STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2021G043(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARCUS A. MAES,
Complainant,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the evidentiary hearing via web conference on October 13-15, 2021. The record was closed on October 15, 2021.

Throughout the hearing, Complainant appeared in person and through his attorney, Christopher M.A. Lujan, Esq. Respondent appeared through its attorney, Assistant Attorney General Amanda C. Swartz, Esq. Respondent's advisory witness was Shawn Smith, Highway Maintenance Superintendent.

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

MATTER APPEALED

Complainant, a certified employee, appeals his reversion from a trial service position, alleging retaliation in violation of the Colorado Anti-Discrimination Act (CADA), § 24-34-401, C.R.S., *et seq*., and the Colorado State Employee Protection Act (Whistleblower Act), § 24-50.5-103, C.R.S., *et seq*. Complainant argues that Respondent's reversion decision constituted retaliation for Complainant's participation in an investigation of a civil rights complaint. Complainant seeks reinstatement and back pay, and an award of attorney fees and costs.

Respondent denies that it retaliated against Complainant and argues that it reverted Complainant to his former position because of Complainant's poor performance. Respondent argues that all relief requested by Complainant should be denied, and that Complainant's appeal should be dismissed with prejudice.

For the reasons discussed below, Respondent's decision to revert Complainant from a Transportation Maintenance III position to a Transportation Maintenance II position is **reversed.**

ISSUES

1. Did Respondent retaliate against Complainant in violation of CADA?

2. Did Respondent retaliate against Complainant in violation of the Whistleblower Act?

3. If Respondent retaliated against Complainant, what is the appropriate remedy?

4. Is Complainant entitled to an award of attorney fees and costs?

FINDINGS OF FACT

Background

1. A Transportation Maintenance (TM) I is a basic entry level position.

2. A Transportation Maintenance (TM) II leads a patrol of 5-7 TM Is.

3. A Transportation Maintenance (TM) III leads 2-3 patrols, including 2-3 TM IIs and 17-21 TM Is.

4. A Labor, Trades and Crafts (LTC) Ops[1] is assigned an area that includes 3 TM IIIs and 6-7 TM IIs. LTC Ops are responsible for helping their TM IIIs ensure that everything is running smoothly in their area.

5. Complainant has worked for Respondent for ten years. He started as a TM I. Prior to August 22, 2020, Complainant worked as a TM II for Respondent.

6. On April 2, 2020, Complainant's supervisor, Anthony Vallejos, rated Complainant an overall 3.53 out of 5, or a "Successful, Occasionally Exceeds," on a performance evaluation for Complainant's work as a TM II. Mr. Vallejos noted that Complainant "continues to learn Bridge responsibilities, on top of his Graffiti duties, he is always willing to work late on Bridge emergencies or weekend emergencies though he is technically graffiti. He does what's asked of him and his crew, and is an important part of the department."

7. Mr. Vallejos trained Complainant and supported Complainant's efforts to promote to a Transportation Maintenance III (TM III) position.

Complainant's Promotion to TM III

8. Shawn Smith, Superintendent, Region 1, Section 5 (Denver Metro), sat on the final interview panel for an available TM III position for which Complainant applied. Mr. Smith determined that Complainant was the best prepared of all the candidates, was very professional, and presented an impressive binder describing all of the maintenance work he had performed during his tenure with Respondent.

9. On August 22, 2020, Complainant was promoted to a Transportation Maintenance III (TM III) position for a six-month trial period. (Stipulated fact.)

10. The Denver Metro area is divided into four quadrants. As a TM III, Complainant was assigned to the northwest quadrant of the Denver metro area, known as the "Mary area." This area is roughly bounded by I-25, I-70 and C470.

11. As a TM III, Complainant's basic job description included supervision of maintenance work:

> Coordinates with other Transportation Maintenance Supervisors and LTC

[1] No evidence was presented as what "Ops" refers to.

> Ops and ensures that maintenance activities are performed in accordance with appropriate plans, specifications and agency standards; supervises maintenance activities through scheduling of staff, equipment and products with allotted region dollars to meet levels of service…

12. Complainant was aware that failure to perform at a satisfactory level as a TM III during the trial service period would result in reversion to TM II. (Stipulated fact.)

13. Initially, Complainant's immediate supervisor was Mr. Vallejos, LTC Ops for the Mary area. Sometime in late September or early October 2020, Mr. Vallejos was reverted to a TM III position for unsatisfactory performance.

14. When Mr. Vallejos was reverted to a TM III, William Riddle became the Acting LTC Ops for the Mary area.

15. Complainant's second level supervisor was Jered Maupin, Deputy Maintenance Superintendent for Region 1, Section 5. Mr. Maupin was Mr. Riddle's first level supervisor.

16. Complainant's third level supervisor was Mr. Smith. Mr. Smith was responsible for leading, training and mentoring 338 full time employees, including but not limited to TM Is, TM IIs, TM IIIs, and LTC Ops. Mr. Smith was Mr. Maupin's first level supervisor.

17. Complainant's Appointing Authority was Brent Spahn, Deputy Director of Maintenance.

18. Complainant's six-month trial period was scheduled to end on or about February 20, 2021.

Complainant's Performance as a TM III

19. In September 2020, Mr. Riddle and Leonard DelValle**,** who were TM IIIs at that time, began sharing concerns they had about Complainant's performance as a TM III with Mr. Smith. When Mr. Riddle became the Acting LTC Ops for the Mary area in late September or early October 2020, he relayed concerns about Complainant's communication deficiencies to Mr. Smith. Because Complainant was a new TM III, Mr. Smith instructed Mr. Riddle to coach, train and mentor Complainant.

20. Shortly after Mr. Riddle became the Acting LTC Ops, Mr. Maupin instructed him to use Mr. Vallejos' observations and comments concerning Complainant's performance during his first weeks as a TM III. Mr. Riddle rated Complainant an overall 2 out of 5, or a "Successful, Expected," on Complainant's initial performance evaluation. Mr. Riddle adopted Mr. Vallejos' comment that Complainant "while being a new TM III has consistently demonstrated maintenance and Bridge knowledge, he also guided his crew towards meeting patrol goals."

21. On November 12, 2020, Complainant went on Emergency Paid Sick Leave after contracting COVID-19. After Mr. Riddle expressed concerns to Complainant about being short-staffed, Complainant returned to work on December 6, 2020. After Complainant returned to work, he had post-COVID syndrome symptoms, including fatigue.

December 27, 2020

22. On December 27, 2020, Complainant and his crew were instructed to report to the site of

a large pothole repair on a bridge deck at I-70 and 32nd.

23. Jason Bowles was a TMIII leading the bridge crew assigned to repair the pothole. Complainant's crew was assigned to handle traffic control.

24. Phillip Farley, a TM II on Complainant's crew, was assigned to operate the service vehicle, which was a sign truck needed for traffic control. Mr. Farley was responsible for conducting a pre-trip inspection on that vehicle.

25. Pre-trip inspections on service vehicles generally involve an electronic inspection to verify that the vehicle is safe to operate and does not need to be taken out of service.

26. TM IIIs are not responsible for conducting pre-trip inspections on a service vehicle, unless they need to operate that vehicle themselves. TM IIIs are assigned pickup trucks to drive to work sites. However, TM IIIs are responsible for checking with a service truck driver to make sure a pre-trip inspection was completed.

27. After Complainant and his crew arrived at the repair site, they discovered that the sign truck operated by Mr. Farley was not operational, and that some traffic signs were missing. The sign truck had to be returned to the shop and replaced with an operational truck.

28. Traffic control was not completed until midnight.

29. Mr. Bowles decided to delay the pothole repair because his crew would not be able to complete the repair before the morning rush hour.

January 4-5, 2021

30. On or about 3:00 p.m. on January 4, 2021, Respondent's Traffic Operations Control contacted Mr. Riddle about the need for a pothole repair on a bridge deck at Mile Marker (MM) 259 on I-70 westbound. This bridge had recurring repair issues for years.

31. Because Mr. Riddle had little experience with bridge repairs, he called Michael Martinez around 3:30 p.m. to see if he could come and look at the pothole. Mr. Martinez was a LTC Ops on a bridge repairs crew in Region 5. Mr. Riddle asked Mr. Martinez whether his crew could do the bridge repair work that evening.

32. Mr. Martinez told Mr. Riddle he could not meet him at MM 259 until the next morning. Mr. Riddle and Mr. Martinez discussed having Complainant and his crew handle the pothole repair.

33. The "pothole" on the bridge deck at MM 259 on I-70 was actually a more serious "hole in a bridge deck."

34. A hole in a bridge deck occurs where there is a bridge going over another road, and the rebar for the concrete under the bridge has delaminated or fractured. A hole develops and increases in size. Traffic going over the hole compresses the rebar, causing concrete to drop onto the road below the bridge.

35. Cold mix may be used as a temporary pothole repair, especially in the winter months. It typically takes two 50 lb. bags of cold mix to repair a pothole.

36. Repairing a hole in a bridge deck is more complex than repairing a pothole. A hole in a bridge deck is repaired using rebar, plywood, concrete and hot mix asphalt. Six to eight employees are needed to repair a hole in a bridge deck.

37. Mr. Riddle attempted to repair the hole in the bridge deck by putting rocks from the side of the road into the hole and instructing the crew to dump thirteen 50 lb. bags of cold mix into the hole. This attempt was unsuccessful, as the cold mix did not fill the hole and fell inside the bridge. Some of the cold mix fell through the hole onto the road underneath the bridge.

38. At 5:15 p.m., Complainant returned Mr. Riddle's call. Mr. Riddle instructed Complainant to report to MM 259 on I-70 with his crew to complete repair of the "pothole."

39. Complainant told Mr. Riddle he was short staffed and only had three employees on his crew. Mr. Riddle told Complainant he could call other crews for assistance.

40. Mr. Riddle went home for the evening.

41. When Complainant arrived at MM 259, he discovered that the "pothole" was actually a hole in the bridge deck. Complainant called Mr. Riddle at home, informed him of the hole in the bridge deck and told him that this larger hole created an emergency situation.

42. Mr. Riddle did not return to MM 259 to assist with the emergency situation and remained at home.

43. After talking with Mr. Riddle, Complainant contacted a bridge crew to repair the hole in the bridge deck.

44. The subsequent bridge hole repair was performed by a bridge repair crew that was not supervised by Complainant, but by Mr. Bowles, a TM III who had more seniority as a TM III than Complainant.

45. Complainant's crew initially set up a lane closure and then worked to fill some smaller potholes. Another crew, called by Complainant, handled traffic control.

46. Complainant called Mr. Riddle several times during the evening to update him on the situation.

47. A bridge repair constitutes a critical incident requiring a critical incident report (CIR).

48. A CIR documents a major event that will cause delays or safety concerns for the general public. A CIR keeps upper level management aware of critical incidents.

49. Because Complainant's crew was short staffed, Complainant asked Mr. Riddle to create a CIR for upper level management.

50. Mr. Riddle failed to create the CIR as requested by Complainant.

William Riddle's PDFs Concerning Complainant

51. On January 6, 2021, Mr. Riddle issued two performance documentation forms (PDFs) to Complainant concerning attempted pothole repairs on December 27, 2020 and January 4-5, 2021.

52. PDFs are used to document positive and negative incidents concerning an employee. PDFs describing performance issues are intended to notify an employee of a performance issue so that the employee can improve his or her performance.

53. Before issuing the PDF concerning the December 27, 2020 incident, Mr. Riddle submitted a rough draft to Mr. Maupin to review. This PDF was the first one Mr. Riddle had ever drafted for a TM III. Mr. Maupin helped Mr. Riddle to revise the PDF by including specific details of the incident.

54. In the first PDF issued to Complainant, Mr. Riddle described the following incident:

> On 12/27/2020 patrol 15 and patrol 21 were supposed to set up traffic control and help the bridge crew with a large pothole repair on I-70 and 32nd eastbound on bridge deck. From the report you gave me from Philip Farley, the trucks were not fitted with proper signs and were also taken to the job site without proper pre-trip inspection (sign truck not operational) and had to be taken back to the shop for a different truck. Ultimately you are the supervisor for these patrols and need to make sure that the sign trucks are fully stocked with proper signage at all times. This lane closure is basic and should be able to be completed properly and safely within a reasonable amount of time. The shift started at 20:00 and the lane closure was not complete until 24:00 do [sic] to trucks not being stocked properly and equipment taken to the job site inoperable.

55. In the second PDF issued to Complainant, Mr. Riddle described the following incident:

> On 1/4/21-1/5/21 You were tasked with a pothole repair on I-70 MM 259 westbound. You are expected to properly inform your supervisor with crucial information when problems arise. You are also responsible for critical incident notifications that did not get sent out for this project once it became a critical incident. The decisions that were made on this project were unprofessional and the work was not properly performed creating a lengthy closure of 2 of 3 lanes of traffic during a peak period that could have been avoided with proper communication. You were instructed to call your day crew in early to take over the project for you and the night crew and did not do so creating longer working hours for employees that could have been avoided. Your disregard for proper planning and scheduling could have avoided this closure altogether.

Investigation of Complaints Concerning Mike Martinez

56. On December 9, 2020, George Price, Internal Civil Rights Specialist, received an anonymous discrimination complaint concerning Mr. Martinez, alleging that Mr. Martinez made "racial comments to African American employees" and harassed "a Muslim employee."

57. Mr. Price forwarded the anonymous discrimination complaint concerning Mr. Martinez to Patricia Bowling, Region 1 Civil Rights Manager. Ms. Bowling oversees the work of employees in the Region 1 Civil Rights office.

58. Ms. Bowling investigated the December 9, 2020 complaint by interviewing a number of potential witnesses, as well as Mr. Martinez and his immediate supervisor.

59. On January 3, 2021, Ms. Bowling's office received a second discrimination complaint concerning Mr. Martinez. This second complaint also contained allegations concerning Mr. Maupin, Mr. DelValle, Mike Willyard and Mr. Smith.

60. The majority of the twenty witnesses listed in the second complaint, which included Complainant, were in Mr. Smith's region.

61. After receiving the second complaint, Ms. Bowling and Mr. Spahn had a meeting with Mr. Smith. They informed Mr. Smith that he had been named in a civil rights complaint that was being investigated and that he would be excluded from the investigation.

62. On January 8, 2021, Ms. Bowling sent a report to Mr. Spahn concerning the December 9, 2020 complaint. This report summarized her interviews with witnesses and outlined her findings.

63. Ms. Bowling concluded that Mr. Martinez referred to an African American employee as a character from *Planet of the Apes.* Ms. Bowling also concluded that a dead rat was found on a Muslim employee's prayer rug. She found Mr. Martinez's statement that "he was unaware of the incident" not to be credible. Ms. Bowling also found that Mr. Martinez's "blanket denial suggests that he had involvement in placing the dead rodent on [the Muslim employee's] prayer rug." She also found that "multiple employees in supervisory roles" failed to properly report potential discrimination complaints to her office.

64. Ms. Bowling found that witnesses' "recollections of harassment and bullying" by Mr. Martinez "were consistent and did not seem coordinated." She found that members of his crew were "reluctant to report significant concerns of discrimination." Ms. Bowling also found that Mr. Martinez carried a weapon at work, and concluded that "this fact supports that [Mr. Martinez] may intimidate others from reporting concerns." Ms. Bowling noted that, while Mr. Martinez may have a permit allowing him to legally carry a concealed weapon, carrying a weapon at work "may border on a violation of CDOT's Workplace Violence Policy Directive," which "defines workplace violence as any act that conveys intimidation."

65. Ms. Bowling investigated the January 3, 2021 complaint by conducting additional interviews of alleged witnesses.

66. Ms. Bowling interviewed Complainant on January 14, 2021. Complainant expressed concerns about participating in the interview because of his probationary status as a TM III. Ms. Bowling reassured Complainant that retaliation against him was prohibited.

67. Complainant told Ms. Bowling that Mr. Martinez referred to an African-American employee as a character from *Planet of the Apes*, and gave another African-American employee "a hard time when he grew his hair long." Complainant told Ms. Bowling that he had heard about a dead rat being placed on a Muslim employee's prayer rug. Complainant also told

Ms. Bowling that Mr. Martinez and Mr. DelValle openly discuss carrying guns at work.

68. On January 29, 2021, Ms. Bowling sent a report to Mr. Spahn concerning the January 3, 2021 complaint. Once again, this report summarized her interviews with witnesses and outlined her findings. This report included a description of Ms. Bowling's interview with Complainant.

69. While Ms. Bowling found that the evidence was "inconclusive" concerning additional allegations of policy violations by Mr. Martinez, Ms. Bowling recommended that Mr. Martinez be counseled concerning his management style and communications with employees.

70. Ms. Bowling also recommended that Mr. Smith, "as a newer employee to CDOT," be counseled concerning prompt reporting of discrimination allegations to the Civil Rights office.

71. Mr. Spahn reviewed Ms. Bowling's investigation reports, including a description of her interview with Complainant.

72. Before Mr. Spahn made a decision about whether to discipline Mr. Martinez, he conducted his own investigation of the allegations concerning Mr. Martinez, including allegations made by Complainant. Mr. Spahn interviewed all of the employees on Mr. Martinez's bridge repair crew.

73. On January 29, 2021, Mr. Spahn found that there was "insufficient evidence" to conclude that Mr. Martinez "violated relevant State or CDOT policies." He cancelled a previously scheduled predisciplinary meeting with Mr. Martinez.

Complainant's Reversion to TM II

74. On February 3, 2021, Mr. Smith consulted with Ms. Bowling and Mr. Spahn about reverting Complainant to his former position as a TM II.

75. Ms. Bowling asked Mr. Smith whether Mr. Martinez "had any input into the situations leading to the PDFs?" Mr. Smith replied: "No. Mike would only provide supporting documentation to the LTC Ops (if needed)."

76. A statement from Mr. Martinez criticizing Complainant's performance on January 4-5, 2021, was attached to Mr. Riddle's second PDF.

77. Mr. Riddle is married to Mr. Martinez's cousin.

78. Mr. Smith recommended to Mr. Spahn that Complainant be reverted to his former TM II position. This recommendation was based primarily on information Mr. Smith received concerning Complainant's job performance from Mr. Riddle.

79. Mr. Smith did not do any investigation of the incidents described in Mr. Riddle's PDFs. Mr. Smith's knowledge of these incidents is limited to what is contained in the PDFs.

80. Mr. Smith did not talk with Complainant before recommending his reversion.

81. Mr. Spahn did not do any investigation of the incidents described in Mr. Riddle's PDFs or talk with Complainant before reaching his decision to revert Complainant to his former TM II position.

82. On February 4, 2021, Mr. Spahn reverted Complainant to his former TM II position for "unsatisfactory performance."

83. Complainant's pay was reduced to the pay he was receiving prior to his promotion, plus any annual salary adjustments, effective February 6, 2021.

Complainant's Earnings

84. Complainant's regular gross monthly pay as a TM III was $5,178. (Stipulated fact.)

85. Complainant received a monthly housing stipend of $500 as a TM III. (Stipulated fact.)

86. After his reversion in February 2021, Complainant's regular gross monthly pay as a TM II was $4,671. (Stipulated fact.)

ANALYSIS

A. TRIAL SERVICE REVERSION.

The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service." Colo. Const. Art. XII, § 13(8).

A certified employee who promotes to a new position is subject to a period of "trial service." Board Rule 4-42(B). A trial service period is limited to six months. An employee who fails to perform satisfactorily during trial service shall revert to their previous position without a right to a hearing. Board Rule 4-43. However, a trial service employee may be granted a discretionary hearing on non-disciplinary matters. Board Rule 4-41(A).

B. CADA RETALIATION CLAIM.

The Colorado State Personnel Board has jurisdiction over appeals alleging retaliation under the Colorado Anti-Discrimination Act (CADA). *See* § 24-50-125.3, C.R.S. *See also* Board Rule 8-20.

Complainant claims Respondent retaliated against him because of concerns he raised about Respondent′s alleged discriminatory or unfair employment practices that violated CADA. Under CADA, it is a ″discriminatory or unfair employment practice ... [f]or any person ... [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because he has filed a charge with the [Colorado Civil Rights] commission, or because he has testified, assisted or participated in any manner, in an investigation, proceeding or hearing conducted pursuant to parts 3 and 4 of this article." § 24-34-402(1)(e)(IV), C.R.S.

The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1964. 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). Board Rule 9-4 provides: "In determining whether discrimination or harassment has occurred, the Board shall apply Colorado law, including the standards and guidelines adopted by the Colorado Civil Rights Commission. The Board may refer to federal law in the event Colorado legal standards are unclear."

1. Complainant's *Prima Facie* Case

To establish a *prima facie* case of retaliation under CADA, Complainant must show: (1) protected opposition to discrimination, (2) an adverse employment action occurred, and (3) a causal connection between the protected activity and the adverse employment action. *Smith v. Board of Educ. of Sch. Dist. Fremont RE-1*, 83 P.3d 1157, 1162 (Colo. App. 2003).

As to the first element of a *prima facie* case of CADA retaliation, Complainant participated in protected opposition to discrimination when he was interviewed by Ms. Bowling on January 14, 2021. Complainant told Ms. Bowling that Mr. Martinez referred to an African-American employee as a character from *Planet of the Apes*, and harassed another African-American employee "when he grew his hair long." Complainant also told Ms. Bowling that he had heard about a dead rat being placed on a Muslim employee's prayer rug. These allegations concern discriminatory acts on the basis of race and religion in violation of CADA. Thus, Complainant has established the first element necessary to demonstrate a *prima facie* case of CADA retaliation.

As to the second element of a *prima facie* case of retaliation, Complainant suffered an adverse employment action when he was reverted to a TM II. Reversion is tantamount to a demotion. An adverse employment action for a CADA retaliation claim is one "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), citing *Rochon v. Gonzales,* 438 F.3d 1211, 1219 (D.C. Cir. 2006). Complainant's reversion may reasonably dissuade other workers from making or supporting a charge of discrimination. Thus, Complainant has established the second element necessary to demonstrate a *prima facie* case of CADA retaliation.

As to the third element of a *prima facie* case of CADA retaliation, a causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Chavez v. City of Arvada,* 88 F.3d 861, 866 (10th Cir.1996). Thus, temporal proximity alone may be sufficient to establish an inference of retaliatory motive. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999).

Complainant communicated his opposition to discriminatory statements and actions targeting his coworkers during a January 14, 2021 interview with Ms. Bowling. This interview occurred approximately two weeks before Complainant's reversion to a TM II. The individual who decided to revert Complainant to a TM II, Mr. Spahn, was informed of Complainant's specific allegations of discrimination in Ms. Bowling's January 29, 2021 report. Mr. Spahn's reversion decision was communicated to Complainant on February 4, 2021 – six days after Mr. Spahn was informed of Complainant's allegations of discrimination. This close temporal proximity is enough to establish a causal connection between Complainant's protected opposition to discrimination and Respondent's decision to revert Complainant to a TM II position. Thus, Complainant has established the third element necessary for a *prima facie* case of CADA retaliation.

2. Respondent's Reasons for Complainant's Reversion

Once 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. *Colo. Civil Rights Comm'n v. Big O Tires*, *Inc.*, 940 P.2d 397, 401 (Colo. 1997). Once the employer articulates a legitimate, nondiscriminatory reason for the employment decision, 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. *Id*.

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." *Morgan v. Hilti, Inc.,* 108 F.3d 1319, 1323 (10th Cir. 1997). *See also Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 148 (2000) (holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.").

Respondent asserts it had legitimate business reasons for Complainant's reversion. During the hearing, Mr. Riddle, Mr. Maupin, Mr. Smith and Mr. Spahn testified about Complainant's performance problems in very vague, general terms. The only specific performance problems detailed by Respondent concerned two incidents for which Mr. Riddle issued PDFs on January 6, 2021. Conflicting testimony about these specific incidents raises serious doubts about the accuracy of these PDFs and the alleged performance problems.

Mr. Maupin, who supervised Mr. Riddle, told Mr. Smith that Mr. Riddle originally forwarded drafts of the PDFs to Mr. Maupin for his review. Mr. Maupin told Mr. Smith that Mr. Riddle's draft PDFs "were a complete mess." Both Mr. Smith and Mr. Maupin testified that Mr. Maupin helped Mr. Riddle revise the PDFs. In contrast, Mr. Riddle denied receiving any assistance in drafting the PDFs.

Mr. Smith, who recommended Complainant's reversion, testified that he had no personal knowledge of the incidents that resulted in Mr. Riddle's issuance of the January 6, 2021 PDFs. Based on the information he received from Mr. Riddle, Mr. Smith believed that, on January 4, 2021, Complainant was assigned a pothole repair at MM 259 on I-70 that then developed into a hole in the bridge deck. However, a number of employees consistently testified that this hole in the bridge deck existed before this repair was assigned to Complainant, and that Mr. Riddle unsuccessfully tried to fix it using rocks and multiple bags of cold mix. Mr. Riddle then turned this problem over to Complainant and went home for the night.

Mr. Smith testified that the "senior leader" on a work site "is ultimately responsible for everything." Based on the information he received from Mr. Riddle, Mr. Smith believed that Complainant supervised bridge repairs that were not done according to Respondent's standards. However, the repairs to the hole in the bridge deck were originally started by Mr. Riddle who, as a LTC Ops, was senior to Complainant. The subsequent repairs to the hole in the bridge deck were performed by a bridge repair crew that was not supervised by Complainant, but by Mr. Bowles, a TM III who had more seniority as a TM III than Complainant.

The preponderance of the evidence establishes that Complainant's crew was responsible for some small pothole repairs, not the more extensive hole in the bridge deck repair,

on January 4-5, 2021. The preponderance of the evidence also establishes that the unprofessional decisions and improper bridge repairs cited in the PDF resulted from Mr. Riddle's incorrect assessment of a hole in the bridge deck as a simple pothole, and his attempts to use rocks and multiple bags of cold mix to fix this hole.

Mr. Smith also believed that Complainant failed to timely communicate with Mr. Riddle concerning the bridge hole repair on January 4-5, 2021. However, both Complainant and Mr. Riddle testified that Complainant called Mr. Riddle a number of times to update him on the situation. Because Complainant's crew was short staffed, Complainant asked Mr. Riddle to create a CIR for upper level management. Mr. Riddle failed to create the CIR.

Mr. Riddle's inaccurate reporting of the events of January 4-5, 2021 casts doubt on his description of Complainant's performance problems on December 27, 2020. In his PDF, Mr. Riddle admonished Complainant for failing to ensure that a service truck had proper traffic control signage and was operational. This service truck was operated by Mr. Farley. Mr. Maupin testified that Complainant simply needed to ask Mr. Farley if he completed the pre-trip inspection, suggesting that Complainant could simply rely on Mr. Farley's response, rather than closely supervising or double-checking that inspection. The preponderance of the evidence establishes that Mr. Farley, rather than Complainant, failed to properly complete a pretrip inspection of a service vehicle.

The Colorado Supreme Court has recognized that "employees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination…" *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 296 (Colo. 2000). In *Colo. Civil Rights Comm'n v. Big O Tires*, *Inc.*, the Colorado Supreme Court held:

> Where a prima facie case of discrimination is proven and the reasons given for discharge are found to be a pretext for discrimination, no additional evidence is required to infer intentional discrimination.

Colo. Civil Rights Comm'n v. Big O Tires, *Inc.*, 940 P.2d at 402.

Respondent has failed to establish a legitimate, nondiscriminatory reason for its reversion decision by a preponderance of the evidence. Further, the inconsistencies, contradictions and weaknesses in Respondent's assertions concerning Complainant's performance problems lead to the reasonable inference that Respondent did not act for its alleged non-discriminatory reasons. *Bodaghi v. Dep't of Natural Resources*, 995 P.2d at 297-98 (Colo. 2000). As previously outlined, Mr. Riddle's PDFs describing Complainant's performance problems contradict the preponderance of the evidence presented during the hearing. In addition to Mr. Riddle's inaccurate PDFs, he denied receiving help from Mr. Maupin to revise these PDFs, which Mr. Maupin described as "a complete mess." These inconsistencies, combined with Mr. Riddle's misguided attempts to fix a dangerous hole in the bridge deck at MM 259 on January 4, 2021, before going home and leaving this problem for Complainant to deal with, raise serious questions concerning Mr. Riddle's credibility. Where, as here, disbelief in Respondent's professed reasons for Complainant's reversion "is accompanied by a suspicion of mendacity," such disbelief, combined with the elements of a *prima facie* case established by Complainant, "suffice to show intentional discrimination." *Id.* at 302, *quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

The ALJ finds that Respondent's proffered reasons for reverting Complainant constitute pretext for retaliation in violation of CADA. This finding of pretext, combined with the elements of

a *prima facie* case established by Complainant, suffice to show intentional retaliation in violation of CADA.

C. WHISTLEBLOWER CLAIM.

The Colorado State Personnel Board has jurisdiction over appeals alleging violations of the Whistleblower Act. § 24-50.5-104, C.R.S. and Board Rule 8-24.

The Whistleblower Act protects state employees from retaliation when an employee discloses actions by state agencies that are not in the public interest. See § 24-50.5-101(1), C.R.S. and § 24- 50.5-103, C.R.S. The Board may use its discretion to set whistleblower complaints for hearing under § 24-50.5-104(1), C.R.S. In order to establish a *prima facie* case of whistleblower retaliation and a valid whistleblower complaint, Complainant must establish (1) that he disclosed information to Respondent pertaining to a matter of public interest, (2) that he was disciplined as defined by the Whistleblower Act, and (3) that the disciplinary action occurred on account of the disclosure of information. See § 24-50.5-103(1), C.R.S.; *Ward v. Indus. Comm'n*, 699 P.2d 960, 966-68 (Colo. 1985).

1. Complainant's *Prima Facie* Case

The Whistleblower Act defines "disclosure of information" as "the written provision of evidence to any person...regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." § 24-50.5-102(2), C.R.S. Disclosures may be presented in writing or offered orally. *Ward*, 699 P.2d at 967.

The Whistleblower Act protects state employees from retaliation by their appointing authorities or supervisors because of the disclosure of information about state agency actions that include, but are not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency. *Ferrel v. Colo. Dep't of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007). While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests. *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996).

On January 14, 2021, Complainant provided information to Ms. Bowling about alleged mismanagement and abuse of authority by Mr. Martinez and Mr. DelValle. These allegations included Mr. Martinez's harassment of African-Americans and other employees, concerns about Mr. Martinez and Mr. DelValle carrying concealed weapons at work, a climate of intimidation created by Mr. Martinez and fear of retaliation by management. The allegations Complainant shared with Ms. Bowling involve matters of public concern, and thus meet the definition of protected disclosures outlined in § 24-50.5-102(2), C.R.S.

In addition to establishing that he engaged in protected disclosures by raising issues of public concern, Complainant must also demonstrate that he made "a good faith effort to provide to [his] supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." § 24-50.5-103(2), C.R.S. If Complainant makes a disclosure about a matter of public concern to one of these persons or entities, a single disclosure is sufficient to satisfy the requirements of the Whistleblower Act. *Gansert v. Colorado*, 348 F.Supp.2d 1215, 1228 (D.Colo. 2004).

Complainant's disclosures to Ms. Bowling, a Civil Rights Manager who is responsible for her employees' work in Respondent's Civil Rights office, met the reporting requirements of § 24-50.5-103(2), C.R.S. *See Gansert v. Colorado*, 348 F.Supp.2d at 1226 (holding that "[t]he definition of 'supervisor' … includes any other person who supervises or is responsible for the work of one or more employees"). Ms. Bowling then reported Complainant's disclosures to Mr. Spahn, Complainant's appointing authority. Thus, Complainant has established the first prong of a *prima facie* whistleblower claim.

As to the second element of a *prima facie* whistleblower retaliation case, Complainant suffered an adverse employment action. The Whistleblower Act defines "disciplinary action" as, "any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty." § 24-50.5-102 (1), C.R.S. Respondent's reversion of Complainant to a TM II position is tantamount to a demotion and falls within the Whistleblower Act's definition of a "disciplinary action." Thus, Complainant has established the second element necessary to establish a *prima facie* case of whistleblower retaliation.

Finally, to meet the third element of a *prima facie* case of whistleblower retaliation, Complainant must establish that the "disciplinary action" resulted "on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S. (emphasis added). The Colorado case law implementing the Whistleblower Act fails to define the standard by which this causal connection is established. Therefore, case law implementing the anti-retaliation provisions of CADA and Title VII provides useful guidance. As discussed in the analysis of Complainant's CADA retaliation claim, above, the causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Chavez v. City of Arvada,* 88 F.3d at 866; *Anderson v. Coors Brewing Co.*, 181 F.3d at 1179.

Complainant made his protected disclosures during a January 14, 2021 interview with Ms. Bowling. This interview occurred approximately two weeks before Complainant's reversion to a TM II position. The individual who decided to revert Complainant to a TM II, Mr. Spahn, was informed of Complainant's specific disclosures in Ms. Bowling's January 29, 2021 report. Mr. Spahn's reversion decision was communicated to Complainant on February 4, 2021 – six days after Mr. Spahn was informed of Complainant's specific disclosures. This close temporal proximity alone is enough to establish that the reversion occurred on account of Complainant's disclosures, the third element necessary for a *prima facie* case of whistleblower retaliation.

2. Respondent's Reasons for Complainant's Reversion

If the employee states a *prima facie* case of a whistleblower violation, the agency may then defeat the claim by demonstrating it would have reached the same decision in the absence of the protected conduct. *Ward v. Indus. Comm'n*, 699 P.2d 960, 966 (Colo. 1985). Employers may violate the Act if they had both legitimate and retaliatory motives in issuing the discipline. *Taylor v. Regents of the Univ. of Colorado*, 179 P.3d 246, 249-50 (Colo. 2007).

As discussed above, the preponderance of the evidence establishes that Mr. Riddle's January 6, 2021 PDFs, cited by Respondent as justification for its reversion decision, were inaccurate. For one of these PDFs, Mr. Martinez provided a statement criticizing Complainant's job performance. At the time he provided this statement, Mr. Martinez was the subject of an ongoing investigation into his alleged harassment and intimidation of employees. In addition, Mr.

Riddle is married to Mr. Martinez's cousin. These circumstances raise questions concerning the credibility of Mr. Martinez's statement and Mr. Riddle's PDFs.

On February 3, 2021, Mr. Smith consulted with Ms. Bowling about reverting Complainant based on Mr. Riddle's PDFs. Ms. Bowling asked whether Mr. Martinez "had any input into the situations leading to the PDFs?" Mr. Smith replied "No." In fact, Mr. Riddle conferred with Mr. Martinez before turning the January 4-5, 2021 bridge repair work over to Complainant, and received a supporting statement from Mr. Martinez criticizing Complainant's performance that was attached to Mr. Riddle's PDF.

Mr. Spahn did not investigate the allegations concerning Complainant's performance contained in Mr. Riddle's PDFs before reaching his decision to revert Complainant to his former TM II position. Mr. Spahn testified that he relied on his supervisors to provide him with accurate information and did not conduct independent investigations of employees' performance problems before making reversion or disciplinary decisions. However, Mr. Spahn conducted his own extensive investigation of the allegations of mismanagement and abuse of authority by Mr. Martinez.

In her reports to Mr. Spahn concerning the allegations against Mr. Martinez, Ms. Bowling found that a number of witnesses substantiating these allegations were consistent and credible. In reaching a decision about whether to discipline Mr. Martinez, Mr. Spahn disregarded Ms. Bowling's findings and recommendations. After conducting his own interviews of the employees on Mr. Martinez's crew, Mr. Spahn concluded that there was "insufficient evidence" to conclude that Mr. Martinez "violated relevant State or CDOT policies."

Mr. Spahn's disparate treatment of allegations concerning Mr. Martinez and Complainant suggest a potential motive to protect Mr. Martinez and to punish Complainant for his protected disclosures concerning Mr. Martinez.

Inconsistencies and contradictions in evidence concerning the incidents described in Mr. Riddle's PDFs render them "unworthy of credence." *Morgan v. Hilti, Inc.,* 108 F.3d at 1323. Other than Mr. Riddle's PDFs, Respondent's witnesses offered only vague generalities concerning Complainant's performance as a TM III. The inconsistencies, contradictions and weaknesses in Respondent's asserted non-retaliatory reasons lead to the reasonable inference that Respondent did not act for those reasons. *Id*. Therefore, the ALJ finds that Respondent failed to demonstrate, by a preponderance of the evidence, that it would have reached its reversion decision in the absence of Complainant's protected disclosures.

D. THE APPROPRIATE REMEDY.

Section 24-50.5-104(2), C.R.S., of the Whistleblower Act provides, in pertinent part:

> If the state personnel board after hearing determines that a violation of section 24-50.5-103 has occurred, the state personnel board shall order, within forty-five days after such hearing, the appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, and expungement of the records of the employee who disclosed information…

Respondent argues that, to the extent that this case involves an alleged violation of a trial service employee's procedural rights prior to a reversion, Complainant is only entitled to an award of back pay for the unexpired period of the trial service period. In support of this argument,

Respondent cites *Dep't of Health v. Donahue*, 690 P.2d 243 (Colo. 1984), which held that the proper remedy for failing to hold a predisciplinary meeting before terminating a probationary employee for unsatisfactory performance is an award of back pay for the unexpired period of the probationary term. *Id.*, 690 P.2d at 250. Respondent also cites *McCoy v. Dep't of Soc. Servs., Div. of Aging & Adult Servs.*, 796 P.2d 77, 79 (Colo. App. 1990), which held that a back pay award should be similarly limited where Respondent failed to hold a predisciplinary meeting prior to reverting a trial service employee for unsatisfactory performance.

The cases cited by Respondent were decided before the requirement of a predisciplinary meeting for probationary employees was removed from the Board rules. Unlike these cases, Complainant's appeal does not involve an alleged violation of a trial service employee's procedural rights prior to a reversion. Instead, Complainant's appeal involves substantive rights protected by CADA and the Whistleblower Act. Therefore, the cases cited by Respondent are inapplicable to this appeal.

Because the ALJ has determined that Respondent violated the Whistleblower Act, Complainant is entitled to "reinstatement, back pay, restoration of lost service credit, and expungement of [his] records." § 24-50.5-104(2), C.R.S.

At the time of his reversion from a TM III position on February 4, 2021, Complainant was earning $5,178 per month. Complainant also received a monthly housing stipend of $500. After his reversion, Complainant's regular gross monthly pay as a TM II was $4,671, and he no longer received a monthly housing stipend.

The ALJ finds that Complainant is entitled to back pay in the amount of $507, as well as the $500 stipend he was wrongfully denied, for each month from February 4, 2021 until he is reinstated, plus applicable interest. As of December 4, 2021, Complainant's back pay award will total $9,063, plus applicable interest.

E. ATTORNEY FEES AND COSTS.

Section 24-50.5-104(2), C.R.S., provides that, where an employee establishes that an agency violated the Whistleblower Act, "the state personnel board shall order that the employee filing the complaint be reimbursed for any costs, including any court costs and attorney fees, if any, incurred in the proceeding." (Emphasis added.) Because the preponderance of the evidence establishes that Respondent violated the Whistleblower Act, Complainant is entitled to reimbursement of his costs and attorney fees incurred in the proceeding before the Board.

In addition, § 24-50-125.5(1), C.R.S., provides, in pertinent part:

> Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose … was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless … the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee … against whom such personnel action was taken...

A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Personnel actions that are "in bad faith, malicious, or … a means of harassment" are actions "pursued to annoy or harass, made to be

abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which it is found that "a party fails to offer or produce any competent evidence to support such an action…" Board Rule 8-33(C).

As discussed above, the preponderance of the evidence establishes that Respondent's decision to revert Complainant constituted retaliation in violation of CADA. Because Respondent's reversion of Complainant was retaliatory, this personnel action was "in bad faith, malicious, or … a means of harassment." Respondent also failed to produce competent evidence to support its decision to terminate Complainant's employment, rendering this action groundless. Therefore, under § 24-50-125.5(1), C.R.S., Complainant is entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent retaliated against Complainant in violation of CADA.

2. Respondent retaliated against Complainant in violation of the Whistleblower Act.

3. The appropriate remedy is reversal of Respondent's decision to revert Complainant from his former Transportation Maintenance III position to a Transportation Maintenance II position.

4. Complainant is entitled to an award of attorney fees and costs.

ORDER

1. Respondent's reversion of Complainant to a Transportation Maintenance II position is **rescinded**.

2. Respondent shall **reinstate** Complainant to his former Transportation Maintenance III position.

3. Respondent shall **reimburse** Complainant for his lost wages in the amount of $507, as well as a $500 housing stipend, for each month from February 4, 2021 until he is reinstated, plus applicable interest. This amount is subject to the employer's PERA contribution, as well as interest of 8% per annum to the date of reinstatement.

4. Respondent shall **reimburse** Complainant for his reasonable and necessary costs and attorney fees incurred in the proceeding before the Board.

5. Complainant shall submit a bill of attorney fees and costs to the Board on or before December 13, 2021. Upon receipt of Complainant's bill of attorney fees and costs, Respondent shall have fifteen days to file any objections, or otherwise respond.

Dated this 29th day
of November, 2021, at
Denver, Colorado.

[redacted]
Susan J. Tyburski
Senior Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of November, 2021, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Christopher M.A. Lujan, Esq.
Empower Law, P.C.
christopher@empowerlawdenver.com

Amanda C. Swartz, Esq.
Assistant Attorney General
Amanda.Swartz@coag.gov

[redacted]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits B, F, H, J, N, R, S, U, V, W, Z, AA, BB, CC, DD.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits 1, 2, 3, 4, 5, 6, 9, 10, 11, 14, 15, 17, 18, 19, 20, 21.

WITNESSES

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

Shawn Smith, Superintendent, Region 1, Section 5 (Denver Metro)
Bill Riddle, TM III (former acting LTC Ops)
Patricia Bowling, Region 1 Civil Rights Manager
Neil Lawson, TM I
Phillip Arguello, Heavy Equipment Mechanic (former TM I)
Dave Moreno, TM I
Phillip Farley, TM II
Brent Spahn, former Deputy Director of Maintenance
Jamie Ward, Training Specialist III (former TM III)
Anthony Vallejos, TM III (former LTC Ops)
Tino Trujillo, former TM III
Marcus A. Maes, Complainant
Jered Maupin, Deputy Superintendent, Region 1, Section 5 (Denver Metro)

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).