and § 24-50-101, *et seq.*, C.R.S., certified state employees have the right to appeal disciplinary actions. The burden is on the agency to prove by a preponderance of the 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 705. Unless a complainant's pursuit of an appeal meets the criteria outlined in § 24-

50-125.5, C.R.S., and Board Rule 8-33, imposing an award of attorney fees and costs on complainants who are unsuccessful in pursuing their appeals would have a chilling effect on other potential complainants. For all of these reasons, Respondent is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.

2. Respondent's actions were not arbitrary, capricious, or contrary to rule or law.

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

4. Respondent did not discriminate against Complainant on the basis of disability, race, age or organizational membership.

5. Respondent did not retaliate against Complainant as a whistleblower, in violation of the Whistleblower Act, § 24-50.5-101, *et seq.*, C.R.S.

6. Respondent is not entitled to an award of attorney fees and costs.

ORDER

Respondent's September 30, 2015 decision to terminate Complainant's employment, is **affirmed.** Attorney fees and costs are not awarded. Complainant's appeal is dismissed with prejudice.

Dated this 9th day
of November, 2017.

[redacted]

Susan J. Tyburski
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

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 of receipt of the decision. The petition for reconsideration must allege an oversight or misunderstanding 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.

CERTIFICATE OF MAILING

This is to certify that on the 9th day of November, 2017, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and Notice of Appeal Rights** addressed as follows:

Damian Macias
[redacted]

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