STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2018B056(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JACQUIE ANDERSON,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, STATE VETERANS COMMUNITY LIVING CENTER AT FITZSIMONS,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow held the evidentiary hearing in this case on February 26, 27, 28, March 1, 18, and May 17, 2019,[1] at the State Personnel Board (Board), 1525 Sherman Street, Courtroom 6, Denver, Colorado. This matter was commenced on April 30, 2018. The record was closed on May 17, 2019. Mark A. Schwane, Esq., represented Complainant. Jacob W. Paul, Assistant Attorney General, represented Respondent, the Colorado Department of Human Services (CDHS), State Veterans Community Living Center at Fitzsimons (Respondent or Fitzsimons). Respondent's advisory witness, and Complainant's appointing authority, was Aaron Termain, Division Director of the State Veterans Community Living Centers.

A list of exhibits offered and admitted into evidence is attached hereto as Appendix A. A list of witnesses who testified at hearing is attached hereto as Appendix B.

MATTERS APPEALED

In this consolidated matter, Complainant appeals the disciplinary action she received on March 6, 2018, imposing a ten percent reduction in her base salary for six months, and Respondent's decision to terminate her employment as a certified Administrative Assistant II on September 7, 2018. Complainant contends that she did not commit the acts for which she was disciplined, that the decisions to discipline her were arbitrary and capricious or contrary to rule or law, and that the two disciplinary actions were outside the range of reasonable alternatives. She also alleges that she was the victim of race discrimination in violation of the Colorado Anti-Discrimination Act.[2]

For the reasons discussed below, the undersigned ALJ finds that Respondent's March 6, 2018 disciplinary action is **rescinded**, and Respondent's September 7, 2018 termination of Complainant's employment is **modified**.

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[1] The record, initially closed on March 18, 2019, was reopened on May 2, 2019 when the ALJ solicited evidence on damages and set a damage hearing for May 17, 2019.

[2] Complainant initially claimed retaliation and discrimination based on organizational membership, but abandoned those claims prior to hearing.

ISSUES

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

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

3. Whether the disciplinary actions were within the range of reasonable alternatives;

4. Whether Respondent discriminated against Complainant in violation of the Colorado Anti-Discrimination Act on the basis of race; and

5. Whether Complainant is entitled to attorney's fees and costs.

FINDINGS OF FACT

General Background

1. Fitzsimons is a full-service nursing home for veterans, veterans' spouses, and Gold Star families (relatives of U.S. military members who died in battle).

2. Complainant was first employed by Fitzsimons beginning in June 2006 and was classified as an Administrative Assistant II. (Stipulated fact)

3. At all times relevant to this matter, Complainant was a certified state employee.

4. Complainant is African-American.

5. At the time that her employment at Fitzsimons was terminated, and for many years before that, Complainant was assigned to the front desk of Fitzsimons. Her responsibilities included reception, and general administrative duties such as mail and resident banking. (Stipulated fact)

6. At all times relevant to this matter, Complainant's work schedule was Sunday through Thursday. (Stipulated fact)

Complainant's Performance Evaluations and Prior Corrective Actions

7. In her performance evaluation for the review period April 1, 2008 through March 31, 2009, Complainant's supervisor, Billy Walker, rated Complainant's job performance at Level 2 ("Proficient, Good, Successful, Consistently Meets Expectations, Occasionally Exceeds Expectations")

8. In her performance evaluation for the review period April 1, 2009 through March 31, 2010, Complainant's supervisor, Mary Ann Terry, who at that time was the Fitzsimons Director of Nursing Services, rated Complainant's job performance at Level 2 ("Proficient, Good, Successful, Consistently Meets Expectations, Occasionally Exceeds Expectations").

9. On September 10, 2010, Ms. Terry issued Complainant a corrective action for insubordinate conduct towards Portia Benjamin, who was then acting Director of Nursing Services.

10. In her performance evaluation for the review period April 1, 2010 through March 31, 2011, Ms. Terry rated Complainant's job performance at Level 2. However, Ms. Terry gave Complainant Level 1 ratings ("Needs Improvement") in the core competencies of Communication and Interpersonal Skills. Concerning Complainant's Interpersonal Skills, Ms. Terry wrote, "Jackie has been observed to talk abruptly with other staff. She has been counseled about the use of profanity and other inappropriate language and volume when upset." About Complainant's Job Knowledge, Ms. Terry wrote, "Jackie is very knowledgeable in matters related to scheduling and staffing. Thank you for the good job you do."

11. On February 28, 2012, Steve Fabrizio[3] submitted a written statement to the effect that Complainant had been unprofessional in interactions with the facility office manager and the assistant administrator.

12. In her performance evaluation for the review period April 1, 2011 through March 31, 2012, Complainant's supervisor, Mindy Moskowitz, who was then the Fitzsimons Assistant Administrator, rated Complainant's job performance at Level 1.

13. On April 9, 2012, Ms. Moskowitz issued Complainant a corrective action for her use of inappropriate language at the front desk, in Ms. Moskowitz's phrase, "specifically the 'F' word," in September 2011 and March 2012.

14. In her performance evaluation for the review period April 1, 2012 through March 31, 2013, Complainant's supervisor, Geraldine Ventura, rated Complainant's job performance at rated Level 2.

15. In her performance evaluation for the review period April 1, 2013 through March 31, 2014, Complainant's supervisor, Vanessa Carlson, rated Complainant's job performance at Level 2. However, Ms. Carlson rated Complainant at Level 1 ratings in the core competencies of Communication, Interpersonal Skills, and Accountability. In the End of Performance Year Narrative, Ms. Carlson, wrote:

> As the first contact of internal and external customers, Jacquie plays an important role in laying the foundation for the first impression made about our home and our staff. It is a unique position, in that, while carrying out duties throughout the course of each workday, she is in constant view and within earshot of anyone walking or wheeling past her workstation. It provides the unique opportunity of serving as a role model for internal and external customers, which included fellow employees. Jacquie's flexibility is evident with residents, families, visitors and volunteers, but also needs to extend to fellow employees. She has the knowledge and skills to apply them to all she encounters, but needs to do so more consistently with other staff members.
>
> By focusing on the areas in need of improvement, while maintaining the areas currently performing satisfactorily in, Jacquie will be able to assist us in setting our home apart from all others by making excellence the norm and not the exception.

[3] Neither party offered any evidence as to who Mr. Fabrizio is and whether he was a Fitzsimons resident, guest, or employee.

16. In her performance evaluation for the review period April 1, 2015 through March 31, 2016, Complainant's supervisor, Lynne Miller, who at that time was the Fitzsimons Assistant Nursing Home Administrator, rated Complainant's job performance at rated Level 2. Ms. Miller rated Complainant at Level 3 ("Consistently Exceptional") in the core competencies of Communication and Customer Service.[4] Ms. Miller wrote in the End of Performance Year Narrative Section:

> Jacquelyn is an outstanding employee with great customer service skills. She is above and beyond in communication and customer service as evidenced by her genuine interactions with residents and family members. She is dependable and courteous with all customers and has zero complaints about her service.

17. Complainant was rated Level 2 in her performance evaluation for the period 2016-2017.

18. Complainant's mid-year review for the period April 1, 2017 through September 30, 2017, was signed electronically by Lynne Miller, who was then the Assistant Nursing Home Administrator. Ms. Miller assessed Complainant's performance in each of her core competencies as follows:

> Accountability: "Completes tasks daily. No complaints from residents or families related to front desk services. Coordinates with co-workers to ensure coverage."
>
> Communication: "Communicates with NHA/ANHA about challenges or concerns at the front desk. Alerts when visitors are in the building, requests for appointments and resident needs. Passes on pertinent information to others covering the front desk. Responds well to supervisor requests."
>
> Customer Service: "As mentioned above, no concerns from residents or families about service at the front desk. Above and beyond in relationships with residents. Assists NHA/ANHA by screening phone calls from recruiters/sales people. Responsive to resident inquiries, addresses problems immediately or contacts supervisor/appropriate dept manager to assist as needed."
>
> Interpersonal Skill: "Interacts with residents, family and guests well. Accepts feedback [from] supervisor, implements suggestions timely."
>
> Job Knowledge: "Brings forward important concerns or identified areas of improvement. Completes job duties timely and proficiently in accordance with facility policy. Seeks clarification as needed."
>
> Occupational Safety: "Demonstrates competency in this area."

[4] Complainant's performance evaluation for the 2014-2015 review period was not in Complainant's personnel file and was not offered into evidence by either party.

Applicable Policies and Rules

19. At all times relevant to this matter, Complainant was subject to the CDHS Code of Conduct. (Stipulated fact)

20. The CDHS Employee Code of Conduct, which Complainant signed on April 27, 2017, provides as follows:

> The Department of Human Services is committed to providing a work environment in which employees feel safe and are able to successfully perform their job duties to fulfill the mission of the Department. As representatives of the State of Colorado and the Department of Human Services, all Department employees are expected to conduct their duties with the highest standards of integrity and professionalism. Employees must use reasonable judgment and refrain from conduct which reflects unfavorably on the Department and State of Colorado. All employees shall:
>
> - Be professional, respectful, truthful, and courteous to co-workers, customers, clients, partners and contractors at all times.
> - Perform job tasks promptly and effectively and always strive to perform at the highest level possible.
> - Serve as a positive role model to others.
> - Be responsive to client and co-worker requests and needs.
> - Accept responsibility for their own work, behavior, and actions.
> - Communicate in a professional and respectful manner.
> - Resolve conflicts in an appropriate, respectful, timely, and courteous manner.
> - Be active learners who are committed to forward-looking innovation and solutions.
> - Treat everyone fairly and demonstrate respect for all people and their ideas.
> - Listen actively and share information in an open, truthful, and appropriate manner.
> - Avoid conflicts of interest that may harm the reputation of our clients, business partners, the Department, and the State of Colorado.
> - Act on the values of the Department; be good stewards of public trust and public resources.
> - Adhere to all Federal and State laws, State Personnel Rules, and Department policies and procedures.
>
> By signing this acknowledgement, I am indicating that I reviewed, understand, and will abide by the CDHS Employee Code of Conduct.

21. At all times relevant to this matter, Complainant was subject to the Colorado Classified Employee Handbook. (Stipulated fact.)

22. At all times relevant to this matter, Complainant was subject to the Fitzsimons Attendance, Call-In, Tardy, and Overtime Policy, # N-200.430.00. (Stipulated fact.)

23. Board Rule 1-12 provides that "[e]mployees are required to know and adhere to personnel rules, laws, and executive orders governing their employment. Departments are required to make those rules, laws, and executive orders available to employees."

24. Board Rule 6-9 provides that, "[t]he decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Complainant's Prior History with Fitzsimons Employee CindiLou Peniston

25. CindiLou Peniston is an Administrative Assistant II who has been employed at Fitzsimons for approximately eleven years. At the time of the hearing, she was still employed at Fitzsimons.

26. During Ms. Peniston's tenure at Fitzsimons, management has moved Ms. Peniston from department to department several times.

27. At all times relevant to this matter, it was generally known among Fitzsimons management personnel that Complainant and Ms. Peniston did not like each other and did not work well together. Ms. Peniston had a reputation among Fitzsimons employees, especially non-white employees, as abrasive, intentionally annoying, and quick to send emails complaining about others' conduct.

28. On March 3, 2015, Greg Ryan, who was then the Fitzsimons Assistant Nursing Home Administrator, and Melissa Blair, Fitzsimons' Recreational Therapy Director, who was then Ms. Peniston's supervisor, met with Complainant and Ms. Peniston to discuss their problematic working relationship.

29. On March 4, 2015, a Fitzsimons employee met with Ms. Blair and reported that Complainant stated "I hate her," referring to Ms. Peniston. Ms. Blair memorialized this report in writing and placed it in Complainant's personnel file.

30. On March 17, 2015, Mr. Ryan and Ms. Blair issued a Memorandum of Understanding (MOU) to Complainant and Ms. Peniston, with the subject line "Respectful and Professional work place." The MOU indicated that the goal of the March 3, 2015 meeting "and moving forward is for each of you to treat each other with respect and professionalism within your roles here at the Colorado Veterans Community Living Center."

Complainant's Participation in the Fitzsimons Employee/Management Committee

31. Fitzsimons has an Employee/Management Committee (EMC), pursuant to which representatives of Fitzsimons employees and management discuss workplace issues.

32. Complainant became an employee representative on the EMC beginning in mid-2017.

33. Management employees on the EMC perceived Complainant as unprofessional and angry during these meetings, as well as unwilling to be collaborative.

Ms. Peniston Reassigned to Share Front-Desk Responsibilities with Complainant

34. Ms. Peniston was reassigned from the Fitzsimons Recreational Therapy department to the front desk in or about August 2017. Respondent's witnesses offered varying and conflicting explanations for this reassignment.

35. At the time of Ms. Peniston's reassignment, Complainant and Ms. Peniston were confused about how the front desk duties were to be divided between them. Neither one was provided with a job description. Despite multiple requests from both of them for guidance, management failed to clarify their duties so as to minimize the friction and confusion between them.

36. It is not clear who decided to reassign Ms. Peniston to the front desk, why she was reassigned there, and how the well-known animosity between Complainant and Ms. Peniston would be successfully navigated.

Leslie Gaylord Becomes Complainant's Supervisor and Appointing Authority

37. Leslie Gaylord was hired by Fitzsimons in January 2017 as the Admissions Coordinator, reporting to the Marketing Director. This was her first position with the State of Colorado. Previously, she had worked for the U.S. military for many years.

38. Ms. Gaylord became the Fitzsimons Volunteer Coordinator on November 6, 2017. One of her responsibilities in this position was the front desk, which included supervising Complainant and Ms. Peniston. She also served as Complainant's appointing authority at this time.

39. Ms. Gaylord was not provided any formal training regarding managing and disciplining employees or about State of Colorado personnel rules.

40. Shortly after assuming supervisory responsibility for Complainant and Ms. Peniston, Ms. Gaylord learned that the two had a history of not working well together and felt personal animosity towards each other. Ms. Gaylord was not provided any useful guidance concerning how to manage the conflicts between Complainant and Ms. Peniston.

41. Management, including Ms. Gaylord, failed to take any effective steps to reduce the conflict and friction between Complainant and Ms. Peniston.

The Events of November 29, 2017

42. On November 29, 2017, Complainant and Ms. Peniston had a disagreement about who would handle a donation that had been loaded onto a luggage cart.

43. It was Complainant's understanding that she would deal with the donation herself. However, Ms. Peniston began taking the luggage cart with the donated items past the front desk and into the facility. Complainant told Ms. Peniston that she, Complainant, was already taking care of the donation.

44. Subsequently, Ms. Peniston pushed the cart towards Complainant, and it hit the wall next to her. Complainant perceived Ms. Peniston's act as an attempt to hit her with the cart and harm her.

45. Complainant called Ms. Gaylord and told her what had happened and that she needed to come up to the front desk. Complainant made some sort of comment about "whooping" Ms. Peniston's ass.

46. Ms. Gaylord called Complainant and Ms. Peniston into a meeting in her office and directed them to conduct themselves professionally. Shortly after the meeting, Complainant pointed at Ms. Peniston and told her that she had better not talk to her like that again, or words to that effect.

47. Later that same day, Ms. Miller and Ms. Gaylord reviewed video showing the front desk. A disc was made of Complainant pointing her finger at Ms. Peniston after the meeting with Ms. Gaylord, but the video of Ms. Peniston pushing the cart towards Complainant was not preserved.

48. Respondent's witnesses were unable to satisfactorily explain why the luggage cart incident, which occurred just minutes before the finger-pointing incident, was not preserved.

Board Rule 6-10 Meeting and the December 28, 2017 "Disciplinary" and Corrective Action

49. On December 3, 2017, Complainant smoked a cigarette just outside the main entrance to Fitzsimons, a violation of the Fitzsimons no-smoking policy.

50. On December 12, 2017, Ms. Gaylord held a Rule 6-10 meeting with Complainant "to discuss allegations of communication skills and delivery of information to employees and supervisors, failure to keep a workplace free of violence, threats, harassment, intimidation and other disruptive behaviors, as well as failure to adhere to facility smoke free policy."

51. Pamela Cress of Colorado WINS attended this meeting as Complainant's representative. Cynthia Nunez of the CDHS Human Resources (HR) department, served as Ms. Gaylord's representative.

52. Ms. Gaylord addressed Complainant's violation of the no-smoking policy on December 3, 2017, as well as Complainant pointing her finger at Ms. Peniston on November 29, 2017.

53. When Complainant raised the issue of Ms. Peniston shoving the luggage cart at her on November 29, 2017, Ms. Gaylord said that the incident was not captured on video. Ms. Gaylord recommended that she submit a workplace violence complaint to Vernon Jackson, the CDHS Civil Rights Coordinator.

54. On December 28, 2017, Ms. Gaylord issued what she characterized as a "corrective and disciplinary action" based on the November 29, 2017 and December 3, 2017 incidents.

55. Complainant submitted a Step 2 written grievance to her second-line supervisor, Ms. Miller, about this action, stating that the so-called disciplinary action was not a disciplinary action, and it did not clearly indicate what policies Complainant had violated. In the grievance, Complainant denied that she said she would "whoop [Ms. Peniston's] ass," and alleged that "I am continually required to work with someone who baits, intimidates and belittles, with no relief despite pleas for help." She also objected that there was no investigation into Ms. Peniston's conduct on November 29, 2017, "when I clearly complained about the workplace violence and

inappropriate actions of Ms. Peniston." Complainant requested the following remedies: removal of the corrective action, removal of the term "disciplinary action," protection from further violence and intimidation by Ms. Peniston, and no retaliation for this and any future complaints.

56. On January 18, 2018, Complainant met with Ms. Miller to discuss her grievance. In an undated grievance decision letter, Ms. Miller concluded that Complainant violated the facility's no-smoking policy and that her gesture towards Ms. Peniston on November 29, 2018 was "unprofessional and inappropriate." Ms. Miller agreed that the December 28, 2017 action was not a disciplinary action, but only a corrective action, and that Ms. Gaylord would provide her with a revised letter "clarifying your R[ule] 6-10 conclusion." Ms. Miller denied Complainant's request that the corrective action be rescinded.

57. The December 28, 2017 action was replaced by a properly-termed corrective action issued on February 7, 2018, based on the same two incidents -- smoking in front of the facility on December 3, 2017, and Complainant's finger-pointing aimed at Ms. Peniston on November 29, 2017. With respect to Complainant's interaction with Ms. Peniston, Ms. Gaylord wrote, "it is evident that your gestures towards Ms. Peniston were unprofessional and inappropriate. In accordance with the CDHS Workplace Violence Policy, the Department does not tolerate oral or written statements or gestures that communicate a direct or indirect intent to commit physical or psychological harm. The video footage revealed that you pointed your finger directly at Ms. Peniston and leaned your body forward to lean on the counter top in between you and Ms. Peniston while you were standing and she was seated. A shift in your posture was evident. Witness statements were also reviewed during the grievance process that indicates [sic] you stated 'don't every talk to me like that again' with what was perceived to be an angry tone of voice." Ms. Gaylord mandated that Complainant take training courses to be completed by June 30, 2018, that Complainant adhere to the no-smoking policy, and that she conduct herself "in accordance with the CDHS Employee Code of Conduct."

Christmas 2017 and its Aftermath

58. On some Christmases, the front desk at Fitzsimons remained unattended for at least part of the day. On or about December 14, 2017, Complainant asked Carrie Escalante, who was then the Fitzsimons Administrator, whether the facility would be closed on Christmas. Ms. Escalante referred Complainant to Ms. Gaylord, who informed Complainant that it would be business as usual on Christmas day, which in 2017 fell on a Monday.

59. On Monday, December 25, 2017, Complainant reported to work despite not feeling well and feeling tired. She did not have any flu or norovirus symptoms.

60. On Tuesday, December 26, 2017, Complainant went to work but felt worse than she did the day before. She spoke with Pinkie Fletcher, a Fitzsimons infectious disease nurse, who told her to go home. At 10:58 a.m., Complainant sent Ms. Gaylord an email, stating, "I am sick. I need to leave as I have symptoms of norovirus. I have spoken to Pinkie and cannot find you. I will text you also." Complainant then left the facility.

61. On Wednesday, December 27, 2017 at 7:25 a.m., Complainant sent an email to Ms. Gaylord, informing her that she would not be in that day because she was not yet symptom-free.

62. Ms. Gaylord responded to Complainant via email at 8:16 a.m. on December 27, 2017, writing, "[y]ou will need to fill out a leave/absence request along with the medical certification clearing to to [sic] come back to work."

63. A medical certification form was used for employees on FMLA leave who were ready to return to work.

64. On Thursday, December 28, 2017 at 8:02 a.m., Complainant sent an email to Ms. Gaylord, with a "cc" to Ms. Fletcher, writing, in pertinent part:

> I am feeling better than yesterday, in fact, milder symptoms that I reported to the infection control nurse. I am curious as to why you are requesting that I get a medical certification clearing 'to to' come back to work. . . . I plan to report to work symptom free on Sunday providing my off days are symptom free. Do you expect me to report my health status on my days off? Let me know as we need to be on the same page and I don't think we are.

65. In response to Complainant's email, Ms. Gaylord sent Complainant information about Respondent's policy on reporting employee illness. The policy required a doctor to certify that an employee who had been out sick for three days or more was fit to return to work. Complainant responded by email that she had only been out sick for two days and Friday and Saturday were her days off. She also asked who was supposed to sign the medical certification. Ms. Gaylord responded that the certification should be completed by Complainant's primary care physician, but the response did not address the fact that Complainant had been out sick only two days at that point.

66. On December 28, 2017, Ms. Miller sent Ms. Gaylord an email telling her that when she saw Complainant on Christmas day, Complainant told her "she didn't feel well and was tired, but did not mention specific symptoms." Ms. Miller did not believe that Complainant looked like she had flu or norovirus symptoms.

67. Because Complainant's regular days off were Friday and Saturday, she did not work on Friday, December 29, 2017 or Saturday, December 30, 2017.

68. Complainant did not contact Ms. Gaylord on Sunday December 31, 2017 or Monday January 1, 2018, to let her know she would be absent on those days.

69. On Tuesday, January 2, 2018, Complainant's representative, Ms. Cress, sent Ms. Gaylord an email requesting that Ms. Gaylord send Complainant the medical certification form that Ms. Gaylord required.

70. On Wednesday, January 3, 2018, Complainant sent emails to Ms. Gaylord and Ms. Fletcher asking for the Fitness to Return (FTR) document that Ms. Gaylord required her physician to sign. Complainant informed Ms. Gaylord that she had a doctor's appointment that Friday, January 5, 2018. In her email to Ms. Fletcher, Complainant wrote, "I have asked Leslie to send me the med cert form for my doctor twice and so did Pam Cress. Leslie ended up sending a notice of a mandatory meeting for volunteers. . . . Anyway, would you leave it with the security guard this evening and I will have my daughter pick it up. Thanks." The FTR form was emailed to Complainant later on January 3, 2018.

71. On Friday, January 5, 2018, Complainant saw her primary care physician at Kaiser and submitted the FTR documentation for signature. Complainant was told that it would take between three to five business days for Kaiser to complete. Complainant then called Ms. Fletcher and conveyed this information. Ms. Fletcher then sent an email to Ms. Gaylord forwarding the information, with copies to Ms. Miller, Joan Schwaninger, who was then the Director of Nursing Services, and Ms. Escalante.

72. On Tuesday, January 9, 2018, Complainant emailed her primary care physician asking if the FTR form had been signed yet.

73. On Wednesday, January 10, 2018, Complainant telephoned Ms. Gaylord and told her that she had not yet received her signed FTR form and it would be a couple days more.

74. On Wednesday, January 10, 2018, Complainant received notice that the FTR form was completed and was ready to be picked up. The form indicated that Complainant could return to work starting on January 9, 2018, but it was signed by Complainant's physician on January 10, 2018.

75. Complainant took the FTR form and slipped it under Ms. Gaylord's door at Fitzsimons late on Thursday, January 11, 2018 at approximately 6:20 p.m. Complainant returned to work on her next scheduled workday, Sunday, January 14, 2018.

76. On January 22, 2018, Ms. Gaylord wrote a manager's note memorializing a conversation she had with Complainant that Ms. Gaylord viewed as disrespectful.

77. On January 22, 2018, Ms. Gaylord informed Complainant that her absences from January 9 through January 11, 2018 were unexcused because her FTR form indicated that she was able to return to work on January 9, 2018. Ultimately, Ms. Escalante excused those absences and Complainant was paid for those days.

Ms. Peniston's Allegations About Complainant

78. On January 23, 2018, Ms. Peniston sent an email to Ms. Gaylord alleging that Complainant had yelled at Ms. Escalante the day before.

79. On January 29, 2018, Ms. Peniston sent Complainant an email, with a copy to Ms. Gaylord, asking that Complainant not remove Ms. Peniston's newspaper subscription handout from the front desk binder. She wrote:

> I was polite and respectful of you and did not remove yours. I do not appreciate this and it makes me mad. This is very unprofessional of you and very underhanded. If you do not like what I am doing please take it up with Leslie Gaylord, our Supervisor. Please do not make decisions independently as you obviously do not know how to be considerate, a team player or professional!

80. Complainant responded to Ms. Peniston's email with her own email, stating, "LEAVE ME ALONE AND STOP HARASSING ME, IT MAKES ME MAD!" (Capitalization in original.)

81. On February 6, 2018, Ms. Peniston sent an email to Ms. Gaylord with the subject line "Reporting Jacquie Anderson." The email describes a conversation with Complainant about

a form that Ms. Peniston wanted to use that Complainant viewed as unnecessary and a waste of paper:

> I said to Jacquie I hate how controlling you are. There is nothing wrong with ... then she raised her voice over me, she spoke up and said well I hate you! She shouted as she said it. . . . Will you please discuss this with her. I don't appreciate her shouting at me and telling me she hates me either. If she wants to stop using a form or following a rule she should discuss it with me and with you. *Thank you.* (Italics in original.)

Change in Complainant's Sunday Work Hours, Grievance, Final Grievance Decision

82. On January 30, 2018, Complainant was advised of a change in her work hours on Sunday. The start time was changed from 8:30 a.m. to 7:00 a.m. beginning February 11, 2018.

83. Complainant objected to the change, asserting that she was busy on Sundays before 8:30 a.m. and failed to see the need for expanded hours on Sunday, which she thought was the slowest day of the week. In an email to Ms. Gaylord on January 20, 2018, Complainant wrote, "I am very upset that you chose to extend my hours on Sunday, the slowest day of the week. . . . And please consider working with me when you make drastic changes to my schedule."

84. After consulting with Ms. Miller and the new Human Resources employee, Laura Swann, Ms. Gaylord responded to Complainant via email on January 31, 2018, writing, "[t]he decision was made based on the needs of the business and discuss with facility administration. We need to accommodate the needs of the residents who need to get in/out of the facility as well as family members arriving/leaving."

85. A review of facility video for Sundays in December 2017 and December 2018 indicates negligible traffic at Fitzsimons' front door between 7:00 a.m. and 8:30 a.m.

86. On January 31, 2018, Complainant requested a Step 1 grievance meeting to address her objection to the change in her Sunday schedule.

87. On February 6, 2018, Complainant met with Ms. Gaylord for her Step 1 grievance meeting. Complainant stated that she did not see the need for a receptionist to start at 7:00 a.m. on Sundays because there was not enough activity prior to 8:30 a.m. on Sundays. She also asked why no one talked to her about the schedule change before announcing it. Ms. Gaylord responded that she had viewed surveillance videos and there was activity as early as 7:00 a.m. Complainant indicated that she would continue her grievance. There is no indication that Ms. Gaylord told Complainant that she was required to start work at 7:00 a.m. on the next Sunday, February 11, 2018.

88. Complainant then said that she wanted to talk about Ms. Peniston, and alleged that Ms. Peniston intentionally "messes stuff up" at the front desk. She asked Ms. Gaylord, "what duties am I surrendering?" Ms. Gaylord replied that the two of them had to work the division of duties out for themselves. She offered mediation between Complainant and Ms. Peniston. Complainant rejected mediation, stating that she and Ms. Peniston despised each other.

89. On February 16, 2018, Ms. Gaylord issued a Step 1 grievance decision concerning the change in Complainant's schedule. Ms. Gaylord denied Complainant's request that her

Sunday schedule not be changed, writing, "Your duties at the front desk have been modified to reflect the need of the business. Moving forward, you will be required to report to work at 7 am."

90. On Sunday, February 18, 2018, Complainant arrived for work at 8:01 a.m.

91. On Sunday, February 25, 2018, Complainant arrived for work at 6:53 a.m.

92. On Sunday, March 4, 2018, Complainant arrived for work at 6:53 a.m.

93. On Sunday, March 11, 2018, Complainant arrived for work at 7:20 a.m.

Complainant's Work Place Violence Complaint, Investigation, and Investigative Report

94. On December 15, 2017, Mr. Jackson sent Complainant an email, informing her that he had been advised of her allegation during the December 12, 2017 Rule 6-10 meeting that she was afraid of Ms. Peniston. He wrote, in pertinent part:

> It was reported that you alleged the following:
>
> "Jacqueline told us that she has complained about Cindilou Pennington [sic] to several administrators in the past and nothing has been done. When asked what specifically she complained about she said that she is not comfortable working [with] her because she exhibits bi-polar behavior and schizophrenic behavior. She said she knows these symptoms like the back of her hand. she also indicated she didn't ever want her back to Cindilou because she was afraid of what she would do. Jackie also said that she feels that Cindilou's behavior needs to be addressed so she is going to watch her back - she's miserable. Pam Cress then asked if she is afraid for her safety and Jackie said yes."
>
> As such, it isn't clear whether you intended the above-mentioned grievance form as a report of unlawful discrimination or workplace violence.

95. Mr. Jackson attached the CDHS Civil Rights and Workplace Violence policies and a complaint form to his email.

96. On or about February 9, 2018, Complainant submitted a workplace violence complaint against Ms. Peniston to Mr. Jackson regarding the November 29, 2017 luggage cart incident.

97. Complainant described the incident in her Workplace Violence Incident Report as follows:

> I got a call from a citizen notifying me that she was on her way with donation and would like the luggage rack available. When she arrived she came in and got the luggage rack and went to her car and loaded the donations and returned them to the area where she picked up the luggage rack. I was busy with a visitor but acknowledged her. Cindilou went and got the luggage rack and headed down the hall. I asked her what she was doing and she replied that she was taking them to Melissa. I told her that I already had it taken care of so she should put it back. She became irate and told me since I want to be

so controlling to put it back myself and shoved the luggage rack toward me. I moved and it slammed into the wall.

Cindilou has been baiting and retaliating on an ongoing basis since this incident, call me name [sic] and sending nasty emails.

98. Mr. Jackson assigned the matter to Beth Miles, the CDHS Civil Rights Unit's Supervising Investigator, who enlisted Investigator Patricia Bowling to be the matter's lead investigator.

99. Ms. Bowling and Ms. Miles interviewed Complainant, Ms. Peniston and Ms. Gaylord individually on February 14, 2018. They also reviewed the email exchange between Complainant and Ms. Peniston on January 29, 2018, the February 6, 2018 email from Ms. Peniston to Ms. Gaylord in which Ms. Peniston alleged that Complainant told Ms. Peniston that she hated her, the December 28, 2017 corrective action, Complainant's step 1 grievance concerning the December 28, 2017 corrective action, Ms. Miller's step 1 grievance decision, the February 6, 2018 corrective action, the CDHS Code of Conduct and the CDHS workplace violence policy.

101. Complainant described the luggage cart incident to the investigators that was consistent with the description in her Workplace Violence Incident Report. She told the investigators that "she feared for her safety during the incident." She explained the delay in submitting her report by stating that she had reported concerns to HR in the past and had not been satisfied with the results. She acknowledged that she and Ms. Peniston despised each other, adding that they clash at the front desk "because they have different ways of performing tasks and their roles have not been clearly defined." Complainant opined that there was no need for two receptionists at the front desk.

102. Complainant indicated that Ms. Peniston makes comments about Complainant's race that Complainant found offensive and insensitive. "Complainant concludes that she and others find [Ms. Peniston] to be 'annoying' and 'a nuisance' and states that volunteers have quit because of [Ms. Peniston's] demeanor. When asked if she felt [Ms. Peniston's] communication was an awkward attempt to fit in, Complainant responded 'yes.'"

103. Complainant was critical of Ms. Gaylord's supervision. Complainant was concerned that Gaylord is "dishonest," unfamiliar with procedures, and "did not know what to do." (Complainant's words according to the report.) "Complainant asserts that she asked Gaylord to help define her role and Respondent's role. . . . Complainant repeated several times that she asked her supervisor, Gaylord, to 'tell me what part of my job I need to surrender.'" Complainant denied that she frequently complained to Gaylord because Gaylord "does not do anything."

104. The investigators commented about their interview with Complainant as follows:

Complainant was sincere and appeared truthful, but was unable to provide specific information regarding why she feels physically or psychologically threatened by Respondent. Complainant believes the front desk is her domain.

Complainant is proud of her role at that [sic] Front Desk and takes great pride in her work. Complainant seems frustrated with the restructuring of front desk duties. Complainant is upfront about her disdain and lack of respect for

> Respondent and does not appear to recognize that putting aside these differences is necessary to maintain professionalism. Complainant demonstrates a willingness to create conflict to have her own way. Complainant's comments suggest that she is resistant to change.

105. Ms. Peniston stated that she was "forced" into the front desk position, and that it is not her desired position at Fitzsimons. She denied that she shoved the luggage rack at Complainant. She agreed with Complainant that their roles at the front desk are unclear. The report states that Ms. Peniston believes that "management could have done more to facilitate the transition but instead instructed Complainant and [Ms. Peniston] to 'do everything.' [Ms Peniston] states that to this date, no Position Description exists for the Front Desk role." Ms. Peniston expressed concerns that Complainant is sabotaging her, speaks ill of her to other employees and residents, and that complainant has been a problem for years. She added that friends and family who visit Complainant at work "look like trouble." She admitted that Ms. Miller has requested that she stop sending her emails.

106. The investigators commented about their interview with Ms. Peniston as follows:

> [Ms. Peniston] was sincere in her reports of events. [Ms. Peniston'] comments suggest that she believes she is overqualified to work at the front desk and that she may look down on Complainant. However, [Ms. Peniston's] interview suggests that she has a different skill set and attention to detail than Complainant which has allowed her to make necessary improvement to some processes. ... [Ms. Peniston] seems frustrated that she has been shifted between positions in the facility. While [Ms. Peniston] likely believes that she is a "team player," some of her efforts to connect with her peers have backfired.

107. During the investigators' interview with Ms. Gaylord, Ms. Gaylord described the events of November 29, 2018, but failed to mention Complainant's allegation of Ms. Peniston shoving the luggage cart at her, nor did she mention that Complainant pointed her finger at Ms. Peniston when Complainant told her not to treat her like that again. She also did not mention that she and Ms. Miller viewed video that same day, and preserved the finger pointing portion of the video but not the luggage cart incident. Ms. Gaylord stated that Complainant spoke about the luggage cart incident during the December 12, 2017 Rule 6-10 meeting, and Ms. Gaylord instructed Complainant to submit a workplace violence complaint.

108. Ms. Gaylord also conveyed that during a meeting Ms. Gaylord held with Ms. Peniston in early November 2017, Ms. Peniston accused Complainant of conduct towards her that violated the workplace violence policy. She also stated that previous management took Complainant's side in the dispute with Complainant, but did not cite to any evidence to support that opinion. Ms. Gaylord also told the investigators that she had repeatedly asked Complainant and Ms. Peniston to conduct themselves professionally "but situations still arise on a daily basis."

109. The report states that Ms. Gaylord alleged that Complainant had been absent for all of December 2017 and half of January 2018. It is unclear whether Ms. Gaylord misrepresented the facts or the investigators misunderstood Ms. Gaylord's statement about the issue. The report does not contain any statement from Ms. Gaylord about the Complainant's allegation that was the basis for the workplace violence complainant that was the ostensible reason for their investigation -- that Ms. Peniston shoved the luggage cart at Complainant on November 29, 2018.

110. The investigators commented about their interview with Ms. Gaylord as follows:

> Gaylord was candid and truthful. Gaylord is relatively new to Fitzsimons and has been tasked with managing two employees who have clashed for years. Gaylord is taking steps to address the problems and recognizes that it is important for her to be impartial and professional while engaging with the employees. Gaylord has demonstrated that she is willing to place the welfare of her subordinates and the facility over her own needs. Gaylord is an asset to the facility and her contributions should be commended.

111. The analysis section of the report follows in its entirety:

> Complainant alleges that [Ms. Peniston] violated CDHS Policy VI 3.5, "Workplace Violence." Specifically, Complainant alleges that [Ms. Peniston] "shoved a luggage rack at her. In her interview, Complainant added that [Ms. Peniston] made offensive comments based on Complainant's race. Complainant does not allege further incidents of workplace violence.
>
> [Ms. Peniston] admits that she placed a luggage rack between she [sic] and Complainant, but denies that she shoved the rack toward Complainant. Video does show Complainant waving her finger and leaning towards [Ms. Peniston], as though she is admonishing her.
>
> Complainant complaint of workplace violence derives from the November 29, 2017 incident: the same situation for which she received a Corrective Action after a Rule 6-10 meeting. Complainant did not assert that Respondent's actions constituted workplace violence until after Complainant received a Corrective Action related to the incident. It denies [sic] credibility that Complainant received a Corrective Action for the same offense that she now complains about as an incident of workplace violence.
>
> Emails between Complainant and [Ms. Peniston] dated January 29, 2018 and February 6, 2018 suggest that [Ms. Peniston's] attempts to communicate and assert her right to be at the Front Desk are met with hostility by the Complainant. Complainant's response to the January 29 email indicates she has failed to adhere to the professional standards Gaylord communicated during their December 12, 2017 meeting and the related corrective action issued thereafter. Both the January 29th email and the February 6 email involve Complainant destroying or otherwise altering the workspace of [Ms. Peniston], which is an inappropriate act not consistent with the CDHS Code of Conduct.

112. The Conclusion section in its entirety follows:

> Based on the available information, it is unlikely that a reasonable person would consider [Ms. Peniston's] actions on November 29, 2017 as communicating a direct or indirect intent to commit physical or psychological harm. As such, there is insufficient evidence to conclude that [Ms. Peniston's] behavior violates the policy against workplace violence.

Complainant's behavior on November 29, 2017, based on statements made to Gaylord and the circumstances of the situation (Complainant ordering [Ms. Peniston] not to deliver packages to the designated area) appears to violate the CDHS Code of Conduct. Complainant's behavior suggests continuing resistance to allow anyone, other than herself, to manage the Front Desk area.

Complainant, based on her interview and continued behaviors, refuses to follow management's instructions to accept a co-worker at the Front Desk and to conform to the CDHS Code of Conduct. This is evidenced by Complainant's response to [Ms. Peniston's] email of January 29, 2018 and the actions described in the February 6, 2018 email. Complainant demonstrates a lack of respect for [Ms. Peniston] and her supervisor.

According to Rule 6-8, an employee may only receive corrective or disciplinary action once for a single incident. Complainant cannot be disciplined a second time for the incident of November 29, 2017 from which she received a corrective action. However, Complainant's January 29, 2018 and February 6, 2018 emails suggest that the corrective action issued as a result of the December 12, 2017 R[ule] 6-10 meeting has not been effective in changing Complainant's behavior, and that she has likely violated the corrective action issued.

113. The report also contains a section labeled Options/Observations, as follows:

Complainant and [Ms. Peniston] both describe dissatisfaction with their current positions, although Complainant states that she enjoyed the Front Desk position when she worked alone.

Assigning Complainant and [Ms. Peniston] in close proximity to one another, and without the clear definition as to their roles, creates conflict. Preparing well-defined PDQs will be helpful in reducing arguments over responsibilities and will enable Complainant and [Ms. Peniston] to take ownership over their projects and be evaluated on individual contributions related to the roles and responsibilities of the Front Desk.

Interviews with Complainant and [Ms. Peniston] suggest there may not be enough work at the Front Desk to support two full-time employees. If Complainant and [Ms. Peniston] have sufficient and separate workloads, it may reduce the amount of time they have to engage each other, and reduce conflict.

Lack of designated duties between the Complainant and [Ms. Peniston], however, is not a justification for Complainant to act or communicate in an aggressive and unprofessional manner to a co-worker, simply because she believes the Front Desk belongs to her.

March 6, 2018 Disciplinary Action

114. On February 7, 2018, Respondent issued a notice of a Board Rule 6-10 meeting, scheduled for February 13, 2018, which was received by Complainant. (Stipulated fact.) The notice was signed by Ms. Gaylord.

115. The notice states, in pertinent part, that the areas of Complainant's job performance that needed to be discussed were:

> communication skills, delivery of information to employees and supervisors along with your continued failure to keep the workplace free of violence, threats, harassment, intimidation and other disruptive behaviors as well as adhere to policy and procedures of CDHS. The identified areas violate policies such as CDHS Employee Code of Conduct and Attendance, Call-In, Tardy, and Overtime Policy, Infection Prevention and Control Plan, CDHS Workplace Violence Policy.

116. Pursuant to the written notice received by Complainant, a Board Rule 6-10 meeting was conducted on February 13, 2018 between Respondent and Complainant. Present for that meeting on behalf of Respondent were Ms. Gaylord and Ms. Swann. Complainant attended that meeting with her chosen representative, Ms. Cress. (Stipulated fact.)

117. During the February 13, 2018 Rule 6-10 meeting, Ms. Gaylord asked Complainant a series of questions about Complainant's health status on December 25, 2017, her absences from December 27, 2017 through January 11, 2018, and her noncompliance with the new Sunday schedule that required her to start at 7:00 a.m.

118. On February 16, 2018, Complainant sent an email to Ms. Gaylord, Ms. Cress and Ms. Escalante, providing additional information as a follow-up to the Rule 6-10 meeting. The email stated that Ms. Gaylord knew that Complainant was out sick and would be unable to return until she obtained her doctor's signature on the FTR form and to call in would have been unnecessary. Complainant also denied that she knew she had the flu on December 25, 2017.

119. On March 6, 2018, Respondent issued a disciplinary action letter to Complainant. (Stipulated fact.) The Disciplinary action reduced Complainant's base salary by 10% for six months starting on March 3, 2018.

120. The disciplinary action was based on Ms. Gaylord's determination that Complainant violated applicable policies by not contacting Ms. Gaylord on a daily basis when she was out from December 27, 2017 through January 11, 2018; that Complainant showed up at work ill on December 25, 2017, putting Fitzsimons residents, a vulnerable population, and staff at risk; and that Complainant failed to adhere to the directive that she begin work on Sundays at 7:00 a.m. Ms. Gaylord concluded that Complainant violated the Colorado State Employee Handbook, the Fitzsimons Attendance, Call-in, Tardy and Overtime Policy, and Board Rule 1-12. The disciplinary notice does not clearly tie Complainant's alleged misconduct to specific policy violations.

121. Ms. Gaylord listed the bases for her determination as: (1) the February 7, 2018 corrective action for failure to comply with Fitzsimons' Attendance, Call-In, and Tardy Policy and the Code of Conduct; (2) the January 30, 2018 meeting Ms. Gaylord held with Complainant to discuss "professional work relationships, assigned duties, and adjusting work schedule for business need"; (3) a December 14, 2017 training meeting Ms. Gaylord held with Complainant to discuss "front desk duties and expectations, attendance and leave, Google calendar bookings, Admin-Front Desk information book;" and (4) a December 4, 2014 MOU given by Nursing Home Administrator Greg Ryan regarding Time and Attendance.

122. None of these matters was discussed with Complainant during the February 13, 2018 Rule 6-10 meeting.

123. According to a manager's note drafted by Ms. Gaylord about the meeting she held with Complainant to deliver the disciplinary action, Complainant argued with her, told her the statements in the notice were not true, called her "foul," and "continued cursing and telling me how it was my fault and then got up and slammed my door when she left."[5]

The "White Box" Incident

124. On Sunday, March 4, 2018, a volunteer brought in a white box that had been left outside the facility's front door.

125. Complainant and the security guard looked in the box. It contained accessories for a vaporizer, or "vape" pen.

126. Complainant put the box on her desk behind the computer monitor, but later removed it from the facility.

127. On Monday, March 5, 2018, Complainant told Ms. Gaylord about the white box, identified the resident that she believed owned it, and told her that she took it out of the facility and put it in her car. Complainant wanted to give the box to the resident/owner. Ms. Gaylord directed Complainant to speak to a social worker instead about what to do with the box.

128. Complainant spoke with the social worker and was advised to dispose of the box, which she did in the trash at 7-Eleven across the street from the facility.

129. After learning about the white box, Ms. Gaylord informed Ms. Miller. Ms. Miller spoke with the security guard at approximately 6:00 p.m. on March 5, 2018, and obtained a statement from him.

130. Ms. Miller asked Ms. Gaylord to obtain a statement about the white box from Complainant.

131. On March 6, 2018 at 9:50 a.m., Ms. Gaylord sent an email to Complainant requesting a written statement regarding the white box.

132. Complainant replied that she spoke with the social worker and was advised what to do with the box. She stated that there was no need for a written statement.

133. Informed of Complainant's refusal to provide a written statement, Ms. Miller sent an email to Complainant explaining that a written statement was necessary because the box may have been the personal property of a Fitzsimons resident.

134. When Complainant balked, Ms. Miller scheduled a meeting with Complainant for 3:00 p.m. that day.

135. According to Ms. Miller, Complainant became accusatory, aggressive, and defensive in the meeting. She raised her voice and accused Ms. Miller of "bullying and harassing."

[5] In her manager's note, Ms. Gaylord spelled it "fowl."

136. Shortly after that meeting, Complainant sent Ms. Miller an email, in which she explained that a volunteer brought the box into the facility on Sunday, she and the security guard looked inside the box and discovered accessories to a vape pen, she took the box away from the facility, she spoke with Ms. Gaylord who told her to talk to the social worker, who advised her to throw the box away, which she did in the trash at 7-11 across the street.

Events of March 15, 2018

137. On March 15, 2018 at 8:53 a.m., Ms. Peniston sent an email to Ms. Gaylord, alleging that Complainant said to her, "I hate you and this place." Ms. Peniston identified LaShawn Williams, a Fitzsimons Administrative Assistant, as having overheard Complainant's comment, or part of it.

138. Ms. Gaylord forwarded Ms. Peniston's message to Ms. Swann at 9:54 a.m.

139. At 10:34 a.m., Ms. Swann sent Ms. Gaylord an email informing her that Ms. Swann spoke with Ms. Miller and decided to put Complainant out on administrative leave. "I am doing the Admin Leave letter right now and will send it to you so you can provide it to her ASAP."

140. Neither Ms. Swann nor Ms. Miller spoke with Complainant or with Ms. Williams to confirm the veracity of Ms. Peniston's allegation before deciding to place Complainant on administrative leave.

141. Later that same day, Ms. Gaylord hand-delivered the written notice of administrative leave. The notice states that the reason for the decision to place Complainant on administrative leave was that Ms. Gaylord received "information that supports the need to investigate matters relating to allegations of employee misconduct."

142. On that same day -- March 15, 2018 -- Aaron Termain sent a memorandum to Ms. Gaylord rescinding her appointing authority concerning Complainant. This action left Mr. Termain as Complainant's appointing authority.

A Second Rule 6-10 Meeting -- April 9, 2018 -- and Its Aftermath

143. On March 29, 2019, Mr. Termain sent Complainant a notice of a Rule 6-10 meeting scheduled for April 5, 2018. The meeting was later rescheduled to April 9, 2019.

144. In preparation for the Rule 6-10 meeting, Mr. Termain spoke with Ms. Escalante, Ms. Miller and Ms. Gaylord about both Complainant and Ms. Peniston. He also reviewed the workplace violence incident report and the attachments thereto. Ms. Swann prepared a script for him and he drafted questions.

145. The Rule 6-10 meeting was held on April 9, 2018. Ms. Cress attended at Complainant's representative, and Ms. Swann attended as Mr. Termain's representative.

146. Ms. Swann attempted to record the meeting, but was unable to properly save the recording. Consequently, there is no recording of this Rule 6-10 meeting.

147. According to the script prepared by Ms. Swann and Mr. Termain, as well notes taken by Ms. Swann and Ms. Cress during the Rule 6-10 meeting, Mr. Termain asked Complainant questions about the workplace violence incident report, Complainant's handling of

the white box incident, Complainant's interactions with Ms. Miller and Ms. Gaylord on March 6, 2018, and Complainant's comments to Ms. Peniston on March 15, 2018. It does not appear that Mr. Termain straightforwardly presented information about the reasons for potential discipline or the sources of that information. Ms. Cress had trouble understanding what the allegations against Complainant were.

148. Within ten days after the Rule 6-10 meeting, Mr. Termain told Ms. Swann that he was leaning towards terminating Complainant's employment. First, however, he wanted to look at more information. Consequently, Ms. Swann pulled Complainant's personnel file and CDHS and State Personnel rules.

149. After the Rule 6-10 meeting, Mr. Termain spoke with the Fitzsimons leadership again, namely Ms. Escalante, Ms. Miller and Ms. Gaylord. He reviewed Complainant emails and Ms. Peniston emails.

150. He also reviewed Complainant's personnel file, including her performance evaluations. He did not review Ms. Peniston's personnel file nor did he interview Ms. Peniston.

151. Mr. Termain did not review Ms. Peniston's corrective actions, he did not review Ms. Peniston's personnel file. He did not investigate Ms. Peniston's prior work issues. He did not investigate Ms. Peniston's dissatisfaction with her assignment to the front desk. He did not investigate Complainant's claims of Ms. Peniston's racial comments, and he did not interview Ms. Peniston. Concerning Ms. Peniston's emails, which included such statements as, "I hate how controlling you are," and characterizing Complainant's conduct on one occasion as making her "mad" and "very underhanded," Mr. Termain did not view these statements as inappropriate. Mr. Termain concluded that Ms. Peniston was attempting to establish a working relationship with Complainant, who rebuffed those attempts.

152. Mr. Termain did not interview Ms. Williams to confirm that Complainant told Ms. Peniston on March 15, 2018 that she hated Ms. Peniston and "this place."

153. In considering the information he gathered and reaching his conclusion regarding the corrective or disciplinary action appropriate to Complainant's situation, Mr. Termain concluded that Complainant's statements were not credible because they were inconsistent with the reports of others. He viewed Complainant as acting in an unprofessional and insubordinate manner. He was critical of Complainant viewing herself as a victim. He believed that Complainant initiated the workplace violence claim as a result of the corrective action she received on February 6, 2018.

154. Mr. Termain relied heavily on the workplace violence incident report and that report's criticism of Complainant's conduct. He did not give much credence to the statements of Complainant and Ms. Peniston that they were unclear about their duties and that Ms. Gaylord was not helpful in resolving this issue, which lead to conflict and friction between the two. He did not believe their duties were undefined. He believed that Complainant and Ms. Peniston should have been able to work their differences out. He did not take the report's advice regarding defining roles. He did not agree that there was not enough work for two receptionists.

155. Mr. Termain's view of Fitzsimons management and Ms. Gaylord was that they were making reasonable efforts to coach Complainant to conduct herself in a professional manner and to use appropriate language, but Complainant was noncompliant. He was not at all critical of Fitzsimons' management or of how Ms. Gaylord managed the front desk employees. He denied that Ms. Gaylord lacked knowledge about state personnel rules.

156. Mr. Termain's conclusion from his review of Complainant's personnel file was that its contents verified what he had already seen in the workplace violence report and Complainant's emails and corrective actions. Although Mr. Termain believed that Complainant received a few good evaluations during her employment at Fitzsimons, he did not believe that these good evaluation held much weight or merit. With respect to the 2016-2017 annual performance evaluation and the 2017-2018 mid-year evaluation, Mr. Termain viewed these as Complainant's previous supervisor, Vanessa Carlson, not wanting to deal with Complainant's issues, failing to realize that the 2017-2018 mid-year evaluation was drafted by Ms. Miller, not Ms. Carlson. Mr. Termain further discounted the 2017-2018 mid-year review by indicating that he did not glean very much information from it.

157. Complainant was on administrative leave from March 15, 2018 until her termination on September 7, 2018.

158. Mr. Termain and Ms. Swann contended that it took so long for Mr. Termain to make a decision about Complainant's employment because of challenging work schedules and because they wanted to get the decision and its rationale right.

159. Mr. Termain testified at hearing that he did not make a final decision until he was drafting the disciplinary letter during the first week of September 2018.

September 7, 2018 Notice of Disciplinary Action

160. On September 7, 2018, Mr. Termain issued his notice of disciplinary action, terminating Complainant's employment. The notice states that the basis for the decision was Complainant's interactions with Ms. Peniston, which evidenced a refusal to accept Ms. Peniston as a co-worker at the front desk and aggressive conduct towards her, interactions with Ms. Gaylord and Ms. Miller, which evidenced disrespect and insubordination, taking the "white box with drug paraphernalia" to her car, and the incident on March 15, 2018 with Ms. Peniston.

161. In the disciplinary notice's discussion of the Rule 6-9 factors, two significant factors are not mentioned -- previous performance evaluations and mitigating circumstances.

162. The section headed "Information presented by you and others" -- contains nothing but the Code of Conduct.

163. Mr. Termain's entire discussion of the Rule 6-9 factor "the nature, extent, seriousness and effect of the act" is as follows: "Your continuous violations of the Code of Conduct and your failure to keep a workplace free of violence, threats, harassment, intimidation and other disruptive behaviors."

164. The notice does not identify to what Mr. Termain is referring when accusing Complainant of "violence, threats, harassment, intimidation and other disruptive behaviors."

165. The notice addresses the concept of "extent" in characterizing Complainant's alleged violations of the Code of Conduct as "continuous."

166. Mr. Termain fails to discuss the extent of Complainant's other purported problematic conduct.

167. The disciplinary notice did not discuss what Mr. Termain viewed as the seriousness and effect of Complainant's purported inappropriate conduct.

168. In the notice's Background section, Mr. Termain writes, "Allegations of workplace violence were investigated by the CDHS Civil Rights Unit . . . ." He failed to identify the allegations of workplace violence as Complainant's, and the purported perpetrator as Ms. Peniston.

169. Mr. Termain also notes that the Rule 6-10 meeting was recorded, but did not indicate that that the recording was lost.

170. Mr. Termain referred to the contents of the white box on more than one occasion as "drug paraphernalia," which was his own interpretation of the contents of the white box, and nobody else's.

Economic Losses Incurred by Complainant As a Result of Disciplinary Actions

171. Prior to the March 6, 2018 disciplinary action, Complainant's gross weekly base salary was $823.40.

172. From March 3, 2018 through June 30, 2018, with the imposition of the disciplinary reduction of 10% of her base salary, Complainant's gross weekly base salary was $741.08.

173. On July 1, 2018, all state employees were given a 3% increase in base salary. From July 1, 2018 through August 31, 2018, Complainant's gross weekly base salary was $763.32.

174. With the end of the six month disciplinary reduction in her salary, Complainant's gross weekly base salary went back up to $848.12.

175. From March 3, 2018 through June 30, 2018, a period of 17 weeks, Complainant should have been paid $823.40 weekly. Given the rescission of the 10% disciplinary reduction in her base salary, Complainant is owed $1,399.44.

176. From July 1, 2018 through August 31, 2018, a period of 9 weeks, Complainant should have been paid $848.10 per week. Given the rescission of the 10% disciplinary reduction in her base salary, Complainant is owed $763.29 for this period.

177. Complainant received her non-disciplinary weekly base salary for the week of September 1 through September 8, 2018 of $848.10.

178. Complainant's employment was terminated on September 7, 2018. From that date through June 30, 2019, a period of 42 weeks, Complainant would have been paid a gross weekly salary of $848.10 but for her termination, for a total of $35,620.20. With the 10% reduction in base salary for three months starting on September 8, 2018, a period of 13 weeks, Complainant's gross salary for this time period totals $34,517.67.

179. Complainant received the following benefits prior to her disciplinary dismissal: employer health care insurance contributions in the amount of $265.53 every two weeks; employer life insurance contributions in the amount of $4.49 every two weeks; employer dental insurance contributions in the amount of $12.96 every two weeks; and employer short term

disability insurance contributions in the amount of $2.29 every two weeks. For the period September 7, 2018 through June 28, 2019, Complainant's lost benefits equals $5,990.67.

180. Complainant applied for and was granted unemployment insurance benefits in the amount of $12,032 through April 28, 2019, at which time her unemployment insurance benefits were exhausted.

181. In order to qualify for unemployment insurance benefits, Complainant was required to apply for at least 5 jobs each month. She met those requirements. She obtained a part-time position as a home companion for Mission Health in September 2018, a position she still holds. Earning approximately $405 per week, Complainant's compensation from this position through June 28, 2019 is approximately $3,822.

DISCUSSION

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, 707 (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 scales are not weighted in any way by the appointing authority's initial decision to discipline." *Kinchen*, 886 P.2d at 706. Respondent has the burden of proving 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. *Id.* at 704. The ALJ is required to make "an independent finding of whether the evidence presented justifies [the disciplinary action]." *Id.* at 706.

With respect to Complainant's claim of race discrimination in violation of the Colorado Anti-Discrimination Act, Complainant bears the ultimate burden of proof.

The Board may reverse or modify a Respondent's disciplinary decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

HEARING ISSUES

THE MARCH 6, 2018 DISCIPLINARY ACTION

I. Complainant Did Not Commit All of the Acts for Which She Was Disciplined

The March 6, 2018 disciplinary action Ms. Gaylord imposed on Complainant reduced Complainant's base salary by ten percent for six months because of the following alleged acts or omissions: (1) Complainant purportedly came to work ill on December 25, 2017, in violation of the facility infection prevention and control plan; (2) Complainant did not contact Ms. Gaylord every day she was absent from December 28, 2017 through January 11, 2018; and (3) Complainant did not comply with the change in her Sunday schedule effective February 11, 2018.

Respondent failed to establish by a preponderance of the evidence that Complainant was sick with an infectious illness when she came to work on Christmas day in 2017. Complainant told Ms. Miller that day that she did not feel well and was tired, but had no other symptoms, and no symptoms of flu or norovirus. Ms. Miller testified at hearing that Complainant did not look ill, and did not display any signs of the flu or norovirus. At hearing, Ms. Gaylord testified that Complainant told her on December 26, 2017 that she was "sick as a dog" the day before, but during the February 13, 2018 Rule 6-10 meeting, Ms. Gaylord denied speaking with Complainant at all on December 26, 2018. Accordingly, Ms. Gaylord's hearing testimony is not credible and is accorded little or no weight. The weight of the evidence supports the conclusion that Complainant did not violate Fitzsimons' infection prevention and control plan by showing up for work on December 25, 2017.

Ms. Gaylord's expectation that Complainant should have informed her each day that she was going to be absent is unfounded. Complainant left work sick on Tuesday, December 26, 2017. She contacted Ms. Gaylord on Wednesday, December 27, 2017 to let her know she would not be in that day because she was not symptom free. Ms. Gaylord informed Complainant on that day that she would need a medical certification signed by her doctor before she came back to work. On December 28, 2017, Complainant emailed Ms. Gaylord and told her that she was feeling better than the day before. Complainant did not contact Ms. Gaylord on her scheduled days off, Friday and Saturday, December 29 and December 30. Complainant did not contact Ms. Gaylord on Sunday December 31, 2017 or Monday, January 1, 2018 to let her know she would be absent, but up to that point Ms. Gaylord had not yet provided Complainant the pertinent medical forms for her doctor's signature before she could return to work. On Tuesday, January 2, 2018 and Wednesday, January 3, 2018, Ms. Cress and Complainant requested the forms. On January 3, 2018, Complainant informed Ms. Gaylord that she had a doctor's appointment scheduled for Friday January 5, 2018. On January 5, 2018, Complainant informed Ms. Fletcher that Kaiser told her it would take three to five business days to get the FTR form signed by a doctor. So, as of January 5, 2018, Ms. Gaylord knew that that Complainant would not be permitted to return to work before Wednesday, January 10, 2018, and that she might not be able to return to work until Sunday January 14, 2018, not being scheduled to work on Friday or Saturday. On January 10, 2018, Complainant informed Ms. Gaylord that she had not yet received her signed FTR form.

Therefore, Ms. Gaylord knew, or should have known, that Complainant could not be expected to return to work until January 10, 11 or 14, 2018. On January 10, 2018, Ms. Gaylord knew that Complainant would not return to work until either January 11 or 14, 2018. The purpose of the attendance and call-in policy that Ms. Gaylord alleges Complainant violated is to inform one's supervisor of absences so that a replacement could be found. Given that Complainant was

required to have her doctor sign a FTR form before she was permitted to return to work, and given that she was not provided with the form until January 3, 2018, had a doctor's appointment on January 5, 2018, and was told it would take three to five business days from January 5, 2018, to obtain her doctor's signature on her FTR form, Ms. Gaylord knew, or should have known, that Complainant would be absent until at least January 10, 2018. When Complainant informed her on January 10, 2018 that she had not yet received the signed FTR form, Ms. Gaylord knew that she would not be at work on that day. January 11, 2018 is the only day unaccounted for. Ultimately, Ms. Escalante approved Complainant's absence on January 11, 2018.

Accordingly, Complainant was not derelict in her duty by not informing Ms. Gaylord on every single day from December 27, 2017 through January 11, 2018 that she would be absent. Complainant informed Ms. Gaylord, or Ms. Gaylord knew, or should have known through the exercise of reasonable review, that Complainant would not be at work for all her scheduled days through January 10, 2018.

Concerning the change in Complainant's schedule, Ms. Gaylord's denial of Complainant's step 1 grievance, issued on February 16, 2018, indicates that "going forward," Complainant was required to come in at 7:00 a.m. on Sundays. She did not do so on February 18, 2018, but did so for the next two Sundays, and was late on the third Sunday.

In short, the only inappropriate acts that Respondent established at hearing were Complainant's failure to inform Ms. Gaylord that she would be absent on January 11, 2018, and Complainant's failure to arrive at work at 7:00 a.m. on two Sundays: February 18, 2018 and March 11, 2018.

II. The Appointing Authority's Action Was Arbitrary, Capricious, or Contrary to Rule or Law

A. Respondent's Decision to Impose Discipline Was Arbitrary and Capricious

In determining whether an agency's disciplinary decision 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 after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

In determining whether the appointing authority acted in an arbitrary or capricious manner, or contrary to rule or law, the Board's analysis is generally divided into two separate considerations: first, whether the decision to discipline is arbitrary and capricious or contrary to rule or law, and second, assuming that discipline in some form is warranted, whether the level of discipline imposed is within the reasonable range of alternatives.

1. Reasonable Diligence and Care to Procure Evidence

Ms. Gaylord obtained the evidence she was authorized to obtain in considering disciplining Complainant under these circumstances.

2. Candid and Honest Consideration of the Evidence

As discussed at length above, Ms. Gaylord misrepresented Complainant's health status on December 25, 2017, exaggerated the extent to which Complainant failed to keep her informed of her absences from December 27, 2017 through January 11, 2018, and mischaracterized the extent to which Complainant was non-compliant with the change in her Sunday schedule. Accordingly, Ms. Gaylord failed to give candid and honest consideration of the evidence she reviewed in considering and determining the disciplinary action she imposed on Complainant on March 6, 2018. Therefore, Ms. Gaylord's decision to reduce Complainant's base salary was arbitrary and capricious.

The perception of Ms. Gaylord's candidness and honesty, generally, is further undermined by her testimony at hearing, which was not entirely credible. Ms. Gaylord was unduly defensive, argumentative, and unwilling to admit that she made mistakes in her supervision of the Fitzsimons front desk, and unwilling to admit any limitation in her knowledge of applicable policies or Board Rules. For example, Ms. Gaylord insisted at hearing that the December 28, 2017 action was, in fact, both a disciplinary and a corrective action, apparently forgetting what she had been instructed by Ms. Miller. Ms. Gaylord explained that the December 28, 2017 action was replaced because Complainant and Ms. Cress asked for a separation of the corrective and disciplinary actions, although the February 7, 2018 action was only a corrective action. Furthermore, Ms. Gaylord's testimony concerning Complainant's health status on December 25, 2017 conflicts with previous statements she made, and is afforded no credence.

B. Contrary to Rule or Law

Board Rule 6-9 provides that, "[t]he decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Although Ms. Gaylord wrote in her disciplinary letter that she reached her decision "after careful deliberation and consideration of all information gathered, in accordance with Board Rule 6-9," there is no discussion about the factors included in Board Rule 6-9. The failure to discuss any of these factors raises an inference that Ms. Gaylord did not consider all the Rule 6-9 factors in deciding to issue Complainant a disciplinary action, an inference Respondent failed to dispel at hearing. Respondent did not establish that Ms. Gaylord actually did consider all of the Rule 6-9 factors in reaching her decision.

Respondent offered insufficient evidence to establish that Ms. Gaylord considered all factors listed in Board Rule 6-9 in arriving at her disciplinary decision. As such, her decision violated Rule 6-9.

III. The Discipline Imposed Was Not Within the Range of Reasonable Alternatives

The third issue to be determined is whether the disciplinary ten percent reduction in Complainant's base salary for a period of six months was within the range of reasonable alternatives available to Respondent. Respondent established that Complainant failed to call in on one day, and did not appear at 7:00 a.m. on two Sundays. These omissions do not warrant the severe and costly disciplinary action Ms. Gaylord imposed on Complainant.

Respondent failed to establish that Complainant committed all the acts for which she was disciplined; Ms. Gaylord's disciplinary decision was arbitrary and capricious; Ms. Gaylord's decision violated Board Rule 6-9; and the discipline imposed was not within the range of reasonable alternatives. Accordingly, this disciplinary action is **rescinded**.

IV. The March 6, 2018 Disciplinary Action Was Not the Result of Race Discrimination

Complainant alleges that both the March 6, 2018 disciplinary action and the September 7, 2018 disciplinary dismissal constituted discrimination on the basis of race. Complainant's race discrimination claims are fully discussed below, beginning at page 37. As that discussion indicates, Complainant did not establish that Respondent's purported legitimate, nondiscriminatory reasons for the March 6, 2018 disciplinary action were a pretext for race discrimination.

SEPTEMBER 7, 2018 EMPLOYMENT TERMINATION

I. Complainant Did Not Commit All of the Acts for Which She Was Disciplined

In his September 7, 2018 notice of disciplinary action terminating Complainant's employment, Mr. Termain states that the bases for the decision were: (1) Complainant's interactions with Ms. Peniston, which evidenced a refusal to accept Ms. Peniston as a co-worker at the front desk and aggressive conduct towards her; (2) interactions with Ms. Gaylord and Ms. Miller, which evidenced disrespect and insubordination; (3) taking the "white box with drug paraphernalia" to her car; and (4) the incident on March 15, 2018 with Ms. Peniston.

Respondent established that some of Complainant's interactions with Ms. Peniston were inappropriate and unprofessional, and that some of her interactions with Ms. Gaylord were likewise inappropriate and unprofessional. It may be true that Ms. Peniston sought to annoy and provoke Complainant. It is more likely than not that Ms. Peniston harbors racial animus that she directed at Complainant. It is clear that Ms. Gaylord's lack of knowledge of applicable rules and regulations and her lack of effective leadership skills frustrated Complainant. However, Complainant's responses to these provocations were, at times, ill-advised and violative of the CDHS Code of Conduct and general standards of workplace professionalism and courtesy.

At the hearing of this matter, however, Respondent failed to establish that Complainant committed all the acts for which she was disciplinarily dismissed. Respondent did not establish by a preponderance of the evidence that Complainant told Ms. Peniston on March 15, 2018 that she hated her and Fitzsimons. That allegation, which was never fully investigated, was the triggering event that prompted Respondent to place Complainant on administrative leave and eventually led to Mr. Termain's decision to terminate Complainant's employment. To the extent that Mr. Termain also relied on the March 6, 2018 disciplinary action imposed on Complainant by Ms. Gaylord as a legitimate act in progressively disciplining Complainant, Complainant did not commit all the acts for which Ms. Gaylord disciplined Complainant, as discussed above. In addition, although Complainant did take the white box to her car before she discarded it in the trash across the street from the facility, there is no basis for Mr. Termain's characterization of the contents of the white box as "drug paraphernalia." A vaporizer pen is often used with liquids containing nicotine, and is not exclusively used with illegal substances.

In short, Complainant committed some, but not all, of the acts for which she was disciplinarily dismissed.

II. The Appointing Authority's Action was Arbitrary, Capricious, or Contrary to Rule or Law

A. Respondent's Decision to Impose Discipline was Arbitrary and Capricious

1. Reasonable Diligence and Care to Procure Evidence

Respondent failed to establish that Mr. Termain exercised reasonable diligence and care to procure evidence he was authorized to consider in arriving at his disciplinary decision.

Mr. Termain did not exercise reasonable diligence and care to procure evidence concerning Ms. Peniston, and Ms. Peniston's interactions with Complainant. Without procuring and reviewing such evidence, Mr. Termain could not reasonably assess the nature of Complainant's relationship with Ms. Peniston, and the proper context for judging the manner in which they spoke to each other. Although he was aware that Ms. Peniston had been a problematic employee for years, and that she had received corrective actions for her conduct towards Complainant, Mr. Termain did not review those corrective actions and failed to obtain and review Ms. Peniston's personnel file. He also failed to investigate Ms. Peniston's prior work issues and Ms. Peniston's dissatisfaction with her assignment to the front desk. He also did not interview Ms. Peniston.

Mr. Termain also failed to make any effort to look at Complainant's concerns about Ms. Peniston's potential race bias, and how, if he discovered that Ms. Peniston harbored either explicit or implicit bias, it would be reasonable to conclude that Ms. Peniston might not be a trustworthy narrator. A deeper investigation into the nature of the relationship between Complainant and Ms. Peniston, was warranted if the intent was to find the truth and arrive at a full and fair determination of Complainant's employment fate.

A preponderance of the evidence establishes that Mr. Termain did not interview Ms. Williams about what she saw and heard on March 15, 2018, the event that triggered Ms. Gaylord placing Complainant on administrative leave, and that was a major factor in Mr. Termain's decision to terminate Complainant's employment.

Mr. Termain's failure to confirm Ms. Peniston's allegation by interviewing the only identified witness to the incident, LaShawn Williams, was an unreasonable failure to obtain information essential to his decision. Neither Mr. Termain, nor Ms. Swann, nor Ms. Gaylord, asked Ms. Williams what she saw and heard transpire between Complainant and Ms. Peniston on March 15, 2018. As the preponderant evidence at hearing established, Ms. Williams did not hear what Ms. Peniston contended Complainant said. Mr. Termain's willingness to testify that he did speak with Ms. Williams and that she did corroborate Ms. Peniston's allegations undermines the credibility of his entire testimony. The contention that he did speak with Ms. Williams and that she corroborated Ms. Peniston's allegations about Complainant is outweighed by the fact that Ms. Williams remembers no such conversation with Mr. Termain and, more importantly, no such conversation between Complainant and Ms. Peniston. Mr. Termain made no mention in his disciplinary letter that he confirmed Ms. Peniston's accusations with Ms. Williams, and at hearing he was unable to quote or paraphrase anything that Ms. Williams purportedly said during the alleged conversation he had with her, merely stating that Ms. Williams "corroborated" Ms. Peniston's report.

In summary, Mr. Termain neglected or refused to use reasonable diligence and care to procure evidence he was authorized to consider in making his decision to terminate Complainant's

employment. *Lawley,* 36 P.3d at 1252. Therefore, Mr. Termain's decision to terminate Complainant's employment was arbitrary and capricious.

2. Candid and Honest Consideration of the Evidence

The September 7, 2018 disciplinary letter evidences serious problems with Mr. Termain's decision process and ultimate determination that the termination of Complainant's employment was warranted. Mr. Termain took an inordinate amount of time to finally issue his notice of termination and, according to Ms. Swann, who assisted Mr. Termain's review of Complainant's job performance, part of the reason the process took so long was that she and Mr. Termain wanted to exercise the utmost care in coming to the conclusion that Complainant should be fired, and articulating the justification for that decision in the notice of disciplinary action. Despite all that time and alleged careful consideration, the disciplinary notice indicates that Mr. Termain did not give candid and honest consideration of the evidence he obtained.

The disciplinary notice purports to memorialize all the factors in Board Rule 6-9 Mr. Termain was obligated to consider and weigh in reaching his ultimate decision to terminate Complainant's employment. However, two of the two factors listed in Board Rule 6-9 -- previous performance evaluations and mitigating circumstances -- are not mentioned in the letter, and the section headed "Information presented by you and others" -- contains nothing but the Code of Conduct. His discussion of the other Rule 6-9 factors is deficient. For example, Mr. Termain's entire discussion of the Rule 6-9 factor "the nature, extent, seriousness and effect of the act" is as follows: "Your continuous violations of the Code of Conduct and your failure to keep a workplace free of violence, threats, harassment, intimidation and other disruptive behaviors." Mr. Termain fails to identify to what he is referring when accusing Complainant of "violence, threats, harassment, intimidation and other disruptive behaviors." Although Mr. Termain addresses the concept of "extent" in characterizing Complainant's alleged violations of the Code of Conduct as "continuous," it was hardly that. The Oxford online dictionary defines "continuous" as "without interruption." Mr. Termain fails to discuss the extent of Complainant's other problematic conduct. He also fails to address what he views as the seriousness of Complainant's purported inappropriate conduct, and fails to address the effect of Complainant's conduct.

In addition, as indicated above, Mr. Termain failed to consider the full history and nature of Complainant's relationship with Ms. Peniston, the nature and scope of Ms. Peniston's hostility towards Complainant, and the possibility that Ms. Peniston's uncorroborated allegation that Complainant said, "I hate you and I hate this place," on March 15, 2017, which triggered the decision to place Complainant on administrative leave and the termination of Complainant's employment, was anything less than truthful.

In his consideration of the evidence he obtained, Mr. Termain clearly exaggerated Complainant's alleged inappropriate conduct while refusing to view critically anyone else's conduct, including Ms. Peniston's and Ms. Gaylord's. Concerning Ms. Peniston's emails to Complainant, which included such statements as, "I hate how controlling you are," and characterizing Complainant's conduct on one occasion as making her "mad" and "very underhanded," Mr. Termain did not view these statements as inappropriate. This is contrasted with Ms. Bowling's testimony that these comments by Ms. Peniston were inappropriate and perhaps violated the CDHS Code of Conduct. Mr. Termain concluded that Ms. Peniston was attempting to establish a working relationship with Complainant, who rebuffed those attempts, despite evidence to the contrary indicating that Ms. Peniston acted with little or no regard to how her actions would affect Complainant. Mr. Termain also refused to concede that Ms. Gaylord was ill-quipped to effectively manage the front desk and the conflict between Complainant and Ms.

Peniston, and was not particularly knowledgeable about pertinent policies and Board Rules. He brushed aside any suggestion that management had a responsibility to help resolve the conflict between Complainant and Ms. Peniston, testifying that they should have been able to work it out themselves.

Furthermore, Mr. Termain's reliance on the workplace violence report, issued on October 26, 2018, was problematic. Mr. Termain based his disciplinary decision in large part on the Workplace Violence Incident report issued by the CDHS Civil Rights Unit. The report contained materially incorrect or misleading statements, and there is no evidence that Mr. Termain subjected the report to the necessary critical analysis appropriate to the importance of the decision with which he was tasked. In the context of making a determination that resulted in the termination of Complainant's employment, the uncritical reliance on a flawed investigation and report is insupportable.

First, the scope of the investigation should have been limited to the allegations in Complainant's workplace violence complaint that Ms. Peniston shoved the luggage cart at her on November 29, 2017. Instead, the report deals almost exclusively with the relationship between Complainant and Ms. Peniston, and concludes that Complainant is the primary cause of the friction between the two. The report fails to mention that the video that would have shown what happened with the luggage cart was not preserved, while the video of Complainant pointing her finger at Ms. Peniston a very short time later was preserved. The report alleges that the first time Complainant alleged a violation of the workplace violence policy was after she received a corrective action "related to the incident." That is not true. Complainant contacted Ms. Gaylord to complain about Ms. Peniston's luggage cart shoving conduct immediately after it occurred on November 29, 2017. Although she may not have uttered the magic words of "workplace violence policy violation," it was clear that she was alleging conduct that constituted workplace violence. She made the same allegation during the December 12, 2017 Rule 6-10 meeting, which prompted Vernon Jackson to contact her a few days later and provide her with a workplace violence incident complaint for her to complete and submit. Also, Complainant was not given a corrective action for the same "incident," but for her finger-pointing at Ms. Peniston after the luggage cart incident and after she and Ms. Peniston met with Ms. Gaylord. The report's conclusion that it "denies [sic] credibility that Complainant received a Corrective Action for the same offense that she now complains about as an incident of workplace violence" illustrates a fundamental misunderstanding of the events of November 29, 2017.

The investigators' conclusions about the credibility of the witnesses they interviewed are questionable. About Complainant, the report indicates that she was "sincere and **appeared** truthful, but was unable to provide specific information regarding why she feels physically or psychologically threatened by Respondent." (Emphasis added.) The investigators fail to explain how Complainant's description of Ms. Peniston shoving the luggage cart at her on November 29. 2017 is insufficient to explain why Complainant felt physically threatened by Ms. Peniston at that time. A reasonable person in Complainant's shoes would have every reason to fear for their physical safety under similar circumstances. As such, the report's dismissive attitude towards Complainant's concerns is suspect and problematic.

With respect to Ms. Peniston, on the other hand, the report states that she "was sincere in her reports of events." The investigators failed to reveal why they concluded that Complainant merely "appeared" to be truthful, while no such limitation was attached to Ms. Peniston's statements. The investigators failed to fully review Ms. Peniston's personnel file and the performance and interpersonal issues that she presented in their determination of who was more at fault in the interactions between Complainant and Ms. Peniston. While acknowledging that

Complainant reported that Ms. Peniston was racially insensitive at best, and racially biased at worst, the investigators failed to address the possibility or probability that Ms. Peniston's actions and complaints about Complainant may have been fueled by racial animus. In relying on the report, there is no evidence that Mr. Termain took this racial issue into consideration. He should have.

Concerning Ms. Gaylord, the report states that "Gaylord was candid and truthful. . . . Gaylord is an asset to the facility and her contributions should be commended." Somehow, the investigators failed to realize or failed to report that several of the statements Ms. Gaylord made to the investigators were either knowingly or negligently incorrect or misleading. For example, the allegation that Complainant was absent for all of December 2017 and half of January 2018 is patently false, and fails to provide the information that establishes that Complainant's absences in January were due to Ms. Gaylord's insistence of a FTR form and the three to five business days it took for her doctor to sign the form. The investigators also failed to discover that Ms. Gaylord failed to preserve the video of the luggage cart incident while preserving Complainant's finger pointing, and failed to discover or report that Ms. Gaylord was untruthful in stating that Complainant did not tell her about the luggage cart incident on the day it occurred.

The report is useful in one respect: it identifies a primary cause of the conflict between Complainant and Ms. Peniston. Complainant told the investigators that she and Ms. Peniston were provided little to no guidance as to how they should divide the front desk duties. Ms Peniston confirmed that perspective, and this is one issue on which Complainant and Ms. Peniston agree. The investigators concluded that providing Complainant and Ms. Peniston with job descriptions and additional guidance as to the division of front desk duties would assist in reducing the conflict between the two. Although the investigators were apparently reluctant to excuse what they perceived as Complainant's problematic conduct on the failure of supervisors and management, they failed to directly address management's disastrous decision to reassign Ms. Peniston to the front desk and management's refusal or inability to effectively manage these employee issues.

Finally, the Workplace Violence policy provides, in pertinent part, that "[a]n employee who reports alleged workplace violence under this policy shall not suffer any retaliation, including the loss of benefits, demotion, discipline or adverse impact on the terms and conditions of employment for making the report." By relying so heavily on the workplace violence investigation and report, and the investigators' unsolicited opinions and conclusions that were beyond the scope of the purpose of their investigation, and using that report to help justify the decision to terminate Complainant's employment, Mr. Termain arguably violated the workplace violence policy. Turning Complainant's workplace violence complaint into an investigation of Complainant's compliance with the CDHS Code of Conduct constituted a betrayal of the policy's purpose. Any similar conduct in the future would have a chilling effect on employees who believe that they were the victims of workplace violence, and render the policy ineffective.

The disciplinary notice also contains significant misrepresentations or omissions. In the notice's Background section, Mr. Termain writes, "Allegations of workplace violence were investigated by the CDHS Civil Rights Unit . . . ," obfuscating the fact that the allegations of workplace violence were Complainant's, and the purported perpetrator was Ms. Peniston. Mr. Termain also notes that the Rule 6-10 meeting was recorded "[f]or record keeping purposes...." However, he does not reveal that the recording was lost. Finally, Mr. Termain referred to the contents of the white box on more than one occasion as "drug paraphernalia," which was by no means an established fact.

In conclusion, Mr. Termain failed to give candid and honest consideration of the evidence he reviewed in considering and determining Complainant's employment status. Accordingly, Mr. Termain's decision to terminate Complainant's employment was arbitrary and capricious.

B. Contrary to Rule or Law

Board Rule 6-9 requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose.

Mr. Termain failed to consider, or failed to give sufficient weight to, Complainant's previous performance evaluations, which he misconstrued as being much less satisfactory than they were. He discounted all positive perspectives on Complainant's job performance that were not consistent with the view that Complainant was unprofessional and insubordinate. He discounted Complainant's 2017-2018 mid-year review by indicating that he believed it had little weight or merit because it was inconsistent with the other documents he reviewed, and that he considered it untrustworthy because he viewed it as Complainant's previous supervisor, Vanessa Carlson's, reluctance to deal with Complainant and her issues. However, he failed to recognize that Ms. Miller signed off on it, not Ms. Carlson. He also failed to fully and fairly consider the mitigating circumstances leading up to Complainant's alleged issues, including the difficulties posed by Ms. Peniston's conduct towards her at the front desk, and the mishandling of her supervision by Ms. Gaylord. Having failed to fully and fairly consider these mitigating circumstances, Mr. Termain failed to accord them the weight they deserved.

III. The Discipline Imposed was not within the Range of Reasonable Alternatives

A. Nature, Extent, and Seriousness of the Act, Error or Omission

Respondent failed to establish that the incident that triggered the decision to place Complainant on administrative leave actually happened. It is true that Complainant continued to be in conflict with Ms. Peniston, but there was no serious investigation or consideration of issues that would have provided a different perspective on Complainant's conduct towards Ms. Peniston. It was nearly universally acknowledged that Ms. Peniston has significant troubles interacting with others. Complainant alleged that Ms. Peniston was baiting, harassing, and annoying, and alleged that she was afraid for her safety. She also alleged that Ms. Peniston harbored a racial bias, a view that was also held by Ms. Williams. Complainant's conduct towards Ms. Peniston would likely be viewed differently if these matters were investigated, considered, and substantiated.

The management of Fitzsimons was well aware of the inability of Complainant and Ms. Peniston to work together. It should also have been obvious to them that Complainant's handling of front desk duties had been entirely satisfactory for some time. However, Ms. Peniston was reassigned to the front desk, neither she nor Complainant was provided with a job description, no one made any effort to divvy up their duties, and when conflicts arose, management took no effective steps to alleviate the situation. Ms. Gaylord was new to Fitzsimons and state employment, and was ill-equipped to navigate the situation. Ms. Miller and Ms. Swann were also new and inexperienced. So was Mr. Termain. To put all the responsibility for Complainant's reaction to this untenable situation on Complainant is unreasonable and fundamentally unfair.

B. Effect of the Act, Error or Omission

Complainant's conduct arising from her difficult relationship with Ms. Peniston, and from Ms. Gaylord's overly-critical yet ill-advised supervision of Complainant, no doubt had the effect of irritating Ms. Peniston and Ms. Gaylord and disrupting their work lives. However, as is discussed above in great detail, Complainant's conduct was not without some degree of justification. Had Ms. Peniston conducted herself in a more respectful and less harassing way towards Complainant, and with a great deal more racial sensitivity, it is highly unlikely that Complainant would have conducted herself the way she did. Had Ms. Gaylord been more knowledgeable about state personnel rules and effective management, and been more proactive in reducing the conflicts between Complainant and Ms. Peniston, and been more flexible in her interpretation of rules and guidelines, she would likely have experienced significantly improved conduct from Complainant.

C. Type and Frequency of Previous Unsatisfactory Behavior or Acts

Complainant did, on occasion, utter a profanity, and she did tend to assert her opinion and perspective in a forceful manner. But prior to Ms. Peniston's reassignment to the front desk and Ms. Gaylord becoming her supervisor, Complainant's memorialized unsatisfactory acts were few and far between and were in the distant past.

D. Prior Corrective or Disciplinary Actions

Nearly all the corrective and disciplinary actions imposed on Complainant prior to the termination of her employment were given to her by Ms. Gaylord in the period between December 2017 and March 2018. As discussed above, the March 6, 2018 disciplinary action was arbitrary and capricious, and contrary to rule or law. Mr. Termain relied on that disciplinary action in arriving at his disciplinary decision, and such reliance was unwarranted.

E. Period of Time Since a Prior Offense

Prior to the advent of Ms. Peniston and Ms. Gaylord in Complainant's daily work life, Complainant's most recent offense of the type addressed by Mr. Termain was back in 2015.

F. Previous Performance Evaluations

With one exception (her performance review for the 2011-2012 review period), Complainant's annual performance reviews were all satisfactory.

G. Mitigating Circumstances

As discussed above, there were significant mitigating circumstances that should have been considered by Mr. Termain, but weren't. Among these are Ms. Peniston's conduct and racial insensitivity, Complainant's pride and expertise in her management of the front desk, Ms. Gaylord's inexperience and lack of knowledge of state personnel rules and employee management, and the problems with some of the materials on which Mr. Termain based his decision, such as the workplace violence report and the March 6, 2018 disciplinary action.

Weighing all the factors to be considered in deciding on the nature of the corrective or disciplinary action to be imposed, the termination of Complainant's employment is too severe a penalty for the few acts committed by Complainant that Respondent managed to establish.

Respondent failed to establish that Complainant committed all the acts for which she was disciplinarily dismissed; Mr. Termain's disciplinary decision was arbitrary and capricious; Mr. Termain's decision violated Board Rule 6-9; and the discipline imposed was not within the range of reasonable alternatives. Accordingly, Complainant's disciplinary dismissal is action is **modified**. Complainant shall be reinstated to her position as an Administrative Assistant II, assigned to the front desk at Fitzsimons. Because Respondent did establish that Complainant did conduct herself inappropriately and was insubordinate at times, a disciplinary reduction in her base salary of 10% for a period of three months (13 weeks) starting September 7, 2018 is imposed as a substitute disciplinary action.[6]

IV. Unlawful Discrimination Based on Race

Complainant alleges that she was discriminated against by Respondent on the basis of her race, African-American. She alleges race discrimination was the reason for both the March 6, 2018 disciplinary action and the September 7, 2018 disciplinary dismissal.

The Colorado Anti-Discrimination Act (CADA), and the Board's rules mandate that employment decisions be made without discrimination on the basis of race. *See* § 24-34-402(1)(a), C.R.S. ("It shall be a discriminatory or unfair employment practice ... [f]or an employer ... to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of ... race ...."); Board Rule 9-3 ("Discrimination against any person is prohibited because of ... race .... This applies to all employment decisions").

CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. *See, e.g., George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). Under Board Rule 9-4, "[s]tandards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

"Colorado has adopted the following approach [for analyzing discrimination claims based on circumstantial evidence], modeled on the [U.S.] Supreme Court's analysis in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), for proving an inference of discriminatory intent." *St. Croix v. Univ. of Colorado Health Sciences Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007). "Initially, [the complainant] must establish a *prima facie* case of discrimination by showing (1) he or she belongs to a protected class; (2) he or she was qualified for the job at issue; (3) he or she suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination." *Id.* (citing *Colorado Civil Rights Comm'n v. Big O Tires,* 940 P.2d at 397, 400 (Colo. 1997)). "If the complainant establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. Once the employer meets its burden, the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." *Big O Tires,* 940 P.2d at 401. *See also Bodaghi v. Dep't of Natural Resources,* 995 P.2d 288, 298 (Colo. 2000) (if the employer produces evidence of a legitimate, non-discriminatory reason for its action, the factfinder "giving full and fair consideration to the evidence offered by both sides, proceeds to decide the ultimate question: whether, in light of all the evidence in the record, the employee has proved that the employer intentionally and unlawfully discriminated against the employee").

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[6] At the damages hearing, Complainant argued that front pay in lieu of reinstatement is the more appropriate remedy. This issue is discussed below, at page 40.

As a preliminary matter, it is inappropriate for the undersigned ALJ to focus on the issue of whether Complainant has established a *prima facie* case at this stage of the litigation, after the evidentiary hearing has concluded. As the U.S. Supreme Court has recognized, there is a point at which a trial has progressed too far to revisit the question of whether a *prima facie* case exists. That point is "when the defendant fails to persuade the ... court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the [adverse action taken against the plaintiff]." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714–15 (1983) (footnote omitted); *accord, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67–68 (1986). "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case," the focus should no longer be on the preliminary question of the *prima facie* case but on the "ultimate question of discrimination *vel non*."[7] *Aikens*, 460 U.S. at 713–15. In other words, once the trial has proceeded to the second step of the *McDonnell Douglas* burden-shifting framework, the first step, the *prima facie* issue, should be left behind. From that point, the inquiry should focus on the ultimate question of "whether the defendant intentionally discriminated against the plaintiff." *Id.* at 715 (internal quotation omitted). *Accord, E.E.O.C. v. Samsonite Corp., Luggage Div.*, 723 F.2d 748, 749-50 (10th Cir. 1983).

In this case, Respondent has offered legitimate, nondiscriminatory reasons for the two disciplinary actions at issue here. Therefore, the discussion must focus on evidence that these purported legitimate, nondiscriminatory reasons are pretextual.

The courts have recognized a number of categories of evidence of pretext. Generally, to show that an employer's proffered nondiscriminatory reason for an adverse employment action is pretextual, a plaintiff must produce evidence of such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence, and hence infer that employer did not act for the asserted nondiscriminatory reasons. *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 490 (10th Cir. 2006); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000). As the U.S. Supreme Court had held, "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (citation and internal quotation marks omitted). Furthermore, "the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id.*, quoting *Wright v. West*, 505 U.S. 277, 296 (1992). Thus, "the factfinder's rejection of the employer's proffered reasons will 'permit the trier of fact to infer the ultimate fact of intentional discrimination'" from evidence already in the record. *Bodaghi*, 995 P.2d at 299 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

Furthermore, pretext can be established by disturbing procedural irregularities or an employer action contrary to an unwritten policy or contrary to company practice. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1122 (10th Cir. 2007) ("disturbing procedural irregularities surrounding an adverse employment action may demonstrate that an employer's proffered nondiscriminatory business reason is pretextual"); *Kendrick*, 220 F.3d at 1230. Pretext may also be established by showing that the complainant is treated disparately, and less well, than others similarly-situated who are not members of the complainant's protected class. *McDonnell Douglas*, 411 U.S. at 804. In addition, misjudging an employee's performance may be evidence of pretext.

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[7] Latin, meaning "or not." Translated here, this sentence means "the question of discrimination or lack of discrimination."

See *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000) ("evidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination") (citation and internal quotation marks omitted).

One argument often raised by respondents is that the complainant is unable to prove that the decision maker harbored discriminatory animus against the complainant, and therefore the decision did not constituted race discrimination. However, even if a complainant is unable to establish that the decision maker harbored discriminatory animus in making the disciplinary decision, a complainant can still prevail if subordinate bias, often referred to in case law as the "cat's paw doctrine," was a factor in the disciplinary decision. A complainant can demonstrate subordinate bias in the same manner as establishing pretext, through circumstantial evidence.

"The 'cat's paw' doctrine derives its name from a fable in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire." *BCI Coca-Cola Bottling Co.*, 450 F.3d at 484. In employment discrimination cases, the term "refers to a situation in which a biased subordinate, who lacks decision making power, uses the formal decision maker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Id.* The rubber-stamp doctrine "refers to a situation in which a decision maker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate." *Id.* Under these doctrines, the "issue is whether the biased subordinate's discriminatory reports, recommendation, or other action caused the adverse employment action." *Id.* at 487. For a plaintiff to prevail on a cat's paw theory claim, he or she "must show that a biased subordinate's discriminatory reports, recommendations, or other actions caused the adverse employment action." *Hamby v. Associated Ctr. for Therapy*, 230 Fed.Appx. 772, 780 (10th Cir. 2007). In the Tenth Circuit, a plaintiff may not recover under [the cat's paw theory] without showing "that the decision maker followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee." *English v. Colorado Dep't of Corrections*, 248 F.3d 1002, 1011 (10th Cir. 2001) (citation and internal quotation marks omitted).

The Claim of Race Discrimination and the March 6, 2018 Disciplinary Action

Ms. Gaylord justified the March 6, 2018 disciplinary action she imposed on Complainant by citing to the Complainant's alleged illness when she appeared for work on Christmas day, Complainant's failure to contact Ms. Gaylord each day she was absent from December 28 through January 11, 2018, and her failure to comply with the change in her Sunday schedule.

Although, as discussed above, Respondent failed to establish that Complainant committed all the acts for which she was disciplined, Complainant was unable to establish that the purported legitimate, nondiscriminatory reasons for this disciplinary decision were a pretext for discrimination on the basis of race. Complainant failed to tie Ms. Gaylord's decision to Complainant's race. There is no evidence to suggest that Ms. Gaylord harbored racial animus towards Complainant.

The Claim of Race Discrimination and the September 7, 2018 Disciplinary Dismissal

With respect to the decision to terminate Complainant's employment, the combination of evidence of procedural irregularities, questionable investigations, mischaracterizations of Complainant's conduct, disparate treatment, and evidence of subordinate bias, supports a determination that Respondent's decision to terminate Complainant's employment was the result of race discrimination.

Here, there are several disturbing irregularities that support a conclusion that the decision to terminate Complainant's employment was a result of race discrimination. First, the failure to preserve the video of the November 29, 2017 luggage cart incident while preserving the finger-pointing incident that occurred in very close temporal proximity raises an inference of an illicit motive. The failure to preserve the recording of the April 9, 2018 Rule 6-10 meeting is also an unusual and disturbing irregularity. The loss of both the video and the audio recording is especially troubling.[8]

The decision to place Ms. Peniston at the front desk, knowing that Complainant and Ms. Peniston could not work together, was either negligent or was intentionally designed to antagonize Complainant and prompt her to engage in conduct that ultimately provided Respondent a facially-legitimate reason to terminate Complainant's employment. Add to that management's failure to provide Complainant and Ms. Peniston with job descriptions and a clearly delineated division of duties, and failure to take affirmative and effective steps to ameliorate the conflict between the two, and it appears that there was a concerted effort to make Complainant's work life miserable. Furthermore, Complainant's complaints about Ms. Peniston's racial comments and abrasiveness, which were never investigated as far as is known, tie Complainant's race to the placement and maintenance of Ms. Peniston at the front desk. In addition, placing Complainant on administrative leave after receiving a report from Ms. Peniston alleging that Complainant told her that Complainant hates her and Fitzsimons, and failing to corroborate that report either then or prior to terminating Complainant's employment, is highly suspicious and unjustifiable.

Then there is the issue of disparate treatment. Complainant and Ms. Peniston were similarly situated employees; Complainant is black, Ms. Peniston white. Although Respondent's witnesses took pains to distinguish Complainant's conduct from Ms. Peniston's and argue that Complainant's allegedly objectionable conduct was significantly more egregious, thus warranting more severe discipline, their conduct, properly viewed in context, was not so significantly different as to justify the significantly different manner in which Respondent treated them. Both said arguably inappropriate things, both treated each other with disdain. Both had similar issues with perceived insubordination towards supervisors and management. Complainant's employment was terminated. Ms. Peniston remains a Fitzsimons employee.

Ms. Peniston's racial comments, as described by Complainant, her belief that she was too good for the front desk, and her condescending attitude towards Complainant, raise the inference of a racial animus. Ms. Peniston's March 15, 2018 uncorroborated allegation that Complainant said to her, "I hate you and I hate this place," was the trigger for Complainant's ultimate employment termination. This supports an inference that subordinate bias was a factor in the decision to terminate Complainant's employment.

All these factors support the conclusion that the decision to terminate Complainant's employment constituted discrimination on the basis of race in violation of CADA.

V. Remedies

Board Rule 9-6 provides, in pertinent part, "If the Board finds that discrimination has occurred, it may order affirmative relief that the Board determines to be appropriate, including

[8] One is reminded of Lady Bracknell's response to Jack Worthing's admission that he has "lost" both of his parents in Oscar Wilde's play, *The Importance of Being Earnest*: "To lose one parent, Mr. Worthing, may be regarded as a misfortune; to lose both looks like carelessness."

reinstatement or rehiring of employees, with or without back pay, front pay, and any other equitable relief the board deems appropriate."

Where a legal injury is of an economic character, as here, legal redress in the form of compensation should be equal to the injury. *Department of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984). Such remedy must make the employee whole only and may not result in a windfall. *Id.* The purpose of equitable remedies in discrimination cases is to make the claimant whole within a particular setting, i.e., to place the claimant in the position he would have been in but for the discriminatory conduct. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1175 (Colo. 2000); *Ward v. Department of Natural Resources,* 216 P.3d 84, 96-97 (Colo. App. 2008).

The Issue of Mitigation

At the hearing on damages, Respondent argued that Complainant failed to properly mitigate her damages, and therefore should not receive the full amount of her back pay and benefits.

Once a complainant has established a wrongful termination and presented evidence on damages, the respondent has the burden of showing that she did not exercise diligence in attempting to find alternative employment. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989). A respondent may satisfy its burden only if it establishes that: 1) there were substantially equivalent positions that were available; and 2) the complainant failed to use reasonable care and diligence in seeking such positions. *E.E.O.C. v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980). In *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979), the Tenth Circuit held that "A claimant is required to make only reasonable exertions to mitigate damages, and is not held to the highest standards of diligence. It does not compel him to be successful in mitigation. It requires only an honest good faith effort." *Id.* at 938.

Respondent argues that Complainant did not exercise the requisite diligence in attempting to find alternative employment. However, the only evidence Respondent has offered in support of its position is the number of positions for which Complainant applied, which Respondent deems inadequate, and the amount of compensation she earned after the termination of her employment at Fitzsimons.

Respondent's bare assertion of inadequacy is not sufficient to meet its burden of establishing that Complainant did not exercise diligence in attempting to find alternative employment. In order to qualify for unemployment insurance benefits, Complainant was required to apply for at least five jobs each month. She met those requirements. She obtained a part-time position as a home companion for Mission Health in September 2018, a position she still holds. Although that substitute employment is only part-time, and Complainant has managed to earn only a fraction of what she had earned at Fitzsimons, Complainant has met her duty to mitigate damages.

Back Pay and Benefits

Back pay is determined by measuring the difference between a complainant's actual earnings and the earnings that would have been received, but for discrimination, to the date of judgment. *Black v. Waterman*, 83 P.3d 1130, 1133 (Colo. App. 2003). "A calculation of back pay should include the employee's base salary amount and pay raises the employee reasonably expected to receive, as well as sick leave, vacation pay, and other fringe benefits, during the back

pay period." *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 232 P.3d 277, 283 (Colo. App. 2010).

Unemployment compensation received during this period of time is offset. *Donahue*, 690 P.2d at 250. The statutory rate of interest under § 5-12-201, C.R.S., applies to awards of back pay in cases before the Board. *Rodgers v. Colo. Dep't of Human Svcs.*, 39 P.3d 1232, 1237 (Colo. App. 2001). Therefore, Complainant is entitled to eight percent interest per annum on her back pay damages.

As the chart appended hereto indicates, the imposition of the March 6, 2018 disciplinary reduction in salary resulted in Complainant losing $1,399.44 in base salary from March 7, 2018 through June 30, 2018, and $763.29 from July 1, 2018 through August 31, 2018, for a total loss of **$2,162.73** attributable to the March 6, 2018 disciplinary action

The disciplinary termination of Complainant's employment on September 7, 2018 resulted in a loss of base salary of $35,620.20 from September 7, 2018 through June 30, 2019. After the imposition of a 10% reduction in her base salary for three months (13 weeks) beginning September 7, 2018, amounting to $1,102.53), Complainant's economic losses for this period equals **$34,517.67.**

In addition, for the period of September 7, 2018 through June 30, 2019, Complainant lost $5,576.13 in employer health care insurance contributions, $94.29 in employer life insurance contributions, $272.16 in employer dental insurance contributions, and $48.09 in employer short term disability insurance contributions, for a total of **$5,990.67.**

The total loss of back pay and benefits equals **$42,671.07.**

In mitigation, Complainant received $12,032.00 in unemployment insurance benefits. She also earned approximately $3,822.00 at Mission Health through June 30, 2019, for a total of **$15,854.00.**

Complainant is therefore awarded back pay and benefits in the amount of **$26,817.07**, plus interest compounded annually at eight percent of **$1,787.80**, totaling **$28,604.87.** This amount is subject to employer PERA contributions. Complainant shall also be credited with sick leave and vacation leave from September 7, 2018 through the date of her reinstatement.

Reinstatement or Front Pay in Lieu of Reinstatement

During the damages phase of this matter, Complainant argued that she should be awarded front pay in lieu of reinstatement because of the manner in which she was treated while an employee at Fitzsimons, and because she would be returning to a hostile environment, especially if she were assigned to the front desk with Ms. Peniston.

Front pay is a substitute for reinstatement and is a necessary part of the "make whole" relief mandated by CADA and Title VII of the Civil Rights Act of 1964. § 24-34-405(2)(a)(II), C.R.S.; Board Rule 9-6; *Abuan v. Level 3 Commun., Inc.*, 353 F.3d 1158,1176 (10th Cir. 2003). Reinstatement is the preferred remedy in discrimination cases and should be ordered whenever it is appropriate. *Abuan,* 353 F.3d at 1176; *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir. 1989). If reinstatement is inappropriate, however, the complainant is entitled to an award of front pay. *Id.* at 638.

Front pay may be appropriate when an employer's extreme hostility renders a productive and amicable working relationship impossible or if the employer-employee relationship has been irreparably damaged by animosity caused by the lawsuit. Reinstatement is not appropriate if the employer's persistent animosity towards the complainant has destroyed the employee's ability to be an effective member of the employer's workforce. *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1157-58 (10th Cir. 1990).

In this case, the continued presence of Ms. Peniston at the Fitzsimons front desk raises the distinct possibility that Complainant will face a challenging work situation if she is reinstated to the position she held prior to her disciplinary dismissal. However, Respondent has pledged to minimize contact between the two if Ms. Peniston remains at the front desk. Furthermore, if Respondent corrects its previous refusal to clearly indicate the specific duties assigned to each employee with front desk duties, the likelihood of continued friction and confusion will be decreased. In addition, Ms. Gaylord and Ms. Miller, two supervisory employees who contributed to Complainant's perception of animosity aimed at her, are no longer employed at Fitzsimons. With a new supervisor and a new start, it is likely that Complainant can once again have a productive and amicable working relationship at Fitzsimons. Many Fitzsimons employees with whom Complainant maintained cordial relationships continue to work there. Complainant has not established that the employment relationship has been irreparably damaged by this action brought by Complainant. Accordingly, reinstatement, the preferred remedy, is more appropriate in this matter than an award of front pay in lieu of reinstatement.

VI. Complainant has established a basis for entitlement to attorney fees and costs.

As part of her requested remedy, Complainant seeks her attorney's fees and costs incurred in this litigation.

Board Rule 8-33 provides:

> Pursuant to § 24-50-125.5, C.R.S., attorney fees and costs may be assessed against an applicant, employee, or department, upon final resolution of a proceeding against a party if the Board finds that the personnel action from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, was a means of harassment, or was otherwise groundless.
>
> A. Frivolous means that no rational argument based on the evidence or law was presented;
>
> B. In bad faith, malicious, or as a means of harassment means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth;
>
> C. Groundless means despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.

In this matter, Ms. Gaylord's imposition of a disciplinary action, and Mr. Termain's decision to terminate Complainant's employment, lacked sufficient support and were ill-advised. However, Complainant did not demonstrate that the March 6, 2018 disciplinary action met the definition of "frivolous, in bad faith, malicious," harassing or was otherwise groundless. Complainant did

violate the no-smoking policy and she did not initially comply with the change in her Sunday schedule.

The same cannot be said of Mr. Termain's decision to terminate Complainant's employment. Based on the finding that the decision to terminate Complainant's employment was the result of race discrimination, Mr. Termain's decision was made in bad faith and was disrespectful of the truth. Accordingly, Complainant is entitled to an award of attorney's fees and costs associated with her appeal of her disciplinary dismissal.

Complainant shall file and serve a Bill of Attorney's Fees and Costs no later than July 15, 2019. If Complainant is unable to apportion attorney's fees between her two appeals, the undersigned ALJ will do so. *See Regency Realty Inv'rs, LLC v. Cleary Fire Protec., Inc.*, 260 P.3d 1, 8 (Colo. App. 2009) (when faced with multiple claims, not all of which afford a basis for recovering attorney fees, the trial court should attempt to apportion fees by claim).

CONCLUSIONS OF LAW

1. Complainant did not commit all the acts for which she was disciplined.

2. Respondent's actions were arbitrary, capricious, and contrary to rule or law.

3. The discipline imposed was not within the range of reasonable alternatives.

4. Respondent discriminated against Complainant on the basis of race in violation of the Colorado Anti-Discrimination Act with respect to the decision to terminate Complainant's employment.

5. Complainant is entitled to attorney's fees and costs associated with the appeal of her disciplinary dismissal.

ORDER

1. Respondent's March 6, 2018 disciplinary action is **rescinded**.

2. Respondent's September 7, 2018 disciplinary dismissal is **modified**. A 10% reduction in base salary for a three month period beginning September 7, 2018 is substituted for the disciplinary dismissal.

3. Respondent shall **reinstate** Complainant to her former position as an Administrative Assistant II at the Colorado Veterans Living Center at Fitzsimons, at the compensation level she would now hold had Complainant's employment not been terminated, and had her monthly base salary not been reduced by ten percent from March 1, 2018 through September 7, 2018.

4. Respondent will compensate Complainant with her lost back pay and benefits, offset by the substitute earnings and unemployment compensation received by Complainant during this period of time, for a total of **$28,604.87 through June 30, 2019**. This amount is subject to employer PERA contribution, as well as post-judgment statutory interest of 8% per annum to the date of reinstatement.

5. Respondent shall credit Complainant with sick leave and vacation time for the period from September 7, 2018 to the date of reinstatement.

6. Complainant is awarded reasonable attorney's fees and costs attributable to the appeal of her disciplinary dismissal. Complainant shall file a Bill of Attorney's Fees and Costs no later than **July 15, 2019**. Respondent shall file a response to the Bill of Attorney's Fees and Costs within 10 days after receipt of the Bill of Attorney's Fees and Costs.

Dated this 1st day
of July 2019,
at Denver, Colorado

[redacted]

Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of July 2019, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Mark Schwane, Esq.
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[redacted]

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.

APPENDIX A

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED:

G, H, I, K, L, M, N, S, BB, CC, DD, QQ, TT, UU

RESPONDENT'S EXHIBITS ADMITTED:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

APPENDIX B

WITNESSES WHO TESTIFIED AT HEARING

The following is a list of witnesses who testified at hearing:

Leslie Gaylord

Pamela Cress

Lynne Miller

Patricia Bowling

Cindilou Peniston

Laura Swann

Aaron Termain

Pinkie Fletcher

Jacquie Anderson

LaShawn Williams

A	B	C	D	E	F	G	H	I
Time Period	**Gross base salary paid by Respondent**	**Gross salary that would have been paid absent disciplinary actions**	**Column C minus Column B**	**Less 10% base salary for 3 mos. (13 weeks) starting 9.7.18[1] as a substitute discipline**	**Employer Health Care Contribution shortfall**	**Employer Life insurance contribution shortfall**	**Employer Dental insurance contribution shortfall**	**Short term Disability Insurance shortfall**
3.7.18-6.30.18 (17 Weeks)	$12,598.36 (17x$741.08)	$13,997.80 (17x$823.40)	$1,399.44	$1,399.44				
7.1.18-8.31.18 (9 weeks)	$6,869.90 (9x$763.29)	$7,632.90 (9x$848.10)	$763.29	$763.29				
8.31.18-9.7.18 (1 week)	$848.10	$848.10	0	0	0	0	0	0
9.7.18-6.30.19 (42 weeks)	0	$35,620.20 (42 x $848.10)	$35,620.20	$34,517.67	$5,576.13	$94.29	$272.16	$48.09
TOTALS				$36,680.40	$5,576.13	$94.29	$272.16	$48.09
Amounts received in mitigation	$12,032 (UI) $3,822 (MH) Total = $15,854			$15,854.00				
Difference between comp rec'd and comp rec'd with rescission and modification of discipline				$20,826.40	$5,576.13	$94.29	$272.16	$48.09
TOTAL damages by category				$20,826.40	$5,576.13	$94.29	$272.16	$48.09
Total damages (prior to interest added)	**$26,817.07**							

[1] **($1,102.53)**