STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2021B054**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LYDIA MARTINEZ,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,
Respondent.

Administrative Law Judge ("ALJ") McCabe held an evidentiary hearing on August 2, 2021. The record closed on August 6, 2021. The hearing was conducted on site at 1525 Sherman Street, 4th Floor, Court Room 6 in Denver, Colorado. Lydia Martinez, Complainant, appeared on her own behalf. Vincent Morscher, Esq., represented Respondent, Department of Human Services, Colorado Mental Health Institute at Pueblo. Ronda Katzenmeyer, Complainant's Appointing Authority, appeared as Respondent's advisory witness.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing are attached in an Appendix.

Respondent filed a Motion for Summary Judgment less than ten days in advance of the hearing. Ms. Martinez filed her response to the Motion for Summary Judgment on August 5, 2021. This Initial Decision renders a ruling on the Motion for Summary Judgment moot.

MATTER APPEALED

Ms. Martinez, a certified employee, appeals Respondent's decision to administratively discharge her from employment. Ms. Martinez alleges Respondent discriminated against her on the basis of disability. Ms. Martinez argues that, at the time Respondent administratively discharged her from employment, an American with Disabilities Act ("ADA") determination had not been made, all of her leave was not exhausted, her physician approved her to return to work with modified duty, and Respondent refused to allow her to return to work with modified duty. Ms. Martinez seeks rescission of Respondent's decision to administratively discharge her from employment, reinstatement, Respondent's completion of the ADA Accommodation Process, an order for Respondent to follow its Modified Duty Policy, and an award of back pay/benefits.

Respondent argues that it fully complied with Personnel Director's Administrative Procedure 5-6 when it administratively discharged Ms. Martinez from employment, Ms. Martinez was not a qualified individual with a disability who could perform the essential functions of her position with or without accommodation, and it did not discriminate against Ms. Martinez.

For the reasons discussed below, Respondent's administrative discharge of Ms. Martinez from employment is **affirmed**.

ISSUES

1. Did Respondent discriminate against Ms. Martinez in violation of the Colorado Anti-Discrimination Act ("CADA") on the basis of disability?

2. Was Respondent's decision to administratively discharge Ms. Martinez from employment arbitrary, capricious, or contrary to rule or law?

FINDINGS OF FACT

Background

1. The Colorado Mental Health Institute at Pueblo ("CMHIP") is a state-run psychiatric facility that serves forensic patients.

2. Respondent hired Ms. Martinez on May 16, 2011. Respondent employed Ms. Martinez as a Client Care Aide ("CCA") II.

3. Ms. Martinez worked in a pool position and, therefore, could work in any area of Respondent's facility.

4. CCAII is a physically demanding position.

5. Ms. Martinez's Position Description included a "Functional Attributes of Job Duties" section. Per this section, the physical demands of a CAAII are "HEAVY." "HEAVY" is defined as "Exert up to 100 lbs. of force occasionally, and/or up to 50 lbs. of force frequently, and/or up to 20 lbs. of force constantly to move objects." The "Functional Attributes of Job Duties" section also identified specific physical demands of the position. Those physical demands included climbing, balancing, stooping, kneeling, and control of others. Control of others is defined as "seizing, holding, controlling, and/or otherwise subduing violent, assaultive, or physically threatening persons to defend oneself or prevent injury. Body strength and agility of all four limbs is necessary."

6. Per Ms. Martinez's Position Description, the purpose of her work unit, in part, was to "Provide a safe, secure, therapeutic setting for comprehensive/holistic care of patients with both psychiatric and medical issues to include evaluation and treatment. This includes 24 hour nursing care for patients."

7. Per Ms. Martinez's Position Description, Ms. Martinez's job duties included administering nursing care. This administration of nursing care required Ms. Martinez to provide direct patient care, which included bathing, lifting, turning and transferring patients. This direct patient care also included escorting patients, feeding patients, dressing patients, and assisting patients with other activities of daily living. Ms. Martinez may also have had to go hands-on with patients; this could involve physically restraining a patient.

8. If a CCA is unable to assist in the physical transfer of patients, it could pose a risk to the patient and the CCA.

9. Respondent has two positions at or below the level of a CCAII. Those positions are a CCAI and a dining services position. Those positions are also physically demanding.

Relevant Employees

10. Ronda Katzenmeyer is Respondent's Chief Nursing Officer. Ms. Katzenmeyer was Ms. Martinez's Appointing Authority.

11. Nancy Schmelzer is an ADA Coordinator for the Department of Human Services. Ms. Schmelzer works with employees, appointing authorities, and medical providers to find accommodations for employees with impairments. Accommodations can assist employees in performing the essential functions of their positions or can include reassignment.

12. Vicki Wilson is a Human Resource Benefits Specialist for the Department of Human Services. Ms. Wilson works on the CMHIP campus. Ms. Wilson administers core benefits and processes Family Medical Leave and Short-Term Disability claims.

Policies

13. Respondent has a Modified Duty Policy. Per the policy, "Modified duty is a proactive approach to returning employees to a safe and productive work environment after they have suffered an injury or illness." It is Respondent's policy to maximize healing and restoration of employees by "attempting to temporarily utilize them in modified duty assignments following an injury."

14. Respondent's Modified Duty Policy contemplates bringing an employee back to work who cannot perform the essential functions of their position, "All employees with injuries who are not able to perform the essential functions of their positions may be eligible for modified duty as prescribed by this policy." The policy limits modified duty assignments to 180 days per injury or illness. The policy explains, "Modified duty assignments are temporary and may be reviewed, changed or discontinued at any time, based upon the business needs of the facility or office." The policy encourages appointing authorities to make modified duty assignments available for employees who experience work related injuries. The policy, however, gives the appointing authority discretion to determine "whether a modified duty assignment exists."

15. In making determinations about modified duty, Ms. Katzenmeyer, as an appointing authority, must critically think about an employee's restrictions. Ms. Katzenmeyer must consider whether the employee's restrictions allow Ms. Katzenmeyer to safely bring an employee back to work.

16. Respondent has an ADA Accommodation Policy. Per the policy, Respondent "is committed to providing reasonable accommodations to employees and applicants for employment to ensure that qualified individuals with disabilities enjoy equal access to all employment opportunities." The policy sets forth the procedure for requesting reasonable accommodations. The policy requires employees to "cooperate with all requests for information."

17. The ADA Accommodation Policy describes the interactive process. The policy provides "communication is key and a priority throughout the entire process."

18. The ADA Accommodation Policy provides that Respondent will give a person seeking an accommodation notice of when Respondent approves or denies a reasonable accommodation. As to denial, the policy states, "As soon as the ADA Coordinator determines that a request for reasonable accommodation will be denied, that decision will be issued in writing to the individual requesting the accommodation along with the reason for denial."

19. The ADA Accommodation Policy defines Essential Function as:

> Those duties that are so integral to the job, that the removal of which would fundamentally alter the job. A function can be considered "essential" if, among other things:
>
> - the position exists specifically to perform the function;
> - there are a limited number of other employees available who could perform the function; or
> - the function is specialized.

20. The ADA Accommodation Policy defines Reasonable Accommodation as:

> An adjustment or alteration that enables a qualified individual with a disability to apply for a job, perform job duties, or enjoy benefits and privileges of employment. There are three classes of reasonable accommodations:
>
> - Modifications of [sic] adjustments to a job application process to permit a qualified individual with a disability to be considered for the job;
> - Modifications or adjustments to enable a qualified individual with a disability to perform the essential job functions of the job; and
> - Modifications or adjustments that enable a qualified individual with a disability to enjoy equal benefits and privileges of employment.

21. The ADA Accommodation Policy provides the following as examples of reasonable accommodations: "providing readers, sign language interpreters, acquiring or modifying equipment or devices, modifying work schedules, job restructuring, or reassignment to a vacant position."

22. The ADA Accommodation Policy defines reassignment as, in part, "A form of reasonable accommodation that…is provided to employees (not job applicants) who, because of disability can no longer perform the essential functions of their jobs, with or without reasonable accommodation." The ADA Accommodation Policy provides, "The reassignment cannot result in a promotion and [Respondent] is not obligated to create a position for the purpose of reassignment.

Workers' Compensation Injury

23. On April 26, 2019, Ms. Martinez suffered a workplace injury. The injury required surgery on February 27, 2020 and then again later in 2020.

24. Ms. Martinez's injury was covered and processed as a workers' compensation injury. Ms. Martinez applied for hearings with the Office of Administrative Courts related to her workers' compensation claim.

25. Ms. Martinez is represented by counsel from the Seckar Law Office on her workers' compensation claim.

26. As part of the workers' compensation process, in approximately June or July, 2019, Ms. Martinez agreed to release all of her workers' compensation medical records to Respondent. Those records were sent to Assistant Attorney General Skye Meyers.

27. Ms. Martinez received workers' compensation injury leave from January 13, 2020 to February 19, 2020. Ms. Martinez began receiving make whole workers' compensation payments on February 21, 2020. The make whole payments ended on August 13, 2020. Ms. Martinez received unpaid leave beginning August 13, 2020.[1]

28. In June 2020, Ms. Martinez's workers' compensation medical provider ("Medical Provider") authorized Ms. Martinez to return to work on modified duty. The Medical Provider restricted Ms. Martinez as follows: "Ambulation is with the walking boot. She is to avoid any prolonged standing. Avoid steps. No Ladders. Keep leg elevated."

29. Respondent did not return Ms. Martinez to modified work in June 2020.

30. In October 2020, the Medical Provider again authorized Ms. Martinez to return to work on modified duty. The Medical Provider restricted Ms. Martinez as follows: "Sitting 90% of time, No standing walking > 10 minutes/hour. No kneeling or squatting. No climbing ladders, No lifting/carrying > 5 pounds, No pushing/pulling > 5 pounds, No climbing stairs."

31. These restrictions prevented Ms. Martinez from assisting patients with the activities of daily living and responding to emergencies with patients.

32. Respondent did not return Ms. Martinez to modified work in October 2020.

33. In January 2021, the Medical Provider again authorized Ms. Martinez to return to work on modified duty. The Medical Provider restricted Ms. Martinez as follows: "Sitting 33% of time, No standing/walking > 40 minutes/hour, No kneeling or squatting, No climbing ladders, No lifting/carrying > 15 pounds, No pushing/pulling > 15 pounds." The Medical Provider gave an estimated Maximum Medical Improvement ("MMI") date of March 4, 2021.

[1] Ms. Martinez appears to have received make whole payments at the beginning of each month after she began receiving unpaid leave. The evidence in the record does not explain why these payments were made at the beginning of each month.

34. MMI is when a person reaches the maximum level of improvement they are going to achieve.

35. Respondent did not return Ms. Martinez to modified work in January 2021.

36. In March 2021, the Medical Provider again authorized Ms. Martinez to return to work on modified duty. The Medical Provider restricted Ms. Martinez as follows: "Sitting 25% of time, No Standing/walking > 45 minutes/ hour, No kneeling or squatting, No climbing ladders, No lifting/carrying > 15 pounds, No pushing/pulling > 15 pounds."

37. Ms. Katzenmeyer does not receive medical records in workers' compensation cases. Ms. Katzenmeyer receives statements about whether or not the employee has restrictions.

38. Each time Ms. Martinez's supervisor received workers' compensation paperwork for Ms. Martinez, he would ask Ms. Katzenmeyer about the possibility of a modified duty assignment for Ms. Martinez.

39. Ms. Martinez's supervisor communicated with Ms. Martinez about modified duty.[2]

40. Ms. Katzenmeyer never offered Ms. Martinez a modified duty assignment. Ms. Katzenmeyer determined there were no modified duty assignments that Ms. Martinez could do safely, protecting Ms. Martinez and patients.

41. As of the date of the hearing, Ms. Martinez still had not reached MMI on her workers' compensation claim.

42. As of the date of the hearing, Ms. Martinez still had physical restrictions. Ms. Martinez can lift and carry a maximum of 15 pounds. Ms. Martinez cannot kneel, squat, use stairs, or climb ladders. These restrictions prevent Ms. Martinez from performing the essential functions of a CCAII.

Family Medical Leave and Short Term Disability

43. On September 21, 2020, Ms. Wilson provided Ms. Martinez notice of eligibility for Family Medical Leave. The notice informed Ms. Martinez that she was required to use available paid sick, vacation, and other leave during her Family Medical Leave absence.

44. Ms. Martinez exhausted Family Medical Leave on November 19, 2020. Ms. Wilson reviewed timekeeping records to determine Ms. Martinez exhausted Family Medical Leave.

45. On September 24, 2020, Ms. Wilson provided Ms. Martinez information about short-term disability benefits and provided the application for benefits.

46. Ms. Martinez was approved for short-term disability through September 24, 2020. Ms. Martinez was not eligible for short-term disability after September 24, 2020. Eligibility for short-term disability is from the date of disability.

[2] The specifics of the supervisor's communication to Ms. Martinez are not part of the record.

ADA Accommodation Process and Personnel Director's Administrative Procedure 5-6 Administrative Discharge

47. On September 21, 2020, Ms. Schmelzer provided Ms. Martinez a reasonable accommodation packet by email.

48. On September 21, 2020, Ms. Schmelzer, through a system-generated message, notified Ms. Katzenmeyer that Ms. Martinez may require reasonable accommodation. The email outlined the ADA Accommodation Process.

49. On October 5, 2020, Ms. Schmelzer again provided Ms. Martinez a reasonable accommodation packet by email.

50. On October 12, 2020, Ms. Schmelzer notified Ms. Katzenmeyer through a system-generated message that Respondent closed Ms. Martinez's ADA File. The email explained Ms. Schmelzer had not heard from Ms. Martinez after sending the reasonable accommodation packet.

51. On October 30, 2020, Ms. Katzenmeyer sent Ms. Martinez a notice of a Personnel Director's Administrative Procedure 5-6 Meeting ("5-6 Meeting"). The notice informed Ms. Martinez that Ms. Katzenmeyer received notification that Ms. Martinez had exhausted all paid balances. The notice set a 5-6 Meeting for November 6, 2020.

52. On November 5, 2020, in advance of the scheduled 5-6 Meeting, Ms. Wilson emailed Ms. Martinez a copy of one year of her timesheets, a worksheet, Personnel Director's Administrative Procedure 5-6, and Personnel Director's Administrative Procedure 5-17.

53. On November 5, 2020, Ms. Martinez provided Ms. Katzenmeyer an ADA request by hand delivered letter. Ms. Martinez informed Ms. Katzenmeyer she had a workers' compensation injury and that Ms. Martinez had been approved for modified duty. Ms. Martinez wrote, in part, "I am therefore requesting that we begin the ADA process, and that the Rule 5-6 meeting scheduled for November 6, 2020 be vacated."

54. Ms. Katzenmeyer did not conduct a 5-6 Meeting on November 6, 2020.

55. On November 30, 2020, Andrew Lotrich, Legal Assistant for Seckar Law Office, notified Ms. Schmelzer that Ms. Schmelzer's prior emails went into Ms. Martinez's spam folder. The email requested Ms. Schmelzer not close the reasonable accommodation process.

56. On or about December 3, 2020, Ms. Martinez filed a request for reasonable accommodations on a Reasonable Accommodation Request Form. Ms. Martinez requested, "any accommodation that [would] help [her] return to work."

57. The Reasonable Accommodation Request Form contains a portion for a medical professional to fill out. Ms. Martinez had the Medical Provider complete that portion of the form. The Medical Provider provided that Ms. Martinez had a disability that interfered with the major life activity of walking. The Medical Provider did not suggest any reasonable accommodations, but listed Ms. Martinez's restrictions. The Medical Provider suggested "continued physical therapy" would help improve Ms. Martinez's job performance.

58. To determine if there is an accommodation available, Ms. Schmelzer reviews the request for accommodations, reviews the employee's position description, and determines if there are accommodations available. In Ms. Martinez's case, Ms. Schmelzer could not make an accommodation for Ms. Martinez because of the extent of Ms. Martinez's restrictions and the physical demands of her position.

59. Ms. Schmelzer did a review to determine the possibility of reassignment for Ms. Martinez. Ms. Schmelzer did not discuss job reassignment with Ms. Martinez. Reassignment was not possible because the only lateral or demotion positions, the CCAI position and the dinning services position, were also physically demanding positions that Ms. Martinez could not perform with her restrictions.

60. On January 6, 2021, Ms. Katzenmeyer sent Ms. Martinez another notice for a 5-6 Meeting. The notice was mailed to Ms. Martinez. The notice again informed Ms. Martinez that she had exhausted all paid leave balances. Ms. Katzenmeyer wrote, in part, "In response to your request, I granted postponement of your Rule 5-6 Status Meeting pending your ADA status….". The notice set the 5-6 Meeting for January 13, 2021.

61. On January 12, 2021, in advance of the scheduled 5-6 Meeting, Ms. Wilson emailed Ms. Martinez a copy of one year of her timesheets, a worksheet, and Personnel Director's Administrative Procedure 5-6.

62. On January 12, 2021, Mr. Lotrich, Ms. Schmelzer, and Ms. Katzenmeyer exchanged a series of emails.

63. At 9:28 a.m., Mr. Lotrich sent Ms. Katzenmeyer an email informing her that Ms. Martinez was still going through the ADA Accommodation Process, and asserting the 5-6 Meeting was premature until the completion of the ADA Accommodation Process. Mr. Lotrich requested to reschedule the January 13, 2021, 5-6 Meeting.

64. At 11:01 a.m., Ms. Schmelzer sent an email to Mr. Lotrich explaining the purpose of the 5-6 Meeting, and asking how Ms. Martinez would like to conduct the ADA Accommodation Process.

65. At 11:32 a.m., Mr. Lotrich sent an email to Ms. Schmelzer challenging the information in her prior email. Mr. Lotrich also requested Ms. Schmelzer contact the Seckar Law office to schedule a meeting to discuss the ADA Accommodation Process.

66. Ms. Martinez failed to attend the January 13, 2021, 5-6 Meeting.

67. On January 14, 2021, Ms. Katzenmeyer sent another notice of 5-6 Meeting. The notice was mailed to Ms. Martinez. The notice again informed Ms. Martinez that she had exhausted all paid leave balances. The notice set a 5-6 Meeting for January 29, 2021.

68. On January 25, 2021, Mr. Lotrich sent an email to Ms. Katzenmeyer and Ms. Schmelzer. The email requested counsel be included on communications related to the ADA Accommodation Process. The email requested Respondent stop the Personnel Director's Administrative Procedure 5-6 process until the ADA Accommodation Process was completed. The email provided Ms. Martinez was not available for the 5-6 Meeting scheduled on January 29, 2021. Ms.

Schmelzer responded and requested availability to meet regarding the ADA Accommodation Process.

69. On January 28, 2021, Mr. Lotrich sent Ms. Schmelzer an email and provided Ms. Martinez's most recent physician's report. Mr. Lotrich requested Ms. Martinez's job description, job descriptions for vacant positions, and a statement from Ms. Martinez's supervisor about why she had not been returned to modified duty. Mr. Lotrich provided availability on February 4, 2020 for a meeting related to the ADA Accommodation Process.

70. Ms. Schmelzer provided Ms. Martinez's job description to Mr. Lotrich. Ms. Schmelzer did not provide the other information requested. Ms. Schmelzer did not provide information on vacant positions because Respondent did not have any positions Ms. Martinez could perform with her restrictions that were at or below the CCAII position.

71. On February 4, 2021, Ms. Schmelzer conducted a virtual reasonable accommodation meeting with Ms. Martinez and her attorney, Larry Saunders. Mr. Lotrich was also present for the meeting. Mr. Saunders discussed Ms. Martinez's upcoming appointment with a doctor, and explained it might yield helpful medical information. Mr. Saunders requested to postpone the 5-6 Meeting until after Respondent had an opportunity to review information from the doctor. During the reasonable accommodation meeting, Mr. Saunders proposed two possible accommodations for Ms. Martinez. The requested accommodations were modified duty and extending job protection.

72. Following the meeting on February 4, 2021, Ms. Schmelzer sent Ms. Katzenmeyer an email detailing potential accommodations:

> 1. Modified Duty with walking/standing limited to 40 minutes per hour, no kneeling, squatting, or climbing ladders, & lifting, carrying, pushing, pulling limited to 15 lbs.
>
> 2. Extending job protection (anticipate we should have documentation by March 10th) until we have received additional recommendations from appointment with Dr. Primack and potentially crafting a work hardening plan based on his recommendations.

Ms. Schmelzer recommended extending job protection as an accommodation.

73. Ms. Katzenmeyer decided to extend Ms. Martinez's job protection in order provide Ms. Martinez time to provide additional information. Ms. Katzenmeyer did not feel there were any modified duty assignments that Ms. Martinez could safely perform.

74. On February 5, 2021, Ms. Schmelzer, through a system generated message, sent Ms. Katzenmeyer an email requesting to extend Ms. Martinez job protection through March 15, 2021, as a reasonable accommodation.

75. At some point after February 4, 2021, Ms. Katzenmeyer had a conversation with Ms. Martinez about modified duty. Ms. Katzenmeyer explained to Ms. Martinez that there was not a modified duty assignment available for her, and that Ms. Katzenmeyer felt providing Ms. Martinez a modified duty assignment would present a danger to Ms. Martinez and the patients.

76. Respondent's nursing department does not have any positions available that Ms. Martinez could perform with her restrictions. All of Respondent's nursing department staff are required to be able to perform CPR. To perform CPR, one must do so on their hands and knees.

77. On April 1, 2021, Ms. Schmelzer emailed Ms. Martinez. Ms. Schmelzer informed Ms. Martinez that, if additional information was not received by close of business on April 2, 2021, her ADA File would be closed.

78. On April 2, 2021, Ms. Schmelzer emailed Ms. Martinez. Ms. Schmelzer explained that because she had not received additional information from the Medical Provider, Ms. Martinez's ADA File was being closed. Ms. Schmelzer invited Ms. Martinez to contact her with questions.

79. On April 8, 2021, Respondent administratively discharged Ms. Martinez from employment. Ms. Katzenmeyer notified Ms. Martinez of her administrative discharge by letter. The letter was mailed to Ms. Martinez. The letter cited Personnel Director's Administrative Procedure 5-6, explained when leave was exhausted, informed Ms. Martinez of her appeal rights, and informed Ms. Martinez who to contact about retirement benefits.

80. Prior to Ms. Katzenmeyer's administrative discharge of Ms. Martinez from employment, Ms. Wilson provided Ms. Martinez's leave balance information to Ms. Katzenmeyer.

81. Prior to Ms. Katzenmeyer's administrative discharge of Ms. Martinez from employment, Ms. Katzenmeyer verified with Ms. Schmelzer and Ms. Wilson that she had waited the appropriate timeframe.

82. Prior to Ms. Katzenmeyer's administrative discharge of Ms. Martinez from employment, Ms. Katzenmeyer had communications with Ms. Schmelzer about Ms. Martinez's ADA status. Ms. Schmelzer informed Ms. Katzenmeyer that Ms. Schmelzer had been working with Ms. Martinez and her counsel and that they were in the process of attempting to obtain more medical records. Ms. Schmelzer further informed Ms. Katzenmeyer that she was unaware of any job openings that Respondent could offer Ms. Martinez due to Ms. Martinez's skill and education level.

83. At the time of Ms. Martinez's administrative discharge from employment, Respondent had extended Ms. Martinez's unpaid leave for approximately five months. Ms. Katzenmeyer allowed this long period of unpaid leave to give Ms. Martinez an opportunity to heal from her workers' compensation injury. Ms. Katzenmeyer did not continue to extend job protection for Ms. Martinez because there are a limited number of positions available.

84. In order to maintain appropriate staffing levels, Ms. Katzenmeyer needed to fill Ms. Martinez's position. Ms. Katzenmeyer could not fill Ms. Martinez's position until there was a vacant position. Staffing levels are set for legitimate operational and safety reasons. Ms. Katzenmeyer, the program chief nurses, and an executive committee, determine staffing levels based upon what staffing levels are safe for each unit.

85. On April 19, 2021, Mr. Lotrich provided additional medical records to Respondent. Mr. Lotrich provided the March 2021 workers' compensation paperwork. This paperwork continued to reflect that Ms. Martinez had significant restrictions.

ANALYSIS

A. MODIFIED DUTY AND REASONABLE ACCOMMODATION ARE NOT SYNONYMOUS.

An essential function is a "reasonable, legitimate, and necessary" function of an employee's position. *AT & T Techs., Inc. v. Royston*, 772 P.2d 1182, 1185 (Colo. App. 1989). The essential functions of Ms. Martinez's position included providing physically demanding direct patient care, and required her to be able to exert physical control over patients when necessary. Ms. Martinez was not able to perform the essential functions of her position, because her restrictions prevented her from meeting the physical demands of providing direct patient care.

As reflected in Respondent's Modified Duty Policy, modified duty is something that allows an employee who has suffered an injury to return to work. Modified duty is temporary, and limited to 180 days. Modified duty might involve allowing an employee who cannot perform the essential functions of their position to return to work for a limited period of time.

As reflected in Respondent's ADA Accommodation Policy, reasonable accommodation can be permanent and allows a person to perform the essential functions of their position. A reasonable accommodation may include some modification of job duties or reassignment to a new position.

Here, while the Medical Provider cleared Ms. Martinez for modified duty, and Ms. Martinez was willing to work modified duty, the Medical Provider restricted Ms. Martinez from performing duties that were essential functions of her position. Therefore, although the Medical Provider cleared Ms. Martinez to perform modified duty, that does not mean she could perform the essential functions of her position and be reasonably accommodated in the position of CCAII.

B. RESPONDENT DID NOT DISCRIMINATE AGAINST MS. MARTINEZ ON THE BASIS OF DISABILITY IN VIOLATION OF CADA.

Ms. Martinez has the burden to prove by a preponderance of the evidence that she was discriminated against on the basis of her disability. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400-01 (Colo. 1997). Ms. Martinez claims Respondent discriminated against her in violation of CADA. CADA provides that it is a discriminatory or unfair employment practice to:

> …discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability...; but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job.

Section 24-34-402(1)(a), C.R.S.

The Colorado Civil Rights Commission ("CCRC") has promulgated rules to implement CADA. The rules state CADA, as related to disability, "...is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act, as amended, and the Fair Housing Act

concerning disability." 3 CCR 708-1-60.1(A). Therefore, interpretations of CADA, "...shall follow the interpretations and guidance established in State and Federal law, regulations, and guidelines; and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." 3 CCR 708-1-10.14(C).

To establish a *prima facie* case of discrimination in employment on the basis of one of the protected classes, Ms. Martinez must demonstrate:

> First, an employee must show that [s]he belongs to a protected class. Second, the employee must prove that [s]he was qualified for the job at issue. Third, the employee must show that [s]he suffered an adverse employment decision despite [her] qualifications. Finally, the employee must establish that all the evidence in the record supports or permits an inference of unlawful discrimination.

Bodaghi v. Dep't of Natural Resources, 995 P.2d 288, 297 (Colo. 2000).

Ms. Martinez established the first and third elements of a *prima facie* case of discrimination. As to the first element, Respondent does not dispute that Ms. Martinez is disabled within the meaning of the law and therefore a member of a protected class. As to the third element, Ms. Martinez experienced the adverse employment action of Respondent administratively discharging her from employment.

As to the second element of a *prima facie* case, Ms. Martinez did not establish that she could perform the essential functions of the CCAII position, with or without reasonable accommodations. A person with a disability, "...is 'otherwise qualified' if, with reasonable accommodations, [s]he can perform the reasonable, legitimate, and necessary functions of [her] job." *Royston*, 772 P.2d at 1185. Direct patient care, which includes assisting with the tasks of daily living, is a reasonable, legitimate, and necessary function of a CCAII. The essential function of providing direct patient care, particularly assisting with the tasks of daily living, is physically demanding. The Medical Provider significantly restricted Ms. Martinez. These restrictions prevented Ms. Martinez from meeting the physical demands of providing direct patient care as a CCAII. Ms. Martinez then could not perform the essential functions of her position.

There is no evidence in the record that an accommodation would allow Ms. Martinez to perform the physically demanding essential functions of her position. Ms. Martinez was not otherwise qualified for her position as a CCAII, because she could not perform her position with or without reasonable accommodations. Ms. Martinez is no longer qualified for the position of CCAII "no matter how much accommodation" Respondent extends, because Ms. Martinez can no longer perform the physically demanding essential functions of her position. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1162-64 (10th Cir. 1999).

Ms. Martinez argued she was able to perform modified duty. As discussed above, modified duty is different from reasonable accommodation. Reasonable accommodation is something that allows an employee to perform the essential functions of their position, where modified duty may allow an employee to work temporarily in an assignment when that employee cannot perform the essential functions of their position. Ms. Martinez's clearance and willingness to perform modified duty do not demonstrate she could be reasonably accommodated in the position of a CCAII.

Ms. Martinez argued that Ms. Schmelzer's February 4, 2021, email to Ms. Katzenmeyer demonstrates that Respondent could reasonably accommodate Ms. Martinez by providing modified duty. The email, however, does not demonstrate Respondent could reasonably accommodate Ms. Martinez in the position of a CCAII. Although the email lists the possibility of providing modified duty as an accommodation, the email does not propose an accommodation that would allow Ms. Martinez to perform the essential functions of a CCAII. The email instead lists Ms. Martinez's physical restrictions if Respondent provided modified duty. The email does not discuss any accommodations that would allow Ms. Martinez to perform the essential functions of her position, and it is not evidence Respondent could reasonably accommodate Ms. Martinez in the position of CCAII.

A reasonable accommodation may include holding a position open for a period of time, but does not require an employer to hold a position open indefinitely. *See Rascon v. US West Commc'ns, Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998). Respondent provided Ms. Martinez the reasonable accommodation of holding her position open until March 15, 2021.

Reasonable accommodation also requires the employer to engage in an interactive process with an individual to determine if reassignment is a possibility. *See Smith*, 180 F.3d at 1161 and 1171-74. Respondent did not communicate with Ms. Martinez about reassignment, because Respondent could not reassign Ms. Martinez. Under the ADA, reassignment does not require promotion. *Id.* at 1176-77. Respondent's ADA Accommodation Policy also does not allow a reassignment to result in promotion. Respondent has two positions that are at or below the position of CCAII; those positions are a CCAI position and a dining services position. Both of those positions are physically demanding positions that Ms. Martinez could not perform with her restrictions.

Even if the interactive process was deficient, Ms. Martinez would still have the burden to show reasonable accommodation was possible. "Even if [Employer] failed to fulfill its interactive obligations to help secure a reassignment position, [Complainant] will not be entitled to recovery unless [Complainant] can also show that a reasonable accommodation was possible and would have led to a reassignment position." *Id.* at 1174. Here, there is no evidence in the record that reasonable accommodation was possible and would have led to reassignment. The evidence in the record demonstrates there were only two positions to which Respondent could reassign Ms. Martinez, and Ms. Martinez was physically unable to perform those positions due to her restrictions. Thus, Ms. Martinez failed to establish the second element of a *prima facie* case of discrimination.

Ms. Martinez argued that Respondent did not complete the ADA Accommodation Process. Ms. Schmelzer closed Ms. Martinez's ADA File approximately two months after the February 4, 2021, meeting and after providing notice of the closure to Ms. Martinez. Per Respondents' ADA Accommodation Policy, both Respondent and Ms. Martinez, had communication obligations during the ADA Accommodation Process. There is no evidence in the record that Ms. Martinez responded to the notice of closure provided in the April 2021 emails. It was reasonable for Respondent to close the ADA File after Ms. Martinez failed to respond to the notification of closure. Even if Respondent did not provide sufficient opportunity for Ms. Martinez to seek reasonable accommodations, there is no evidence in the record that Respondent could reasonably accommodate Ms. Martinez in her position as a CCAII.

Of note, had Respondent provided additional time for Ms. Martinez to present medical documentation or further extended unpaid leave, it does not appear there would have been a different outcome. As of the date of the hearing, Ms. Martinez still had restrictions that prevented her from performing the physically demanding essential functions of a CCAII.

To establish the fourth and final element of a *prima facie* case, Ms. Martinez must proffer evidence that supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297. Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. *See George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). The Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi*, 995 P.2d at 296. "[E]mployees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis." *Id*. Ms. Martinez may rely on, "existing conditions from which a fair inference of such discrimination could legitimately be drawn." *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Ms. Martinez did not present direct or indirect evidence of disability discrimination. There was no evidence presented that indicated anyone made derogatory statements related to Ms. Martinez's disability or otherwise openly treated Ms. Martinez differently on the basis of disability. To the contrary, the evidence supports Respondent allowed months of unpaid leave in hopes that Complainant would be able to recover from her injury and safely return to work. Therefore, there is no direct evidence of discrimination.

As to indirect evidence of discrimination, Ms. Martinez asserted Respondent discriminated against her because Respondent did not offer her a modified duty assignment after her Medical Provider released her for modified duty. First, Respondent was not required to provide Ms. Martinez a modified duty assignment. Respondent's Modified Duty Policy gave the appointing authority discretion on whether or not to provide Ms. Martinez a modified duty assignment. Second, the appointing authority appropriately used that discretion after determining that Ms. Martinez could not safely return to work in a modified duty assignment because of the restrictions given by the Medical Provider. There is no evidence in the record that demonstrates Respondent could have safely brought Ms. Martinez back to work for modified duty. In this case, Respondent's refusal to provide Ms. Martinez a modified duty assignment does not support or permit an inference of discrimination. "All the evidence in the record" does not support or permit an inference that Respondent's administrative discharge of Ms. Martinez from employment was discriminatory. *Bodaghi*, 995 P.2d at 297. Therefore, Ms. Martinez failed to establish a fourth element of a *prima facie* case of discrimination.

Had Complainant established a *prima facie* case of disability discrimination, Respondent articulated legitimate, nondiscriminatory reasons for administratively discharging Ms. Martinez from employment. Ms. Martinez did not demonstrate those reasons were pretextual. "When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Texas Dept. of Comty. Affairs v. Burdine*, 450 US 248, 260 (1981). Once an employer meets its burden of proffering a legitimate, non-discriminatory reason for an adverse employment decision, Complainant must "demonstrate by competent evidence" that this articulated reason is "a pretext for discrimination." *Big O Tires,* 940 P.2d at 401. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the

employer did not act for the asserted non-discriminatory reasons.' (citation omitted)." *Morgan v. Hilti, Inc*., 108 F. 3d 1319, 1323 (10th Cir. 1997).

Respondent presented a legitimate non-discriminatory reason for administratively discharging Ms. Martinez from employment. As discussed below, in compliance with Personnel Director's Administrative Procedure 5-6, Respondent administratively discharged Ms. Martinez from employment after she exhausted leave and when she could not return to work. Ms. Martinez did not demonstrate this reason was pretextual. The evidence in the record demonstrates Ms. Martinez could not be reasonably accommodated in her position, could not safely perform a modified duty assignment, and had exhausted leave. Ms. Martinez did not demonstrate Respondent's legitimate non-discriminatory reason for administrative discharge was pretext for discrimination.

C. RESPONDENT'S DECISION TO ADMINISTRATIVELY DISCHARGE MS. MARTINEZ FROM EMPLOYMENT WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

Ms. Martinez bears the burden to prove by a preponderance of the evidence that Respondent's decision to administratively discharge her from employment was arbitrary, capricious, or contrary to rule or law. §24-50-103(6), C.R.S.; *Velasquez v. Dep't of Higher Ed.*, 93 P.3d 540, 542-44 (Colo. App. 2004).

a. Respondent's decision to administratively discharge Ms. Martinez from employment was not arbitrary or capricious.

In determining whether an agency's decision to separate an employee is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused "to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it," 2) failed "to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion," or 3) exercised "its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

As to the first *Lawley* prong, Ms. Katzenmeyer used reasonable diligence and care in procuring evidence to consider administratively discharging Ms. Martinez pursuant to Personnel Director's Administrative Procedure 5-6. After the Medical Provider cleared Ms. Martinez for modified duty, Ms. Katzenmeyer received information about Ms. Martinez's restrictions and exercised discretion not to provide modified duty due to safety concerns. Ms. Katzenmeyer received confirmation from Ms. Wilson that Ms. Martinez had exhausted all of her credited paid leave. Ms. Schmelzer kept Ms. Katzenmeyer apprised of the ADA Accommodation Process. Ms. Katzenmeyer also scheduled and rescheduled a 5-6 Meeting multiple times prior to making a determination to administratively discharge Ms. Martinez from employment. Ms. Katzenmeyer's attempts to hold the meeting and allowance of additional time for the ADA Accommodation Process months after Ms. Martinez exhausted leave demonstrate reasonable diligence and care in procuring information.

Ms. Martinez presented information about a delay in receipt of workers' compensation medical records. The evidence in the record demonstrates that it was taking a long period of time for Ms. Martinez's attorney to receive medical records. This, however, does not indicate a lack of reasonable diligence or care in Ms. Katzenmeyer's procuring of information. Ms. Martinez had been unable to work for over a year, and Ms. Katzenmeyer was apprised of Ms. Martinez's medical restrictions throughout that period of time. Had Ms. Katzenmeyer waited for the March medical records, they would not have changed the outcome for Ms. Martinez. Ms. Martinez still had significant restrictions following her March doctor visits, and was still unable to perform the essential functions of her position.

As to the second *Lawley* prong, Ms. Katzenmeyer gave candid and honest consideration to the evidence. Per Respondent's Modified Duty Policy, Ms. Katzenmeyer had discretion on whether or not to offer a modified duty assignment. Ms. Katzenmeyer made a safety decision, and determined she could not safely give Ms. Martinez a modified duty assignment. Further, Ms. Katzenmeyer allowed a long period of unpaid leave prior to administratively discharging Ms. Martinez from employment. Approximately five months lapsed between the time Ms. Katzenmeyer first noticed Ms. Martinez of possible administrative discharge under Personnel Director's Administrative Procedure 5-6 and the time of discharge. This length of time and the extension of job protection after the February 4, 2021, meeting indicate Ms. Katzenmeyer's decision was not a hasty decision.

Ms. Martinez asserted Respondent retaliated against her for filing a workers' compensation claim. The evidence in the record does not demonstrate Respondent retaliated against Ms. Martinez for filing a workers' compensation claim. The evidence in the record demonstrates Ms. Martinez had restrictions that prevented Respondent from safely bringing Ms. Martinez back to work and that Ms. Katzenmeyer gave candid and honest consideration to the evidence.

As to the third and final *Lawley* prong, Ms. Martinez did not demonstrate a reasonable person would reach a contrary conclusion. The evidence in the record demonstrates it would have been unsafe to return Ms. Martinez to work for modified duty, that Ms. Martinez could not be reasonably accommodated in her position as a CCAII due to restrictions, that Respondent could not reassign Ms. Martinez to another position due to her restrictions, and that Ms. Martinez had exhausted all leave. Further, Ms. Katzenmeyer has a limited number of positions and could not indefinitely hold Ms. Martinez's position because of staffing needs. A reasonable person in Ms. Katzenmeyer's position would not reach a contrary conclusion.

b. Respondent's decision to administratively discharge Ms. Martinez was not contrary to rule or law.

An employee's administrative separation from employment is controlled by Personnel Director's Administrative Procedure 5-6, which states, in relevant part:

> If an employee has exhausted all credited paid leave and is unable to return to work, unpaid leave may be granted or the employee may be administratively discharged by written notice following a good faith effort to communicate with the employee. Administrative discharge applies only to exhaustion of leave.

A. The notice of administrative discharge shall inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.

B. An employee cannot be administratively discharged if FML, state family medical leave, or short-term disability leave (includes the thirty (30) day waiting period) apply, or if the employee is a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship.

Personnel Director's Administrative Procedure 5-6 imposes a series of requirements before an employee can be discharged for exhaustion of leave: (1) the employee must have exhausted all credited paid leave; (2) the employee must be unable to return to work; (3) the employee cannot have the protection of FML or short-term disability leave; (4) the employee cannot be a qualified individual with a disability under the ADA who can be reasonably accommodated; (5) there must be a good faith effort to communicate with the employee concerning his or her work status and plans; and (6) there must be a written notice of the discharge issued after such communication or good faith communication effort, and this notice must have appeal rights and retirement plan information.

As to the first requirement of Personnel Director's Administrative Procedure 5-6, Ms. Martinez had exhausted all credited paid leave at the time Respondent administratively discharged her from employment.

Ms. Martinez argued Respondent was obligated to bring her back to work when the Medical Provider authorized her to return to work. As discussed above, Respondent did not have an obligation to bring Ms. Martinez back to work when the Medical Provider authorized her to return to work with modified duty.

Of note, a workers' compensation injury does not prevent the exhaustion of leave or discharge under Personnel Director's Administrative Procedure 5-6. Personnel Director's Administrative Procedure 5-38 (A) allows the agency to use an employee's accrued leave to make the employee whole once the employee begins receiving temporary workers' compensation benefits. The payroll records indicate that Ms. Martinez received make whole payments beginning February 2021. Those make whole payments ended, and unpaid leave began, in August 2021. Personnel Director's Administrative Procedure 5-38(B) specifically allows an agency to separate an employee who has suffered a workers' compensation injury pursuant to Personnel Director's Administrative Procedure 5-6. "The appointing authority may invoke Rule 5-6 if the employee is unable to return to work after exhausting all accrued paid leave and applicable job protection. Termination of service under that rule will not affect continuation of payments under the Workers' Compensation Act." Personnel Director's Administrative Procedure 5-38(B). Here, Ms. Martinez had exhausted leave and was unable to return to work. Personnel Director's Administrative Procedure 5-38(B) permitted administrative discharge of Ms. Martinez after the exhaustion of accrued paid leave and applicable job protection.

Ms. Martinez argued that, if Respondent permitted her to use modified duty, she would not have exhausted leave. First, as discussed above, the appointing authority was not required to authorize modified duty for Ms. Martinez. Second, while Respondent allowing modified duty may have delayed the exhaustion of leave, the evidence in the record indicates Ms. Martinez would have exhausted leave even if Respondent provided her modified duty. Respondent's

Modified Duty Policy limits modified duty to 180 days. If Respondent allowed Ms. Martinez to return to modified duty in June 2020, she would have only been permitted to work with that modified duty until November or December 2020. At the time of hearing, some 400 plus days after the Medical Provider authorized Ms. Martinez to work modified duty, Ms. Martinez was still unable to perform the physically demanding position of a CCAII. Even if provided modified duty, Ms. Martinez would likely still have exhausted her leave and been subject to separation pursuant to Personnel Director's Administrative Procedure 5-6.

As to the second requirement, Ms. Martinez was unable to return to work. Although the Medical Provider released her to return to modified work, the Medical Provider placed significant restrictions on what Ms. Martinez could do while at work. Those restrictions prevented Ms. Martinez from performing her job duties a CCAII. Those restrictions also prevented Respondent from safely bringing Ms. Martinez back to work in a modified duty assignment. At the time of her separation, Ms. Martinez was not able to return to work as a CCAII.

As to the third requirement, Ms. Martinez did not have protection from FML or short-term disability. Ms. Martinez had exhausted both FML and short-term disability eligibility prior to her separation from employment.

As to the fourth requirement, as discussed above, Ms. Martinez was not a qualified individual with a disability who could be reasonably accommodated. There is no dispute that Ms. Martinez was disabled within the meaning of law. Ms. Martinez, however, could not perform the essential functions of her position with or without reasonable accommodation, and Respondent had no positions available at or below the CCAII position to which it could reassign Ms. Martinez.

As to the fifth requirement, Respondent made a good faith effort to communicate with Ms. Martinez regarding her work status prior to her separation from employment. Respondent provided Ms. Martinez multiple opportunities to participate in a 5-6 Meeting and twice provided Ms. Martinez her leave records. Ms. Katzenmeyer's failure to provide Ms. Martinez an additional opportunity to participate in a 5-6 Meeting after the February 4, 2021, accommodation meeting does not demonstrate a lack of good faith. Ms. Katzenmeyer held Ms. Martinez's position for several months after first initiating the Personnel Director's Administrative Procedure 5-6 process.

As to the sixth requirement, Respondent provided Ms. Martinez a written notice of discharge. The notice of discharge contained appeal rights and retirement plan information.

Respondent complied with Personnel Director's Administrative Procedure 5-6 in its administrative discharge of Ms. Martinez from employment. As discussed above, Respondent did not discriminate against Ms. Martinez in violation of the law. Respondent had the authority by rule to administratively discharge Ms. Martinez from employment when she exhausted leave with an active workers' compensation claim. Ms. Martinez did not present legal authority that demonstrates Respondent violated rule or law by administratively discharging Ms. Martinez when she was approved for modified duty, prior to reaching MMI, or while her workers' compensation claim was on going. As such, Respondent's decision to administratively discharge Ms. Martinez from employment was not contrary to rule or law.

Ms. Martinez has reinstatement rights if she becomes able to perform the duties of a CCAII.

CONCLUSIONS OF LAW

1. Respondent did not discriminate against Ms. Martinez in violation of CADA.

2. Respondent's decision to administratively discharge Ms. Martinez was not arbitrary and capricious, or contrary to rule or law.

ORDER

Respondent's decision to administratively discharge Ms. Martinez from employment is **affirmed**. Ms. Martinez's appeal is **dismissed with prejudice**.

/s/ [redacted]

Dated this 7th day of September, 2021, at Denver, Colorado.

K. McCabe, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of September, 2021, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Lydia Martinez
[redacted]

Vincent Morscher, Esq.
Senior Assistant Attorney General
Vincent.Morscher@coag.gov

[redacted]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits A-N.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits 1-21.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Andrew Lotrich

Ronda Katzenmeyer

Vicki Wilson

Nancy Schmelzer

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).

3. 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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.

4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 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. Board Rule 8-53(C). 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. 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. *See* Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is served 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 8-54.

ORAL ARGUMENT ON APPEAL TO THE BOARD

In general, no oral argument is permitted. Board Rule 8-55(C).

MOTION FOR RECONSIDERATION

Motions for reconsideration are discouraged. *See* Board Rule 8-47(K).