STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2016G006(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MATTHEW SALDANA,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, OFFICE OF ADMINISTRATIVE SOLUTIONS, DIVISION OF FINANCIAL SERVICES,
Respondent.

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on February 3, 2017, and the evidentiary hearing on May 15, 17 and 18, 2017, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on May 18, 2017, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared *pro se*. Respondent appeared through its attorney, Stacy L. Worthington, Senior Assistant Attorney General. Respondent's advisory witness was Jeannine Moore, Chief Financial Officer and appointing authority.

MATTER APPEALED

Complainant, a former certified employee, seeks review of the July 6, 2015 corrective action and disciplinary reduction in pay, and the November 13, 2015 termination of his employment, issued by Respondent. Complainant alleges that these actions were arbitrary, capricious and contrary to rule or law, and were motivated by retaliation directed against him as a whistleblower, in violation of the State Employee Protection Act, § 24-50.5-101, *et seq.*, C.R.S. *et seq.* ("Whistleblower Act"). Complainant seeks reinstatement with full back pay and benefits.

Respondent seeks affirmance of its corrective and disciplinary actions, including the termination of Complainant's employment, and dismissal of this appeal with prejudice.

For the reasons discussed below, Respondent's July 6, 2015 corrective action and disciplinary reduction in pay, and its November 13, 2015 decision to terminate Complainant's employment, are **affirmed.**

ISSUES

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

2. Whether Respondent's July 6, 2015 corrective action and disciplinary reduction in Complainant's pay, and November 13, 2015 termination of Complainant's employment, were arbitrary, capricious or contrary to rule or law;

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

4. Whether Respondent retaliated against Complainant as a whistleblower, and

5. Whether Complainant is entitled to an award of attorney fees.

FINDINGS OF FACT

Background

1. Complainant was originally employed in 2008 by Respondent's Division of Youth Corrections as a Correctional Youth Security Officer I at the Sol Vista Youth Corrections Facility ("Sol Vista").

2. When Sol Vista was closed, Complainant accepted a voluntary demotion/transfer to an Accounting Technician III position in the Southern District Accounting Office ("Accounting Office") on November 20, 2011. Several other former Sol Vista employees also accepted transfers to positions in the Accounting Office.

3. The Accounting Office is part of Respondent's Division of Financial Services, which manages Respondent's financial operations and resources. It consists of two Patients' Accounts units that determine, adjust, bill and collect revenue, including Medicaid and Social Security benefits, for all patients or clients served by the Colorado Mental Health Institutes at Pueblo and Fort Logan, the Pueblo Regional Center, and the Wheat Ridge Regional Center ("WRRC").

4. At all times relevant to this appeal, Chief Financial Officer Jeannine Moore was Complainant's Appointing Authority in the Accounting Office. Ms. Moore reported to Clint Woodruff, Director of the Division of Financial Services, who delegated appointing authority to her.

5. At all times relevant to this appeal, Michelle Bourell was Complainant's second level manager and department head.

6. Catherine Wojcik was Complainant's immediate supervisor from November 2011 through May 2012.

7. Between May 2012 and August 2012, Ms. Bourell assumed immediate supervision of Complainant.

8. Sheila Zajkowski was Complainant's immediate supervisor from approximately August 2012 through May 2014.

9. Teresa Miller was Complainant's immediate supervisor from approximately May 2014 until his employment was terminated on November 13, 2015.

Complainant's Job Duties and Performance History at the Accounting Office

10. Complainant began working as an Accounting Technician III in the Accounting Office on or about November 22, 2011. According to the Position Description provided to Complainant on December 27, 2011, the primary purpose of his Accounting Technician III position was "to verify, establish and maintain benefits for clients located at [WRRC]."

11. WRRC is a long term care facility for individuals with developmental disabilities. Collection of patients' benefits, including Medicaid and Social Security, are needed to generate the revenue required to operate WRRC.

12. Medicaid benefits, including long term care, are administered by the appropriate county. The county determines whether an applicant is eligible for benefits and what kind of benefits are approved.

13. Once a resident's application for benefits has been submitted and approved, Medicaid is billed for eligible services by WRRC from the date a resident is admitted.

14. Complainant's duties included applying Medicaid and Social Security regulations to residents of the WRRC, submitting and following up on applications for these benefits, billing benefit providers for services provided to residents receiving benefits, and maintaining accurate, up-to-date information concerning benefits and payments in residents' files.

15. Complainant, as well as the other former Sol Vista employees, were provided training and coaching to assist them in learning their new job duties. Complainant received training from Therese Davis, an experienced co-worker. Ms. Moore recognized that Complainant did not have prior experience doing administrative work in an office environment, and offered him ongoing assistance to help him succeed.

16. In early October 2013, Ms. Moore met with Complainant to discuss a number of performance issues, including Complainant's failure to follow supervisory directives, respect supervisory authority and follow the chain of command. She then arranged a meeting with Complainant, Ms. Zajkowski and Ms. Burrell, during which Ms. Zajkowski and Ms. Burrell reiterated their performance expectations. After that meeting, Ms. Moore, Ms. Zajkowski and Ms. Burrell conferred with Respondent's HR representatives and a Colorado State Employee Assistance Program (CSEAP) counselor. The decision was reached to give Complainant a written Performance Improvement Plan ("PIP") with clearly defined expectations.

17. On October 24, 2013, Complainant received the PIP from Ms. Zajkowski, which was approved by Ms. Moore. This PIP documented ongoing issues with Complainant's interpersonal skills and identified 6 behaviors Complainant was instructed to focus on in the workplace: (1) respecting his supervisor's directives, (2) appropriately clarifying supervisory instructions, (3) following the chain of command by bringing questions and concerns to his immediate supervisor first, before approaching Ms. Bourell, (4) keeping his personnel issues confidential, (5) refraining from excessive visiting with other employees and disrupting productive work time, and (6) avoiding references to violent acts in conversations with co-workers.

18. Because the PIP addressed behavioral issues, Ms. Moore arranged for Complainant to have sessions with the C-SEAP, over and above any sessions Complainant utilized to address personal issues, through the Employer Based Referral (EBR) process. Ms. Moore wanted Complainant to learn new conflict resolution and behavioral skills to enable him to successfully communicate with Ms. Zajkowski and Ms. Burrell, and outlined the following areas needing improvement:

    - respecting supervisory directives
    - appropriately clarifying supervisory instructions (versus questioning supervisory directives)
    - following the chain of command
    - confidentiality of personnel matters (not discussing issues between himself and his supervisor with other employees)
    - excessive time spent visiting
    - inappropriate reference to violent acts

19. On October 31, 2013, Ms. Moore met with Complainant to discuss his PIP, and encouraged him to take advantage of the professional assistance and coaching opportunity she had arranged for him with C-SEAP. During this conversation, Complainant informed Ms. Moore that he had recorded a particular conversation he had with Ms. Burrell. Ms. Moore informed Complainant that it was inappropriate to record others' conversations without their knowledge, and emphasized that it was "critical" that Complainant "not record, discuss or photograph any information relating to our residents and/or patients."

20. On November 5, 2013, Ms. Moore sent Complainant a letter detailing six specific examples of inappropriate behaviors and argumentative communications with his supervisors that occurred between May 6 and October 31, 2013, and encouraging him to take advantage of the C-SEAP sessions she had arranged for him. Ms. Moore acknowledged that Complainant was "a capable and dedicated employee," but expressed her concern over Complainant's repeated pattern of disregarding, questioning or disrespecting his supervisors' directives:

> Your behavior towards your supervisors is expected to change, characterized by positive, cooperative, respectful and professional behaviors, particularly in regard to respecting supervisory directives. You are expected to appropriately clarify supervisory instructions, follow the chain of command, keep personnel matters confidential without discussing them with co-workers, refrain from excessive visiting, refrain from discussing violent acts, and refrain from taping any personal or business conversation in the workplace. As always, confidential information or documents to which you are privy are to be discussed only on a need-to-know basis, and are not [sic] be recorded or used in a manner inconsistent with appropriate business use.

21. On January 21, 2014, Ms. Zajkowski and Ms. Moore met with Complainant to review some continuing communication and performance issues, including proper procedures for documenting information in patient files and meeting the due dates for forms needed by outside agencies for benefits applications.

22. During the latter half of February 2014, while Complainant was out on vacation, Ms. Zajkowski and Ms. Moore discovered the absence of accurate, up-to-date information in patient files maintained by Complainant, as well as billing errors committed by Complainant and his failure to provide necessary information to the proper agencies to enable WRRC clients to timely receive Medicaid and Social Security benefits.

23. On March 3, 2014, the day Complainant returned from vacation, he received a Corrective Action advising him that he had "not adhered to the expectations outlined" in the October 24, 2013 PIP, and had committed errors that resulted in a loss of revenue and delayed benefit payments to WRRC clients. Problems with acknowledging and following supervisory directives; appropriately clarifying, rather than challenging, supervisory instructions, and deficiencies in his work concerning WRRC client benefits, were detailed in this Corrective Action. Complainant was again instructed to follow proper procedures for updating information in patient files, to respond to email requests from his supervisor, to seek clarification of supervisory directives in a respectful manner and to discuss his personnel issues with Human Resources, rather than his co-workers.

24. On April 28, 2014, Complainant received a Performance Management and Pay (PMAP) rating of Level 1 ("Needs improvement, Does Not Meet Expectations") from Ms. Zajkowski, for the rating period April 1, 2013 through March 31, 2014. This PMAP was approved by Ms. Bourell.

Complainant was advised that he needed to improve in the areas of Communication, Interpersonal Skills and Accountability by being "less argumentative and more open in his dialogue" with his supervisor. Ms. Zajkowski explained that Complainant refused to effectively participate in monthly meetings intended to discuss any difficulties he was experiencing in performing his job. Instead, Complainant seemed to be unwilling to accept direction from Ms. Zajkowski and involved his co-workers in his disagreements with her:

> [Complainant] will seek out opinions of co-workers in an attempt to validate his stance, which has created a diminished morale within the department and created a secondary conflict. When given redirection [Complainant] mocks the directive with notes and sarcasm, instead of affording me the courtesy of discussing the issue.

25. In the 2014 PMAP, Ms. Zajkowski encouraged Complainant to develop more positive interactions in the workplace and to use their monthly meetings to discuss ways to improve his job performance. She believed Complainant had the "ability to be successful" on the WRRC team, and needed to pay "attention to detail," "work cohesively with his supervisor and team" and "be willing to acknowledge and address the stated issues and be willing to communicate how we can help him succeed in his position."

Resident AH's and CG's Benefits

26. At various times, AH and CG[1] were residents of WRRC.

27. Since at least May 19, 2010, resident AH was moved from housing facilities managed by Respondent to jail, and then back to Respondent's housing facilities, due to a propensity to engage in physical altercations. Following a lengthy stint in jail lasting more than a year, AH was admitted to WRRC on November 20, 2014. Due to another physical altercation, AH was jailed for 28 days, from February 13, 2015 to March 13, 2015, and returned to WRRC on March 13, 2015.

28. Because of resident's incarceration of over one year, a new application for benefits had to be initiated upon his admission to WRRC on November 20, 2014. AH's subsequent incarceration of less than a month, from February 13, 2015 to March 13, 2015, did not require a new application for benefits. Instead, AH was considered to be on "leave" from his WRCC residency for that short period.

29. The Xerox Corporation (Xerox) administers Medicaid benefit payments for Jefferson County. Xerox had an open-ended Medicaid prior authorization request (PAR) in its computer system for AH dated May 19, 2010. This PAR date is used internally by Xerox and has no effect on AH's eligibility for benefits.

30. Retroactive Medicaid eligibility can be granted for 90 days prior to the date an application is received by the county. If Medicaid benefits have been terminated or are no longer active, a new application must be filed in a timely manner.

31. A case manager with AH's Community Centered Board (CCB), an outside agency, submitted an application for Medicaid and long term care benefits on AH's behalf within ninety days of AH's November 20, 2014 admission to WRRC. Complainant did not follow up on this application. He submitted a long term care application, as well as other documents for AH, to

[1] To protect the privacy of residents, they are identified by initials only.

Jefferson County with erroneous admission dates.

32. Sometime in April 2015, Ms. Moore asked Ms. Miller to work on reducing unpaid claims for WRRC residents. Two of these large outstanding receivable accounts were for WRRC residents AH and CG. In the course of reviewing these accounts, Ms. Miller discovered that Complainant failed to timely submit filings for benefits and that some submissions contained incorrect admission dates, resulting in a loss of benefits revenue.

33. CG was admitted to WRRC on August 28, 2014. The long term care application for CG submitted by Complainant was not received by Jefferson County until December 10, 2014. Complainant's late submission of this application resulted in a permanent loss of revenue in the amount of $2,578.04 for CG.

34. Ms. Miller discovered that a timely application had been submitted by a CCB case manager for AH's benefits sometime prior to his March 13, 2015 release from jail, and was subsequently able to recover benefits in the amount of $66,384.53 for services provided to AH while he resided at WRRC. WRRC did not request benefit payments for the 28 days AH was incarcerated from February 13, 2015 to March 13, 2015.

35. On or about May 5, 2015, Complainant learned that WRRC was receiving benefits for AH following his return to WRRC and told Ms. Miller that he believed that receipt of these payments were improper. Ms. Miller explained that these benefits were properly paid based upon the prior application submitted by the CCB case manager and the open PAR for AH in the Xerox system.

<u>July 6, 2015 Corrective and Disciplinary Actions, and Complainant's Fraud Complaints</u>

36. On May 15, 2015, Ms. Moore held a Rule 6-10 "information gathering" meeting with Complainant to discuss continuing concerns with Complainant's billing, timely filing of benefit applications and lack of follow-up, incomplete documentation in patient files, and missed deadlines, including the benefits applications for AH and CG. This initial meeting lasted two hours. On May 27, 2015, Ms. Moore held a subsequent Rule 6-10 meeting with Complainant.

37. During the 6-10 meetings, Complainant explained that his delay in submitting a Medicaid application for AH was due to his understanding that Medicaid benefits were dependent on approval of an applicant's Social Security Supplemental Income (SSI). For that reason, Complainant was waiting for AH's SSI approval before submitting his Medicaid application. In fact, Medicaid eligibility is independent of Social Security disability eligibility.

38. Complainant also stated that, because AH was in jail from February 13, 2015 to March 13, 2015, WRRC could not bill for AH's residence in WRCC from November 20, 2014 to February 13, 2015, and had to submit a brand new benefits application upon AH's March 13, 2015 release. Complainant also erroneously believed that WRRC used an open-ended (PAR) dated May 19, 2010 to fraudulently obtain benefits for AH.

39. Ms. Moore investigated Complainant's concerns about fraudulent benefits payments to WRRC, and determined that they were without merit.

40. On June 2, 2015, Complaint submitted an email to the Colorado Office of Consumer Fraud relaying the concerns he expressed to Ms. Moore during the Rule 6-10 meetings. He immediately received a pro forma response acknowledging receipt of his email. Complainant sent a second email to the Office of Consumer Fraud on June 4, 2017 with additional

information about this fraud claim. He did not copy Ms. Moore, Ms. Bourell, Ms. Miller or anyone else at the Department of Human Services (DHS) on these emails, and there is no evidence that they knew about these submissions to the Office of Consumer Fraud prior to the disciplinary action imposed on Complainant. It does not appear that any action was taken by the Office of Consumer Fraud concerning Complaint's emails.

41. On July 6, 2015, Complainant received a Corrective and Disciplinary Action addressing "billing and eligibility errors" committed by Complainant, including the errors on AH's and CG's claims for benefits. Respondent imposed a 10% reduction in Complainant's pay for six months, and required him to complete training concerning benefit eligibility and billing for residents.

42. On July 7, 2015, Complaint submitted another email to the Office of Consumer Fraud reiterating his concerns that WRRC was engaging in fraud by applying for and accepting benefits payments for resident AH. He did not copy Ms. Moore, Ms. Bourell, Ms. Miller or anyone else at DHS on this email, and there is no evidence that they knew about this submission to the Office of Consumer Fraud prior to the disciplinary action imposed on Complainant. It does not appear that any action was taken by the Office of Consumer Fraud concerning this email.

43. On July 14, 2015, Complainant grieved the July 6, 2015 Corrective and Disciplinary Action. Ms. Moore met with Complainant to discuss his Step I grievance on July 31, 2015. This grievance was denied by Ms. Moore on August 7, 2015. In this grievance response, Ms. Moore explained why Complainant was mistaken concerning Xerox's maintenance of an open-ended PAR in its system and WRRC's receipt of benefit payments for AH.

44. Complainant filed a Step II grievance on August 14, 2015 with Mr. Woodruff. Mr. Woodruff met with Complainant to discuss his grievance on September 9, 2015.

45. On September 18, 2015, Mr. Woodruff upheld the July 6, 2015 Corrective and Disciplinary Action based on Complainant's "demonstrated work history of below average performance" that was similar to the performance problems identified in that Action.

November 13, 2015 Termination

46. Accounting Technicians in Respondent's Accounting Office are required to protect Personal Health Information (PHI) as required by the Health Insurance Portability and Accountability Act (HIPPA). These protections include encrypting PHI documents when emailing them to another agency and refraining from storing PHI documents on their computer hard drives.

47. Complainant received HIPPA Privacy and Security training on January 2009, May 2011 and June 2015.

48. On or about September 1, 2015, Ms. Moore discovered that Complainant emailed numerous PHI documents concerning 39 WRRC residents to Jefferson County with proper encryption, with a copy to his supervisor, and then emailed those PHI documents a second time to Jefferson County without proper encryption, without copying his supervisor. Consequently, Complainant was placed on administrative leave on September 1, 2015.

49. Ms. Moore investigated Complainant's actions and discovered that, in addition to emailing unencrypted PHI, he stored PHI on his computer hard drive, in violation of Respondent's HIPPA Privacy and Security guidelines. Complainant also continued to make numerous errors in benefit claims and billing documents, and in maintaining accurate information in

resident files. Finally, Complainant failed to complete the training concerning benefit eligibility and billing for residents he was ordered to undertake as part of his July 6, 2015 Corrective Action.

50. On October 2, 2015, Ms. Moore held a Rule 6-10 meeting with Complainant to discuss his unencrypted email containing residents' PHI documents to Jefferson County, as well as his failure to comply with the requirements of the July 6, 2015 Corrective Action and his continued poor job performance. Complainant attended with his representative, Pamela Cress from Colorado WINS Local 1876. Ms. Moore attended with her representative, Justin Icenhower, Respondent's Human Resources Team Lead.

51. During the Rule 6-10 meeting, Ms. Moore reviewed Complainant's continuing performance deficiencies, as well as his failure to complete retraining outlined in the July 6, 2015 Corrective Action. When asked about emailing unencrypted PHI to Jefferson County, Complainant stated that he had to send these documents unencrypted in order to ensure their timely receipt, and did not copy his supervisor on the unencrypted email because he "didn't want to take the risk of getting in trouble."

52. Ms. Moore also asked Complainant about PHI documents stored on his computer hard drive. Complainant explained that he knew he should not store PHI documents on his hard drive, but that "it was easier and more accessible" to do so.

53. After reviewing additional information Complainant provided on October 12, 2015, Ms. Moore determined that, rather than improving his performance, Complainant's errors in applying and billing for resident benefits, and maintaining accurate information in resident files, increased. Complainant intentionally emailed unencrypted PHI to outside agencies without copying his supervisor, and stored PHI on his hard drive, in violation of HIPPA requirements and Respondent's Privacy and Security guidelines. Instead of following supervisory directives, Complainant circumvented his supervisor and "established [his] own process when it suited his purposes, even if expressly directed by supervisors to do something differently."

54. After considering the seriousness of Complainant's intentional HIPPA violations, his work performance history, his refusal to follow supervisory directives and his failure to take advantage of the numerous opportunities provided to improve his performance, Ms. Moore concluded that lesser disciplinary actions or additional corrective actions would not be effective. Because of his blatant disregard of HIPPA requirements and supervisory directives, Ms. Moore was concerned about Complainant's integrity and concluded that Complainant was becoming a detriment to the Accounting Office.

55. On November 13, 2015, Ms. Moore terminated Complainant's employment, effective November 14, 2015, because of his "deliberate non-compliance with [HIPPA requirements] concerning the protection of personal health information (PHI) of the residents of [WRRC]; the numerous instances of billing and eligibility errors; the continued disregard for following reasonable supervisory directives, and pattern of missed deadlines."

Complainant's Appeals to the State Personnel Board

56. Complainant appealed the July 6, 2015 Disciplinary Action to the State Personnel Board (Board), also raising sexual harassment and retaliation claims, and a whistleblower complaint, on July 15, 2017.

57. Complainant appealed the final grievance decision to the Board on September 28, 2015.

58. Complainant appealed the November 13, 2015 termination of his employment to the Board on November 17, 2015. This appeal also included including sexual harassment and retaliation claims. A whistleblower complaint incorporating Complainant's original whistleblower claims was filed on November 18, 2015.

59. Complainant's three appeals were consolidated on November 23, 2015.

60. Complainant's sexual harassment and retaliation claims were referred to the Colorado Civil Rights Division (CCRD) for investigation. Complainant filed a charge of discrimination with the CCRD on December 16, 2015. On October 17, 2016, the CCRD issued a no probable cause determination. Complainant did not appeal this no probable cause determination, as required by § 24-50-125.3, C.R.S., thereby waiving his discrimination and retaliation claims.

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, 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. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 705 (Colo. 1994). 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.

Ms. Moore and Ms. Miller consistently and credibly testified concerning Complainant's numerous performance problems in 2013, 2014 and 2015. Complainant did not dispute that he committed numerous benefits application, billing and file maintenance errors, or that he disregarded supervisory directives, including the requirement to protect the confidentiality of PHI under HIPPA and Respondent's Privacy and Security guidelines. Complainant explained that he had difficulty adjusting to a new office environment and administrative duties that were foreign to him, but did not credibly explain why he did not take advantage of the numerous opportunities available to him to obtain additional training or coaching, or attempt to work with his various supervisors to improve his performance. Therefore, Respondent has proven by a preponderance of the evidence that Complainant committed the acts for which he was disciplined on July 6, 2015 and November 13, 2015.

III. RESPONDENT'S CORRECTIVE AND DISCIPLINARY ACTIONS WERE NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

A. THE DECISIONS TO DISCIPLINE COMPLAINANT WERE NOT ARBITRARY OR CAPRICIOUS, AND WERE 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. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001). A court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *McPeak v. Colorado Dept. of Social Services*, 919 P.2d 942 (Colo. App. 1996). 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*. Complainant was provided a period of approximately two years to adjust to a new office environment and to learn his new administrative duties. Once Complainant's performance problems began to be addressed in late 2013, a progressive approach incorporating supervisory coaching, communication of specific performance expectations, the offer of additional training, PIPs and corrective actions was utilized by Ms. Moore.

In May 2015, Ms. Moore held two Rule 6-10 meetings with Complainant to allow him time to review and respond to the allegations concerning his continuing performance problems, including the mishandling of benefit applications for AH and CG, and his failure to maintain accurate information in residents' files, including AH and CG. Ms. Moore described a thorough and thoughtful review of the information she received, including information from Complainant, and reviewed Complainant's work history and prior efforts to correct his performance, before reaching a decision to impose a Corrective and Disciplinary Action on Complainant on July 6, 2015. Because of the seriousness of Complainant's continuing benefits application and file maintenance errors, as well as his continuing refusal to follow supervisory directives or respectfully communicate with his supervisor, Ms. Moore concluded that a 10% reduction in pay for six months was necessary to motivate Complainant to improve his performance and correct his behavior in the workplace.

Following the July 6, 2015 Corrective and Disciplinary Action, Ms. Moore discovered that Complainant intentionally emailed numerous PHI documents to Jefferson County without proper encryption, in violation of HIPPA and Respondent's Privacy and Security guidelines, and

intentionally concealed this action from his supervisor. After investigating this incident, as well as Complainant's continuing benefit application and file maintenance errors, through another Rule 6-10 process, Ms. Moore determined that Complainant's performance problems were increasing. After considering the seriousness of Complainant's HIPPA violations, his continuing refusal to follow supervisory directives and the prior corrective actions imposed on him, Ms. Moore concluded that Complainant's failure to correct his behavior and improve his performance rendered additional corrective measures or lesser disciplinary actions ineffective. As a result, Ms. Moore terminated Complainant's employment on November 13, 2015.

Respondent has met its burden of establishing that, under *Lawley* and *McPeak*, it did not act arbitrarily or capriciously in issuing a Corrective and Disciplinary Action on July 6, 2015 and terminating Complainant's employment on November 13, 2015. In addition, both disciplinary actions were within the range of reasonable alternatives, as required by Board Rule 6-9.

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

Complainant alleges that Respondent targeted him for corrective and disciplinary action, culminating in the termination of his employment, 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 Commission*, 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 Dept. of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007).

Complainant established that he raised concerns about WRRC improperly receiving benefits for AH to Ms. Miller on May 5, 2015, and to Ms. Moore during their Rule 6-10 meetings on May 15 and 27, 2015. Because these communications reflect the broader public purpose of ensuring that Respondent was in compliance with applicable legal requirements concerning Medicaid benefits, they meet the definition of protected disclosures under § 24-50.5-102(2), C.R.S.

In addition to establishing that he engaged in protected communications by raising issues of public concern, Complainant must also demonstrate that he 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." § 24-50.5-103(2), C.R.S. If Complainant makes a disclosure about a matter of public concern to one of these persons or entities, a single disclosure is sufficient to satisfy the requirements of the Whistleblower Act. Requiring an employee to make

a second disclosure beyond a communication with his supervisor "would undermine a major purpose of the statute, namely to protect an employee from retaliation by the supervisor to whom the information is first disclosed." *Gansert v. Colorado*, 348 F. Supp. 2d 1215, 1228 (D. Colo. 2004).

Complainant's expressions of his concerns to Ms. Miller and Ms. Moore, detailed above, are sufficient to meet the reporting requirements of § 24-50.5-103(2), C.R.S. *Gansert*, 348 F. Supp. 2d at 1226-28. Thus, Complainant has established the first prong of a *prima facie* whistleblower claim.

In addition to establishing that protected disclosures occurred, 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 imposed disciplinary actions on Complainant on July 6 and November 11, 2015. However, Complainant has failed to establish that these disciplinary actions were motivated by his protected disclosures.

The only protected communication that occurred prior to the first Rule 6-10 meeting was a brief conversation Complainant had with Ms. Miller on May 5, 2015. Ms. Miller did not remember this conversation and there is no evidence in the record that she mentioned it to Ms. Moore. Therefore, Complainant has failed to establish any connection between this initial communication of his concerns and Ms. Moore's scheduling of a Rule 6-10 meeting on May 15, 2015.

During the Rule 6-10 meetings on May 15 and May 27, 2015, Complainant discussed his concerns about AH's benefit payments with Ms. Moore. Ms. Moore took these concerns seriously, investigated them and found them to be without merit. Ms. Moore subsequently explained to Complainant his misunderstanding of the facts and regulations concerning AH's benefit payments. Ms. Moore credibly testified that she did not retaliate against Complainant for raising these concerns.

Complainant submitted three emails to the Office of Consumer Fraud on June 2 and 4, 2015 and on July 7, 2015, outlining his concerns about benefit payments received by WRRC for AH. There is no evidence that Ms. Moore was aware of these emails, much less that these emails caused her to discipline Complainant.

As discussed above, Respondent established, by a preponderance of the evidence, that Complainant committed the acts for which he was disciplined. Complainant has failed to demonstrate that any of his disclosures were a substantial or motivating factor in Respondent's July 6, 2015 Corrective and Disciplinary Action or November 13, 2015 termination, and thus has failed to establish that Respondent retaliated against him in violation of the Whistleblower Act.

IV. COMPLAINANT 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).

As discussed above, Respondent established, by a preponderance of the evidence, that Complainant committed the acts for which he was disciplined, and that Respondent's corrective and disciplinary actions were not arbitrary, capricious, or contrary to rule or law. Therefore, Complainant 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 retaliate against Complainant as a whistleblower, in violation of the Whistleblower Act, § 24-50.5-101, *et seq.*, C.R.S.

5. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's July 6, 2015 Corrective and Disciplinary Action, and its November 13, 2015 decision to terminate Complainant's employment, are **sustained.** Attorney fees and costs are not awarded. Complainant's appeal is dismissed with prejudice.

Dated this 29th day
of June, 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 29th day of June, 2017, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and Notice of Appeal Rights** addressed as follows:

Matthew Saldana
[redacted]

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