STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2022B013**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LEANNA BERNABEI,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, COLORADO STATE PENITENTIARY,
Respondent.

Administrative Law Judge (ALJ) McCabe held the evidentiary hearing on December 8, 2021, via web conference using Google Meet. The record was closed on December 9, 2021.

Leanna Bernabei, Complainant, appeared on her own behalf. Respondent appeared through its attorney, Assistant Attorney General Elliot Singer, Esq. Respondent's advisory witness was Complainant's Appointing Authority, Associate Warden Dave Lisac.

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

MATTER APPEALED

Complainant, a certified employee, appeals Respondent's termination of her employment. Complainant argues the discipline was not reasonable and alleges Respondent discriminated against her on the basis of disability, failed to reasonably accommodate her, retaliated against her, refused to consider mitigating information, and failed to follow policies on fitness for duty. Complainant seeks reinstatement, back pay, and past Corrective Actions removed from her personnel file.

Respondent argues Complainant cannot meet her burden to show Respondent discriminated and retaliated against Complainant. Respondent argues Complainant committed the act for which she was disciplined, and the discipline imposed was not arbitrary, capricious, or contrary to rule or law.

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

ISSUES

1. Did Complainant commit the alleged misconduct for which she was disciplined?

2. If so, was Respondent's termination of Complainant's employment arbitrary, capricious, or contrary to rule or law?

3. Did Respondent discriminate against Complainant on the basis of disability in violation of the Colorado Anti-Discrimination Act?

4. Did Respondent retaliate against Complainant in violation of the Colorado Anti-Discrimination Act?

FINDINGS OF FACT

Background

1. Complainant began employment with Respondent in 2017. In 2019, Complainant began work for Respondent at Colorado State Penitentiary.

2. Complainant worked as a Correctional Officer I.

3. Per Complainant's Position Description, her position existed, in part, to "Maintain safety and security of facility and work sites."

4. Colorado State Penitentiary houses some of the state's most violent offenders.

5. Contraband is a serious concern at Colorado State Penitentiary.

6. The knowing introduction of contraband into Colorado State Penitentiary can be a felony criminal offense under § 18-8-204, C.R.S.

7. Section 18-8-204(2)(f), C.R.S., includes any combustible material (other than safety matches) in the definition of contraband.

8. Aerosol cans are considered contraband. Aerosol cans can be weaponized. Aerosol cans are flammable and can be used to make shanks.

9. Cigarettes are considered contraband. Cigarettes have a high monetary value and can result in violent activity among offenders at Colorado State Penitentiary.

10. Carrying cigarettes into Colorado State Penitentiary puts an employee in a compromised position. Bringing cigarettes into Colorado State Penitentiary compromises the employee because the employee could sell, or be solicited to sell, cigarettes to offenders.

11. Colorado State Penitentiary maintains a list of allowable and non-allowable items. The list of non-allowable items includes "[a]ny item deemed as a detriment to the safety and security of employees, offenders and the facility." The list does not specifically include aerosol cans or cigarettes.

12. Colorado Penitentiary has policies specifically prohibiting the introduction of tobacco products to the facility.

13. Colorado State Penitentiary has signs outside the facility informing entrants that tobacco is prohibited. The signs are visible as one drives into the facility.

14. Complainant attended basic training in 2017 and 2019. Basic training included training on DOC Administrative Regulation 1450-01. During basic training, Complainant received training on contraband and the prohibition of tobacco in Respondent's facilities.

15. It is standard protocol for employees to perform a self-search to ensure they are not carrying contraband prior to entering Colorado State Penitentiary. It is every employee's responsibility to do this before entering Colorado State Penitentiary. Complainant received training on this, and was aware she needed to make sure she did not have any contraband on her person before entering Colorado State Penitentiary.

16. DOC Administrative Regulation 1450-01 is Respondent's Code of Conduct. It applies to all of Respondent's employees.

- Section III (B) defines Conduct Unbecoming as, "any act or conduct…which brings the DOC into disrepute or reflects discredit upon the agency, negatively affects job performance, or calls into question one's ability to perform effectively and efficiently in his/her position."

- Section IV (A)(1) requires employees to avoid situations that give rise to conflicts of interest.

- Section IV (A)(3) requires employees to follow Respondent's policies and procedures.

- Section IV (A)(8) prohibits conduct that negatively affects job performance, tends to bring Respondent into disrepute, reflects poorly on the "individual as a DOC employee," or tends to "adversely affect public safety."

- Section IV (B)(1) prohibits conduct that "jeopardizes the integrity or security" of Respondent.

- Section IV (L)(1) prohibits Respondent's employees from possessing or using illegal drugs, abusing controlled substances, or working under the influence of illegal drugs or alcohol.

- Section IV (L)(2) prohibits employees from possessing tobacco in the workplace.

17. Respondent also has a Code of Ethics.

- Section II (A)(1) requires the conduct of employees to hold the respect and confidence of people.

- Section II (A)(2) requires employees to carry out their duties for the benefit of the people and state.

- Section II (A)(3) requires employees to avoid conduct that violates public trust or creates the impression of trust being violated.

- Section III (A) requires employees to "serve the public with respect, concern, courtesy, and responsiveness."

- Section III (B) requires employees to demonstrate "personal integrity, truthfulness and honesty."

- Section III (J) requires employees to expose corruption and impropriety in government when discovered.

18. Respondent has a Fitness for Duty Policy. The Fitness for Duty policy allows an appointing authority to seek a psychological fitness for duty ("PFFD") examination through the state's Universal Policy on Psychological Fitness for Duty ("Universal Policy") when an employee is unable to perform the essential functions of their position for a psychological reason.

19. The Universal Policy provides that implementation of a PFFD process is "an extraordinary step." The Universal Policy states, "Under no circumstances does this policy establish a requirement that a PFFD evaluation be conducted." The Universal Policy also allows an appointing authority to pursue performance management when "an employee's performance or behavior problems rise to the level of unacceptable work performance or unacceptable personal conduct."

20. Dave Lisac, Associate Warden for Colorado State Penitentiary, was Complainant's appointing authority at the time of her separation from employment. Thomas Little, Warden, delegated appointing authority to Associate Warden Lisac.

Complainant's Prior Conduct and Performance History

21. Early in her career with Respondent, Complainant carried a cigarette filter into the Arkansas Valley Correctional Facility. The warden at the facility counseled Complainant that she could not do that. Respondent did not discipline Complainant for the incident.

22. On July 9, 2018, Complainant received an Outstanding Performance Documentation for not taking time off work after a car accident when staffing was at minimum levels.

23. On March 9, 2020, Complainant received a Corrective Action. The Corrective Action was issued for violation of Administrative Regulation 1450-01 (Code of Conduct), Administrative Regulation 1450-05 (Unlawful Discrimination/Discriminatory Harassment), Administrative Regulation 1150-04 (Professional Standards Investigations), Code of Ethics, Complainant's Performance Plan, and Board Rule 6-12. Respondent gave the Corrective Action to Complainant for Complainant's willful failure to report, sexual harassment, unprofessional conduct toward coworkers, and overall unsatisfactory performance. The Corrective Action required, among other things, for Complainant to review Administrative Regulations 1450-01 and 1450-05.

24. Complainant considered this March 9, 2020, Corrective Action to be retaliatory for her own report of sexual harassment, and disagreed with it. Complainant filed a response to the Corrective Action detailing her disagreement with it, but did not grieve or appeal the Corrective Action.

25. On January 26, 2021, Complainant received a Corrective and Disciplinary Action. The Corrective and Disciplinary Action was issued for violation of Administrative Regulation 1450-01 (Code of Conduct), Administrative Regulation 1450-05 (Unlawful Discrimination/Discriminatory Harassment), Code of Ethics, Complainant's Performance Plan, and State Personnel Board Rule 6-12. Respondent gave Complainant the Corrective and Disciplinary Action for willful failure to report, unprofessional/harassing behavior toward coworkers, and overall unsatisfactory performance. The conduct leading to this Corrective and Disciplinary Action included calling an

employee inappropriate nicknames that were sexual in nature, attempting to intimidate the employee, and jokingly making threats of violence against staff. The Corrective Action required, among other things, for Complainant to review Administrative Regulations 1450-01. The Disciplinary Action was a three-month reduction in base pay.

26. Complainant acknowledged that her behavior leading to the January 26, 2021, Corrective Action and Disciplinary Action was inappropriate.

27. On May 20, 2021, Complainant received a Performance Improvement Plan related to days she was absent from work.

28. Complainant disagreed with the May 20, 2021, Performance Improvement Plan. Complainant used paid sick leave for most of the dates listed in the Performance Improvement Plan. On May 21, 2021, Complainant sent an email to Lindsey Seifert, Warden Assistant, regarding her concerns with the Performance Improvement Plan. Complainant did not grieve or appeal the Performance Improvement Plan.

Complainant's Medical Conditions and Family Medical Leave

29. On March 8, 2021, Complainant noticed her behavior might create a safety risk at work. Complainant noted she was angry all of the time. Complainant presented her concerns to Ms. Seifert. After the report to Ms. Seifert, Risk Management determined it needed to put Complainant on administrative leave pending a fitness for duty exam. Respondent put Complainant on administrative leave.

30. On March 9, 2021, Ms. Seifert sent Complainant a notification of her family medical leave rights. The notification explained that Complainant may be eligible for an ADA accommodation, "If you are unable to work due to a permanent disability, you may be eligible for Americans with Disabilities Act ("ADA") accommodation. To request an accommodation for a permanent disability, complete AR Form 1450-35A and mail it to DOC Employee ADA coordinator in the Office of Human Resources." The notification attached AR 1450-35, which includes AR Form 1450-35A.

31. On March 22, 2021, Complainant was diagnosed with multiple medical conditions. Complainant's medical provider recommended that Complainant not return to work at that time due to safety concerns.

32. Complainant's medical conditions affect her conduct and behavior.

33. After the diagnosis, Complainant's administrative leave ended and Complainant began using accrued leave.

34. On March 30, 2021, Respondent approved Complainant for family medical leave from March 8, 2021 to March 28, 2021.

35. Complainant returned to work on April 22, 2021. Complainant's medical provider cleared Complainant to return to work.

36. Complainant discussed her medical diagnoses with dozens of Respondent's employees.

37. After her return to work, Complainant disclosed her conditions to her supervisor. Complainant sought advice about one of her medical conditions from her supervisor, because he knew how the medical condition affects people.

38. On May 21, 2021, following receipt of the May 20, 2021, Performance Improvement Plan related to attendance, Complainant sent an email to Ms. Seifert. Complainant wrote, in part, "I'm kinda of [sic] confused on somethings [sic] and I hope you can give me some clarity and peace of mind." After providing information about dates in February and March 2021, Complainant wrote, "I may have wrongly assumed that after my diagnosis would cover those absences under fmla or even ada."[1]

39. On June 7, 2021, Complainant initiated intermittent family medical leave.

40. On June 8, 2021, Ms. Seifert sent Complainant a notification of her family medical leave rights. The notification explained that Complainant may be eligible for an ADA accommodation, "If you are unable to work due to a permanent disability, you may be eligible for ADA accommodation. To request an accommodation for a permanent disability, complete AR Form 1450-35A and mail it to DOC Employee ADA coordinator in the Office of Human Resources." The notification attached AR 1450-35, which includes AR Form 1450-35A.

41. On June 21, 2021, by memo, Respondent denied Complainant family medical leave for some of the time taken off in March and April 2021 due to Complainant's failure to provide medical certification. The memo informed Complainant she was in a leave-without-pay status from March 29, 2021 to April 21, 2021, and that $3,058.32 would be deducted from her June paycheck.

42. On June 22, 2021, Complainant met with her medical provider. The medical provider prescribed a new medication. The medication change was difficult for Complainant.

43. On June 23, 2021, Respondent approved intermittent family medical leave for Complainant. Per the approval, Complainant could take intermittent leave up to three days per month from June 20, 2021, to December 20, 2021.

44. On June 24, 2021, in response to the June 21, 2021, memo about leave without pay, Complainant sent an email to a number of Respondent's employees. The employees included Ms. Seifert and human resource employees. Complainant wrote, "I would have requested an ADA accommodation if I had any indication my FMLA was at risk of being denied."

45. On August 5, 2021, Respondent placed Complainant on administrative leave due to behavior she exhibited at work. Complainant's supervisor informed Complainant that she would need a "fitness to return" prior to returning to Colorado State Penitentiary.

46. Respondent requested Complainant return to work on August 15, 2021. On August 15, 2021, Complainant returned to work without medical clearance. Respondent terminated Complainant's employment on the same date.

[1] Complainant asserted in her testimony that she submitted a written request for ADA accommodations to Ms. Seifert in this email. However, the evidence establishes that Complainant did not include a request for ADA accommodations in this email.

June 30, 2021, Incident ("Contraband Incident") and Investigation

47. On June 30, 2021, Complainant had exhausted the three days of intermittent family medical leave approved for June 2021.

48. On June 30, 2021, Complainant had concerns about calling-off of work because she earlier received the Performance Improvement Plan for taking days off of work. Complainant felt she was not clear-headed on June 30, 2021.

49. On June 30, 2021, Complainant was running late to work. Prior to arriving at work, Complainant stopped at a gas station and bought multiple drinks and a pack of cigarettes. When Complainant arrived at work, Complainant scooped items from her car into her bag.

50. Complainant proceeded into Colorado State Penitentiary without carefully checking her bag. Complainant had a pack of cigarettes and an aerosol deodorant can in her bag. Complainant was not aware the pack of cigarettes was in her bag. Complainant regularly carried in aerosol cans.

51. Complainant was aware cigarettes were prohibited. Complainant was not aware aerosol cans were prohibited.

52. Prior to entering the facility, Complainant went through a security check. Complainant ran her bag through an E-Scan machine. The officer monitoring the E-Scan machine did not catch the pack of cigarettes in Complainant's bag.

53. Complainant then entered Colorado State Penitentiary with a pack of cigarettes and an aerosol deodorant can.

54. During Complainant's workday, another employee noticed the pack of cigarettes in Complainant's open bag.

55. The employee reported the pack of cigarettes to Lieutenant Kenneth Weber. Lieutenant Weber reported the incident to Captain Jerry Londenberg. Captain Londenberg was the Colorado State Penitentiary Swing Shift Commander at the time.

56. Captain Londenberg and Lieutenant Dawn Busch inspected Complainant's bag and found the pack of cigarettes.

57. Captain Londenberg instructed Lieutenant Busch to take Complainant's bag to the shift commander's office. Captain Londenberg then escorted Complainant to the shift commander's office.

58. Captain Londenberg asked Complainant if she had any unauthorized items in her bag. Complainant responded that she did not think she had any unauthorized items in her bag.

59. Complainant then searched her bag in the presence of Captain Londenberg. Complainant located the pack of cigarettes. Additional inspection of the bag revealed the aerosol deodorant can.

60. Photographs were taken of the pack of cigarettes and aerosol deodorant can.

61. Captain Londenberg contacted Associate Warden Lisac, who was not at Colorado State Penitentiary when the pack of cigarettes was discovered. Captain Londenberg informed Associate Warden Lisac they found Complainant to be in possession of a pack of cigarettes and an aerosol deodorant can.

62. Associate Warden Lisac returned to Colorado State Penitentiary. Associate Warden Lisac had all employees involved in the incident ("Contraband Incident") complete an incident report.

63. Complainant wrote in her incident report:

> On 6/30/2016 [sic], I Officer Bernabei, was asked to go [sic] the shift commander office where I was asked to go through my bag for any contraband. As I was searching I did see an unopened carton of Marlboro Cigarettes underneath a separate bag. This was an honest mistake but entirely my fault for not making sure to be aware of what I had in my bag. I had been running late and just grabbed my stuff off my floor where my chits, jacket and belts had been. I was recently diagnosed with [medical conditions], and I had thought that my medical leave away would give me time to adjust and find a treatment plan. However, even though I'm better, some days are worse than others. This is my fault for not being aware at all times, as that is the expectation set and even more so that when days where my concentration, and cognitive thinking is impaired I should not come in. And bringing in contraband inadvertently or not is not acceptable, This was an oversight, but that's not [sic] excuse and I take full responsibility for my mistake..[sic]

64. Associate Warden Lisac contacted William Hastings, Criminal Investigator with Respondent's Office of Inspector General. It was standard protocol for Associate Warden Lisac to contact Investigator Hastings.

65. On June 30, 2021, Associate Warden Lisac suspended Complainant with pay as a result of the Contraband Incident.

66. Following the Contraband Incident, Respondent initiated a criminal investigation and a professional standards investigation. Investigator Hastings conducted the criminal investigation. Mike Barnett, Investigator with Respondent's Office of Inspector General, conducted the professional standards investigation.

67. On July 1, 2021, Investigator Hastings interviewed Complainant. Investigator Barnett observed the interview.

68. During her interview with Investigator Hastings, Investigator Hastings asked of the Contraband Incident, "But, by the same token, the reason we talked about policies is that you absolutely realize that that's a violation of policy." Complainant responded, "Yes, it was completely my fault. I should have paid more attention. I should have slowed down. Not worried about being late. Being late was probably my biggest concern that day just because I get yelled at for it. So it was my fault. I wasn't paying attention and I absolutely violated policy." Complainant then went on to explain that she believed she came back from her medical leave too early.

69. Investigator Hastings also asked, "You acknowledge that it was your fault. Is that pretty much it in a nutshell?" Complainant responded, "Yes. When I was on FMLA, on days I'm like

that and I'm supposed to not come in, and I chose to do so anyway. And that was neglect on my part."

70. Immediately following the interview with Investigator Hastings, Investigator Barnett interviewed Complainant.

71. During her interview with Investigator Barnett, Complainant discussed her medical issues and medication she was taking.

72. During his investigation, Investigator Barnett also spoke with Captain Londenberg, Associate Warden Lisac, and the officer running the E-Scan machine when Complainant entered on June 30, 2021.

73. Investigator Barnett completed an investigative report. The investigative report includes a synopsis of his interview with Complainant. The synopsis includes Complainant's report of medical issues to Investigator Barnett. The investigative report also includes the incident reports submitted by Complainant and the others involved with the Contraband Incident.

74. Following the investigations, no criminal charges were brought against Complainant for the Contraband Incident.

Discipline Decision

75. On July 14, 2021, Associate Warden Lisac contacted Complainant. Associate Warden Lisac informed Complainant that Respondent was allowing Complainant to return to work.

76. On July 15, 2021, Complainant returned to work.

77. On the same date, Associate Warden Lisac met with Complainant and provided Complainant a Notice of Board Rule 6-10 Meeting. During the July 15, 2021, meeting, Complainant attempted to address the Performance Improvement Plan and an ADA request. Associate Warden Lisac directed Complainant to Ms. Seifert.

78. On July 23, 2021, Associate Warden Lisac conducted a Board Rule 6-10 meeting with Complainant. Health Services Administrator, Stephanie Dalton, was present for the meeting as Associate Warden Lisac's representative. Complainant did not bring a representative to the Board Rule 6-10 meeting

79. The Board Rule 6-10 meeting lasted approximately 20 minutes.

80. During the meeting, Associate Warden Lisac did not allow Complainant to present information related to her medical condition or family medical leave. Associate Warden Lisac informed Complainant he received an email from her and stated, "I didn't accept that because it had – it was full of your HIPAA information." He then said, "So you can share whatever you want today, but I'm not going to address your HIPAA information. Okay? And the reason we're here today is not because of your HIPAA information, so I don't want to cover that ground."

81. Later in the meeting, Complainant attempted to tell Associate Warden Lisac that medication she was on had made her "loopy." He stated, "Again, I'm not going to cover your HIPAA." Complainant responded, "I know. That's really the only thing." He then asked, "You're currently cleared for full duty, correct?" Complainant said, "Correct." Associate Warden Lisac

went on to ask, “You have no medical restrictions of any kind?” Complainant responded, “No.” Complainant then said, “I’m on intermittent FMLA. I don’t know if that matters.” Associate Warden Lisac responded, “Yeah, your FMLA is your thing. It’s something that’s in our policy and it’s a federal thing, and that is not something – why we’re here today.” Complainant responded, “Okay. Just wanted to make sure.” Associate Warden Lisac replied, “We’re not covering that ground. That has nothing to do with anything. That is your right, and that’s something you exercise appropriately when you need it. For this incident and this date, you were cleared for duty. You had no restrictions; and you were planning on coming to work, correct?” Complainant responded, “Correct.” Associate Warden Lisac said, “Okay.” Complainant said, “I ran out of time, I believe.” Associate Warden Lisac then said, “So we’re good. So your FMLA is not a factor and it’s not something I’m considering at all. Okay. All right.”

82. Complainant believed her medical condition contributed to her conduct on June 30, 2021.

83. During the meeting, Complainant referred to the Contraband Incident as a “stupid oversight.” Complainant acknowledged she did not exercise “good judgment” during the Contraband Incident and that she should have been more aware.

84. After the Board Rule 6-10 meeting, Associate Warden Lisac reviewed all documents and all evidence available to him.

85. Associate Warden Lisac also looked at practices at the main entry, and the E-Scan failure to detect the pack of cigarettes Complainant brought in on June 30, 2021. Respondent has taken steps to correct the issues at main entry.

86. Associate Warden Lisac reviewed Investigator Barnett’s investigative report prior to making his disciplinary decision.

87. Associate Warden Lisac reviewed Complainant’s incident report. Associate Warden Lisac considered it when making his disciplinary decision.

88. Associate Warden Lisac reviewed Board Rule 6-9[2] prior to making his disciplinary decision.

89. Associate Warden Lisac considered the nature, extent, and seriousness of the Contraband Incident. Associate Warden Lisac considered the Contraband Incident to be a significant and egregious policy violation, as it placed Complainant, others, and the offender population at risk. Associate Warden Lisac considered the Contraband Incident to be a significant breach of security. Associate Warden Lisac also treated this as a serious incident because of the signs present as one drives into Colorado State Penitentiary reminding entrants that contraband, and specifically tobacco, is prohibited.

90. Associate Warden Lisac considered Complainant’s previous unsatisfactory performance.

[2] This references Board Rule 6-9 in effect prior to July 1, 2021. Board Rule 6-9 then said, “The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.” As of July 1, 2021, similar language is included in Board Rule 6-11.

91. Complainant's past misconduct also violated Administrative Regulation 1450-01.

92. Associate Warden Lisac considered the period of time since Complainant's prior offenses. Associate Warden Lisac found Complainant's offenses were occurring approximately once per year. Associate Warden Lisac believed the Contraband Incident marked an increase in the frequency of Complainant's misconduct.

93. Associate Warden Lisac considered Complainant's prior performance evaluations. Complainant received some needs improvement ratings, but received overall Level 2 ratings on her prior performance evaluations.

94. Associate Warden Lisac considered mitigating evidence. Associate Warden Lisac considered that Complainant may have just been in a hurry on the date of the Contraband Incident as a potential mitigating factor. He also considered that Complainant was taking accountability of her actions during the Contraband Incident.

95. Associate Warden Lisac also considered Investigator Barnett's investigative report, Complainant's performance history, and the 2018 Positive Performance Documentation.

96. Associate Warden Lisac concluded Complainant failed to perform competently, engaged in willful misconduct, failed to comply with rules, and violated the law.

97. Associate Warden Lisac considered corrective action or lesser disciplinary action. He determined lesser action was not appropriate because of the serious nature of the incident and the risk that it posed to Colorado State Penitentiary. He also considered that the prior corrective measures taken did not seem to improve Complainant's conduct.

98. On August 15, 2021, Respondent terminated Complainant's employment.

99. Associate Warden Lisac issued Complainant a "Notice of Disciplinary Action after Rule 6-10 Meeting" ("Notice").

100. In the Notice, Associate Warden Lisac summarized the Board Rule 6-10 Meeting and the information he considered in making his decision.

101. In the Notice, Associate Warden Lisac summarized his refusal to hear or consider information pertaining to Complainant's medical condition as follows:

> We discussed information you emailed to me and OIG Investigator Hastings on July 19, 2021, which I did not accept and deleted as it contained your personal health information and information regarding your FMLA leave. I also informed you that your personal information and FMLA were not cause for the meeting nor would it be discussed during the meeting. I asked if you were on any kind of restriction on that date of incident, you stated you were not and you were cleared for full duty.

102. Associate Warden Lisac concluded, in part:

> You failed to take the necessary steps to ensure you were not bringing dangerous or prohibited items into a correctional facility prior to entering the building. All staff are required to ensure they report for duty on time and only bring authorized items

into the correctional environment on a daily basis. You, as a CDOC staff member, are responsible for enforcing safety measures and policy within the correctional environment and your disregard for individual accountability in this incident has placed others at risk…

Your previous unsatisfactory performance and behavior as reflected in the above documentation shows numerous policy violations, which demonstrate a lack of communication and poor judgment. You have failed to comply with standards of efficient service and willfully violated policy that affects your ability to perform your job in a professional manner…Your actions and behavior have undermined the confidence in your ability to effectively perform your duties as assigned and shows a blatant disregard of CDOC policies, practices and procedures. Despite numerous attempts to correct and improve your performance, you continue to demonstrate deliberate ongoing unsatisfactory performance and egregious behavior that place you and others at risk. Your ongoing disregard for department policy and regulations has had a significant negative impact on facility operations and work environment.

I have determined that you have violated performance expectations as set forth in provisions of DOC Administrative Regulation 1450-01 *Code of Conduct*, Section IV, Subsections A.1, A.3, A.8, A.9, B.1, L.1 and L.2; 100-04 Tobacco Use in Buildings and Vehicles, Section IV, Subsections A and D; 300-27 *Facility Access and Control*: form C#10 and #16; Code of Ethics (*Signed annually, most recently by you on May 9, 2021)* Section II, Subsections A.1, A.2, A.3, Section III, Subsections A, B, and J; your performance plan (*Signed by you on May 20, 2021)*, Competency A – Accountability/Organization Commitment, B- Job Knowledge, E-Customer Service and State Personnel Board Rule 6:12:

1. Failure to Perform Competently;
2. Willful misconduct;
3. Failure to comply with Board Rules, Director's Procedures, department's rules and policies, state universal policies, or other departmental directives;
4. A violation of any law that negatively impacts job performance;

As a result, I have decided to take the following action:

- I have decided to terminate your employment with the Colorado Department of Corrections effective (August 15 2021).

103. The Notice provided Complainant appeal rights, the deadline for filing an appeal, and contact information for the State Personnel Board.

104. Complainant timely filed an appeal on August 25, 2021.

Complainant's Earnings

105. Complainant's base pay was $4,241 per month at the time of her termination from employment.

ANALYSIS

A. DISCIPLINE

i. BURDEN OF PROOF.

The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." Colo. Const. Art. XII, § 13(8). "Once an employee acquires this right by being certified, the employee may be discharged only for just cause based on constitutionally specified criteria." *Dep't of Insts. v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994).

Section 13(8) lists the following specific criteria upon which discipline may be based:

> A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined.

Colo. Const. Art. XII, § 13(8).

State Personnel Board Rule 6-12 clarifies the potential bases for discipline, and includes the following as bases for discipline: "1. Failure to perform competently; 2. Willful misconduct; 3. Failure to comply with the Board Rules, Director's Procedures, department's rules and policies, state universal policies, or other departmental directives; 4. A violation of any law that negatively impacts job performance."

In this *de novo* disciplinary proceeding, Respondent had the burden to prove by a preponderance of the evidence that the alleged misconduct on which the discipline was based occurred. *Kinchen*, 886 P.2d at 706-09. "[A]n appointing authority must establish a constitutionally authorized ground in order to discharge…an employee." *Id.* at 707. The Colorado Supreme Court explained that, in attempting to justify a decision to discipline a certified public employee, this burden of proof is appropriate because "the appointing authority is the party attempting to overcome the presumption of satisfactory service and to discipline the employee." *Id*. at 708.

The Colorado Supreme Court recently clarified the two-part inquiry required in an ALJ's review of a disciplinary action:

> [I]n reviewing an appointing authority's disciplinary action, the ALJ must logically focus on two analytical inquiries: (1) whether the alleged misconduct occurred; and, if it did, (2) whether the appointing authority's disciplinary action in response to that misconduct was arbitrary, capricious, or contrary to rule or law.

Dep't of Corr. v. Stiles, 477 P.3d 709, 717 (Colo. 2021). The Colorado Supreme Court explained that the second analytical inquiry is necessary if the appointing authority establishes that the conduct on which the discipline is based occurred:

> [I]f the appointing authority establishes by a preponderance of the evidence that the alleged misconduct occurred, the Board or the ALJ must turn to the second analytical inquiry. At that stage, the Board or the ALJ must review the appointing authority's disciplinary action in accordance with the statutorily mandated standard of arbitrary, capricious, or contrary to rule or law.

Id. at 718. *See also* § 24-50-103(6), C.R.S.

ii. RESPONDENT ESTABLISHED, BY A PREPONDERANCE OF THE EVIDENCE, THAT COMPLAINANT COMMITTED THE ALLEGED MISCONDUCT FOR WHICH SHE WAS DISCIPLINED.

Respondent disciplined Complainant for failure "to take the necessary steps to ensure [she was] not bringing dangerous or prohibited items into a correctional facility prior to entering the building" placing "others at risk" on June 30, 2021. On that date, Complainant brought prohibited and dangerous items, contraband, into Colorado State Penitentiary. It is not in dispute that Complainant engaged in these actions on June 30, 2021. It is also not in dispute that Complainant's actions caused a serious safety issue at Colorado State Penitentiary and violated Respondent's policies. Therefore, the preponderance of the evidence establishes that Complainant committed the alleged misconduct for which she was disciplined.

Complainant disputes that she engaged in conduct unbecoming in violation of Administrative Regulation 1450-01 during the Contraband Incident. Pursuant to Respondent's policy, conduct unbecoming is conduct that negatively affects job performance, tends to bring Respondent into disrepute, or calls into question one's ability to perform effectively and efficiently in his/her position.

On June 30, 2021, Complainant was aware she needed to perform a self-check for contraband before entering the facility, and Complainant failed to do so. As a result of this failure, Complainant carried a pack of cigarettes and an aerosol deodorant can into Colorado State Penitentiary in violation of policy. Complainant's actions created a safety issue. Complainant's conduct falls within the definition of conduct unbecoming. First, Complainant's conduct negatively affected her job performance, as her position exists to maintain safety and security of Colorado State Penitentiary, and her conduct caused a serious safety issue. Second, Complainant's conduct called into question her ability to effectively and efficiently perform her position, because it caused a serious safety issue. Therefore, the preponderance of the evidence establishes that Complainant engaged in conduct unbecoming.

Complainant also argued her conduct was not willful because of her medical conditions. The preponderance of the evidence establishes that Complainant's conduct was willful. First, Complainant did not prove by a preponderance of the evidence that her conduct during the incident was caused by her medical conditions. The events on the date of the Contraband Incident could happen to any person. Complainant was running late to work and in a hurry. Despite the fact that she was running late, Complainant stopped at a convenience store on her way to work. As a result of the fact that she was running late and in a hurry, Complainant failed to do a self-check before entering Colorado State Penitentiary and carried in contraband. Running late is a circumstance that might happen to any person regardless of medical condition. Running late does not excuse misconduct. Complainant's own statements during the investigation indicate being late to work was something Respondent warned her about previously and that she was concerned about on June 30, 2021. Complainant stated during an interview,

"Being late was probably my biggest concern that day just because I get yelled at for it. So it was my fault. I wasn't paying attention and I absolutely violated policy."

Second, regardless of her medical condition on June 30, 2021, Complainant had a responsibility to check herself before entering the facility and to ensure she was not carrying contraband. As discussed above, Complainant knew she needed to check herself before entering the facility and failed to do so. Even assuming Complainant's overall behavior was impacted by her medical conditions on that day, Complainant went into work. It appears from Complainant's testimony and the evidence presented that Complainant believed her medical condition was affecting her behavior that day and she chose to go to work. As Complainant chose to go to work, Complainant was responsible for making sure she adhered to Respondent's policies as she entered Colorado State Penitentiary. Complainant's failure to do this is willful misconduct.

Complainant argued that it was contradictory in the Notice to say both that Complainant failed in accountability and took accountability for the Contraband Incident. The preponderance of the evidence establishes that Complainant failed in personal accountability on the date of the incident when she failed to search her person prior to entering the facility. She was not personally accountable in making sure Colorado State Penitentiary was safe on June 30, 2021. After the Contraband Incident, Complainant was accountable when she acknowledged she made a mistake, and took responsibility for her actions.

Respondent included a laundry list of policy violations in the Notice. The ALJ concludes, as Complainant argued, that Complainant did not violate all portions of policies and Board Rules listed in the Notice, particularly Administrative Regulation 1450-01, Section IV (L)(1). This section prohibits Respondent's employees from possessing or using illegal drugs, abusing controlled substances, or working under the influence of illegal drugs or alcohol. Complainant did not violate Section IV (L)(1) of Administrative Regulation 1450-01.

Respondent's inclusion of some unsubstantiated policy violations in the Notice does not negate the fact that Complainant committed the conduct for which she was disciplined. Respondent disciplined Complainant for failing to take necessary steps prior to entering Colorado State Penitentiary and bringing dangerous contraband into Colorado State Penitentiary in violation of Respondent's policies. Complainant engaged in this conduct in violation of Administrative Regulation 1450-01, Respondent's Code of Ethics, and policies and laws prohibiting the introduction of contraband to Colorado State Penitentiary.

iii. THE APPOINTING AUTHORITY'S CONDUCT DURING THE BOARD RULE 6-10 PROCESS VIOLATED BOARD RULE 6-10.

Complainant introduced evidence at the hearing that Associate Warden Lisac's actions violated Board Rule 6-10. Associate Warden Lisac violated Board Rule 6-10 when he refused to hear or consider anything related to Complainant's medical conditions or family medical leave. Board Rule 6-10(D)(3) states that during the Board Rule 6-10 meeting, the appointing authority must, "Give the employee an opportunity to respond to the alleged performance issues or conduct." By refusing to permit Complainant to present potentially mitigating factors, Associate Warden Lisac failed to give Complainant a full opportunity to respond.

Respondent argued Associate Warden Lisac received information on Complainant's medical conditions in other ways because Complainant mentioned it in her incident report composed on the date of the incident and in the interview with Investigator Barnett. While this is accurate, it was unknown to Associate Warden Lisac what Complainant may have said in the

Board Rule 6-10 meeting. Associate Warden Lisac prohibited the requisite exchange of information at the Board Rule 6-10 meeting.

Associate Warden Lisac denied Complainant process guaranteed by Board Rule 6-10 when he prohibited the exchange of information during the Board Rule 6-10 meeting. "When the state…promulgates a regulation that imposes on governmental departments more stringent standards than are constitutionally required, due process of law requires those departments to adhere to those standards in discharging employees. (citations omitted)." *Dep't of Health v. Donahue*, 690 P.2d 243, 249 (Colo. 1984). Associate Warden Lisac was required to comply with Board Rule 6-10, and failed to do so. As such, Complainant's first opportunity to present all the information she wanted to be considered was during the evidentiary hearing. Complainant had the opportunity to present evidence, call witnesses, and testify at the evidentiary hearing.

The remedy for this violation of Board Rule 6-10 is back pay to the date of the hearing. "Where a legal injury is of an economic character, as here, legal redress in the form of compensation should be equal to the injury. (citations omitted)." *Id.* at 250. The Board Rule 6-10 process violation was cured when Complainant was afforded an evidentiary hearing before the State Personnel Board. The appropriate remedy then is back pay to the date of the hearing. Reinstatement would result in a windfall to Complainant, because, as discussed below, Respondent proved by a preponderance of the evidence it had just cause to terminate Complainant's employment.

iv. THE APPOINTING AUTHORITY HAD JUST CAUSE TO DISCIPLINE COMPLAINANT. THE APPOINTING AUTHORITY'S ULTIMATE DISCIPLINARY DECISION WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

Based upon the evidence presented at hearing, Associate Warden Lisac had just cause to discipline Complainant, and his ultimate disciplinary decision was not arbitrary, capricious, or contrary to rule or law.

After determining a person has committed the act for which they were disciplined, the second question to be determined is whether the decision to terminate Complainant's employment was arbitrary, capricious, or contrary to rule or law. In determining whether an agency's decision is arbitrary or capricious, the ALJ must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.,* 36 P.3d 1239, 1252 (Colo. 2001).

As to the first *Lawley* prong, Associate Warden Lisac used reasonable diligence and care to procure evidence. On the night of the Contraband Incident, Associate Warden Lisac had all involved individuals complete incident reports. Respondent also initiated two investigations of the Contraband Incident. Associate Warden Lisac reviewed the professional standards investigative report and conducted a Board Rule 6-10 meeting. Although Associate Warden Lisac violated Board Rule 6-10, the information reviewed by Associate Warden Lisac contained Complainant's medical explanation of the Contraband Incident.

As to the second *Lawley* prong, Associate Warden Lisac gave candid and honest consideration to the evidence before him. This is evident from the analysis and discussion in the Notice. The evidence in the record demonstrates Associate Warden Lisac considered Complainant's conduct during the Contraband Incident to be serious in nature. Board Rule 6-11 (A)(1). Associate Warden Lisac considered Complainant's prior misconduct, which included violations of the same policies Complainant violated during the Contraband Incident.[3] Board Rule 6-11 (A)(2). Associate Warden Lisac considered the frequency of misconduct. Board Rule 6-11 (A)(3). Associate Warden Lisac also considered Complainant's prior performance evaluations and mitigating circumstances. Board Rule 6-11 (A)(4) and (5).

Associate Warden Lisac's failure to give weight to Complainant's medical explanation of the events does not demonstrate a lack of candid and honest consideration. Associate Warden Lisac had documents that contained Complainant's medical explanation for the Contraband Incident. Associate Warden Lisac could have considered Complainant's medical explanation to be a mitigating circumstance and did not. As discussed below, this is a reasonable assessment of the Complainant's medical explanation for the Contraband Incident.

As to the third *Lawley* prong, reasonable persons fairly and honestly considering the evidence could reach the same conclusion that Associate Warden Lisac reached. Pursuant to Board Rule 6-12, Complainant engaged in conduct that warranted discipline. During the Contraband Incident, Complainant failed to perform her job competently when she failed to follow standard protocols for a self-check prior to entering the facility and then entered the facility with contraband. *See* Board Rule 6-12 (B)(1). Complainant's job exists to maintain safety and security at Colorado State Penitentiary. Complainant also engaged in willful misconduct. While Complainant did not know[4] she was carrying a pack of cigarettes, Complainant was in a hurry and failed to take necessary precautions prior to entering Colorado State Penitentiary. *See* Board Rule 6-12 (B)(2). Complainant failed to comply with Respondent's policies by carrying contraband into Colorado State Penitentiary. *See* Board Rule 6-12 (B)(3). Therefore, Respondent had just cause to discipline Complainant under Board Rule 6-12.

Termination was an appropriate disciplinary action based upon the factors set forth in Board Rule 6-11. The Contraband Incident was serious and created a safety issue at Colorado State Penitentiary. *See* Board Rule 6-11 (A)(1). Complainant previously engaged in misconduct and violated the same policies during the Contraband Incident. *See* Board Rule 6-11 (A)(2). Complainant was regularly engaging in misconduct resulting in Respondent taking corrective and disciplinary action. *See* Board Rule 6-11 (A)(3). Complainant's prior performance evaluations were overall 2, but Complainant did receive some needs improvement ratings. *See* Board Rule 6-11 (A)(4).

The mitigation in this case does not indicate termination was an unreasonable disciplinary action. Complainant may have just been in a hurry on June 30, 2021, and took responsibility for her actions. Complainant's conduct, however, caused a serious safety issue at Colorado State Penitentiary. Further, Complainant had previously engaged in misconduct. In this case, Complainant's past performance history, particularly the conduct leading to the January 26, 2021,

[3] Complainant's conduct during the Contraband Incident was not similar to her conduct in prior incidents, but did violate some of the same policies.

[4] Respondent does not dispute that Complainant did not know she had a pack of cigarettes when she entered Colorado State Penitentiary on June 30, 2021.

Corrective and Disciplinary Action, is significant to the reasonableness of Associate Warden Lisac's decision to terminate Complainant's employment. The Contraband Incident was not an isolated incident of misconduct. Less than seven months prior to the Contraband Incident, Complainant was disciplined for serious violations that included referring to a coworker by nicknames that were sexual in nature and jokingly making threats of violence at work.

Complainant argued reliance on her past negative performance history was inappropriate, particularly the March 2020 Corrective Action. While Complainant disagreed with some of the negative performance history, Complainant received the Corrective Actions and the Disciplinary Action. The actions were not removed from Complainant's file through a grievance process or through appeal to the State Personnel Board. Associate Warden Lisac then appropriately relied on Complainant's past negative performance history in making his decision to terminate Complainant's employment.

Complainant argued Associate Warden Lisac failed to comply with the PFFD process. There is no evidence in the record that demonstrates Associate Warden Lisac believed Complainant could not perform the essential functions of her position on the date of the Contraband Incident. Complainant confirmed with Associate Warden Lisac during the Board Rule 6-10 meeting that she had no restrictions on her ability to work on the date of the Contraband Incident. Further, the PFFD process is an "extraordinary" step, and initiation of the process would not have prevented discipline. The Universal Policy allows an appointing authority to take performance management steps as a result of behavior that is unacceptable performance or unacceptable personal conduct. Complainant's conduct during the Contraband Incident was unacceptable performance.

Complainant's testimony at hearing indicates that, had she been allowed to present all of the information she wished to during the Board Rule 6-10 process, she would have explained her medical condition and its impacts on her on the date of the incident. Complainant would also have explained her hesitance to take time off as a result of the Performance Improvement Plan for absences. Complainant would also have given additional detail about the prior incident where she carried a portion of a cigarette into one of Respondent's facilities.

Complainant's medical explanation for the events in question is not mitigating. In her incident report, composed on the date of the Contraband Incident, Complainant explained her recent diagnoses and then wrote, "However, even though, I'm better, some days are worse than others. This is my fault for not being aware at all times, as that is the expectation set and even more so that when days where my concentration, and cognitive thinking is impaired I should not come in." Complainant stated in her interview with Investigator Hastings, "Yes. When I was on FMLA, on days I'm like that and I'm supposed to not come in, and I chose to do so anyway. And that was neglect on my part." Accepting Complainant's medical explanation as true, Complainant made a knowing decision to come into work when she was impacted by her medical condition and caused a safety issue at Colorado State Penitentiary. The preponderance of the evidence establishes that Complainant's medical explanation of events is not mitigating.

Complainant's hesitance to take time-off of work because of the Performance Improvement Plan is understandable. There is, however, no evidence in the record that Complainant could not have taken leave on June 30, 2021. Complainant chose not to take leave, and reported to work when she alleges she was aware she was impacted by her medical condition. Again, Complainant's decision to go to work on June 30, 2021, even considering her reason for going to work, is not mitigating. The decision to go into work by her own statement was "neglect."

Additional detail about the prior incident of bringing a portion of a cigarette into one of Respondent's facilities would also not be mitigating. No matter the circumstances, Complainant had previously violated the policy and had been counseled about bringing cigarettes into Respondent's facilities. Complainant then knew she could not bring tobacco products into the facility, and repeated the misconduct.

Termination was an appropriate disciplinary action in this case in light of Complainant's past Corrective and Disciplinary Actions. Reasonable persons could reach the same conclusion based upon the preponderance of the evidence. Ultimately, Respondent had just cause to terminate Complainant's employment.

B. CADA CLAIMS

i. COMPLAINANT DID NOT DEMONSTRATE RESPONDENT DISCRIMINATED AGAINST HER ON THE BASIS OF DISABILITY IN VIOLATION OF CADA.

Complainant has the burden to prove by a preponderance of the evidence that she was discriminated against on the basis of her disability. *Colo. Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400-01 (Colo. 1997). Complainant claims Respondent discriminated against her on the basis of disability in violation of CADA. CADA prohibits discrimination on the basis of disability. § 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, Complainant 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).

Complainant established the first element of a *prima facie* case of discrimination. Disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 USC 125 §12102(1)(A). *See* § 24-34-301(2.5), C.R.S. Complainant suffers from multiple medical conditions that impact her cognitive abilities, including her behavior and conduct. Therefore, Complainant is disabled within the meaning of CADA.

As to the second element of a *prima facie* case, Complainant did not present sufficient evidence to demonstrate she was qualified for the job at issue with or without reasonable accommodation. A person with a disability, "...is 'otherwise qualified' if, with reasonable accommodations, [they] can perform the reasonable, legitimate, and necessary functions of [their]

job." *AT & T Techs., Inc. v. Royston*, 772 P.2d 1182, 1185 (Colo. App. 1989). Complainant failed to demonstrate by the preponderance of the evidence that she could perform the reasonable, necessary, and legitimate functions of her job, with or without reasonable accommodations. Complainant asserted that on the date of the incident she had a disability that caused her to fail at an essential safety function of her position. Complainant did not present evidence of an accommodation that would allow her to perform that essential function of her position. As such, Complainant failed to demonstrate she was qualified for the job at issue. Alternatively, even if Complainant was qualified for the job at issue she failed to present a *prima facie* case of discrimination as discussed below.

Complainant established the third element of a *prima facie* case of discrimination. Complainant experienced the adverse employment action of Respondent terminating Complainant's employment. Thus, Complainant demonstrated the third element of a *prima facie* case of discrimination.

To establish the fourth and final element of a *prima facie* case of discrimination, Complainant 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*.

Complainant did not present direct or indirect evidence of disability discrimination. First, there was no evidence presented that indicated anyone made derogatory statements related to Complainant's medical conditions or otherwise openly treated Complainant differently on the basis of her medical conditions. Evidence in the record demonstrates Complainant felt comfortable enough at work to discuss her medical conditions with dozens of other employees, and to speak with a supervisor about her conditions. The evidence presented by Complainant indicates Respondent provided Complainant administrative leave when she initially presented concerns about her medical conditions in March 2021, and then again allowed administrative leave in August 2021 for her medical conditions. These actions indicate Respondent was working with Complainant through her medical issues.

Second, there is no evidence in the record that similarly situated employees without disabilities were treated more favorably than Complainant, nor is there other indirect evidence of discrimination. Thus, Complainant did not demonstrate the fourth element of a *prima facie* case of discrimination.

Even if Complainant had established a *prima facie* case of disability discrimination, Respondent articulated legitimate, nondiscriminatory reasons for discharging Complainant from employment. Complainant 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.

Here, there was a discrete event that caused a significant safety concern at the Colorado State Penitentiary. The seriousness of this event is not in dispute. Therefore, Respondent had a legitimate business reason to discipline Complainant as a result of the Contraband Incident.

The evidence in the record does not demonstrate Respondent terminated Complainant as a result of her disability, and used the Contraband Incident as pretext for Complainant's termination. The 10th Circuit Court of Appeals stated in *Dewitt v. Southwestern Bell Telephone Co.*, "[The complainant's] argument misapprehends our inquiry here: our inquiry is not *why* [the complainant] disconnected the customer calls. Nor is it whether [the decision maker's] view that [the complainant] intentionally hung up on customers 'was wise, fair or correct.' (citation omitted). Our inquiry under *McDonnell Douglas* is limited to whether [the decision maker] honestly believed her stated reason for terminating [the complainant's] employment and acted in good faith on that belief." *Dewitt v. Sw. Bell Tele. Co.*, 845 F. 3d 1299, 1310 (10th Cir. 2017). (Italics in original). Associate Warden Lisac credibly testified that he terminated Complainant's employment as a result of her performance and behavior. Here, the preponderance of the evidence in the record demonstrates Associate Warden Lisac honestly believed his stated reason for terminating Complainant's employment. The preponderance of the evidence establishes that Associate Warden Lisac terminated Complainant because of her conduct during the Contraband Incident, not because of her disability.

Failure to conduct a fair investigation may be evidence of pretext for discrimination. *Id.* at 1314. The evidence in the record does not demonstrate Respondent's investigation of the Contraband incident was unfair. "[S]imply asking an employee for [her] version of events" ordinarily defeats an inference of pretext. *Id.* Despite the fact that Associate Warden Lisac did not allow Complainant to discuss her medical explanation for the Contraband Incident in the Board Rule 6-10 meeting, Associate Warden Lisac asked for and received Complainant's version of events. Associate Warden Lisac took the requisite steps to secure Complainant's version of the events by requiring Complainant to complete an incident report on the date of the incident and initiating two investigations that included interview of the Complainant. Complainant's incident report and her interviews included her medical explanation of the Contraband Incident. Associate Warden Lisac reviewed Complainant's version of events when he reviewed the investigative report, which included Complainant's incident report. The evidence in the record does not demonstrate Respondent's investigation of the Contraband Incident was unfair.

Further, the evidence in the record indicates that Associate Warden Lisac was attempting to protect Complainant's medical information by refusing to hear it during the Board Rule 6-10 meeting, not that he refused to hear it with discriminatory intent.

As discussed above, Respondent presented a legitimate non-discriminatory reason for terminating Complainant's employment. Respondent terminated Complainant for violating policy by bringing contraband into Colorado State Penitentiary. Complainant did not demonstrate this reason was pretext for discrimination. Therefore, Complainant failed to prove by a preponderance of the evidence that Respondent discriminated against her on the basis of disability in violation of CADA.

ii. COMPLAINANT DID NOT DEMONSTRATE RESPONDENT DISCRIMINATED AGAINST HER ON THE BASIS OF DISABILITY IN VIOLATION OF CADA BY FAILING TO ACCOMMODATE.

Complainant argued Respondent failed to accommodate her medical conditions, resulting in adverse employment action. In order to establish a failure to accommodate claim, a

Complainant must show "'(1) she is disabled; (2) she is 'otherwise qualified'; and (3) she requested a plausibly reasonable accommodation.' (citation omitted)." *Punt v. Kelly Services*, 862 F. 3d 1040, 1050 (10th Cir. 2017).

Complainant established the first element of a *prima facie* case of a failure to accommodate claim. As discussed above, Complainant is disabled within the meaning of the law.

Complainant failed to establish the second element of a *prima facie* case of a failure to accommodate claim. As discussed above, Complainant did not demonstrate she was otherwise qualified for her position. Even if Complainant had demonstrated she was otherwise qualified for the position, Complainant did not establish a *prima facie* case of failure to accommodate.

Complainant failed to establish the third element of a *prima facie* case of a failure to accommodate claim. In order for there to be a failure to accommodate "[t]he employer must of course know of the employee's disability and of the accommodation the employee wishes to receive in order to have any responsibility for providing such an accommodation." *Id*. at 1048. Despite the fact that Complainant asserts she made multiple requests for accommodation, the evidence in the record does not demonstrate Complainant requested accommodations.

First, Respondent informed Complainant she may be eligible to request accommodations, provided her the accommodation policy, and told her to whom request for accommodations should be directed. Complainant did not request accommodations per the policy.

Second, Complainant did not demonstrate she otherwise requested an accommodation prior to the Contraband Incident. Complainant sent two emails that referenced ADA in relation to prior absences and her initial period of leave in March and April 2021. On May 21, 2021, Complainant sent Ms. Seifert an email requesting clarification of why she was issued a Performance Improvement Plan for absences. Complainant wrote, "I may have wrongly assumed that after my diagnosis would cover those absences under fmla or even ada." This is not a request for accommodation and references events that had already occurred. On June 24, 2021, Complainant sent an email to multiple employees inquiring about being in a leave without pay status during her March and April 2021 leave. Complainant wrote, "I would have requested an ADA accommodation if I had any indication my FMLA was at risk of being denied." Again, this is not a request for accommodation and refers to a past period of leave. Complainant did not present other evidence demonstrating she requested an accommodation.

Third, prior to the Contraband Incident, each time Complainant made Respondent aware of concerns about her medical conditions, Respondent took action in the form of providing family medical leave. At the time of the Contraband Incident, Complainant was eligible to use three days of family medical leave per month for her medical conditions. This ability to take leave is something that may be a reasonable accommodation for a medical condition. There is no evidence in the record that Complainant communicated to Respondent this leave was insufficient to meet her medical needs prior to the Contraband Incident. Subsequent conversations or a subsequent interactive process would not change the fact that that the Contraband Incident occurred and that Respondent had an obligation to address Complainant's misconduct during the Contraband Incident.

Finally, no matter what Respondent may have done to accommodate Complainant, Complainant would not have been relieved of her duty to perform a self-check prior to entering Colorado State Penitentiary to ensure that she did not carry contraband into the facility.

The preponderance of the evidence in the record does not demonstrate that Respondent failed to accommodate Complainant.

iii. COMPLAINANT DID NOT DEMONSTRATE RESPONDENT RETALIATED AGAINST HER IN VIOLATION OF CADA.

Claims of retaliation in violation of CADA are within the Board's statutory authority under § 24-50-125.3, C.R.S. CADA prohibits employers from retaliating against employees for engaging in protected opposition to discrimination. § 24-34-402(1)(e)(IV), C.R.S.

To establish a *prima facie* case of retaliation, 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).

Complainant argued that Respondent retaliated against her in violation of CADA, because the March 9, 2020, Corrective Action was issued in retaliation for Complainant's report of sexual harassment and the March 9, 2020, Corrective Action was considered in Associate Warden Lisac's decision to terminate her employment.

Complainant demonstrated the first element of a *prima facie* case of retaliation. Complainant reported sexual harassment. A report of sexual harassment is protected opposition to discrimination.

Complainant demonstrated the second element of a *prima facie* case of retaliation. Respondent terminated Complainant's employment. Complainant suffered an adverse employment action.

Complainant did not demonstrate the third element of a *prima facie* case of retaliation. There is no causal connection between Complainant's sexual harassment complaint and Respondent's termination of Complainant's employment. Complainant was entitled to grieve the March 9, 2020, Corrective Action and failed to do so. As discussed above, Associate Warden Lisac appropriately considered past disciplinary actions in his decision to terminate Complainant's employment. Here, the Contraband Incident prompted the discipline. The preponderance of the evidence in the record does not demonstrate the discipline was retaliation for Complainant's report of sexual harassment more than a year prior.

Also, as discussed above, had Complainant established a *prima facie* case of retaliation, Respondent provided a legitimate business reason for its termination of Complainant's employment. The preponderance of the evidence in the record does not support that Respondent's legitimate business reasons are pretext for retaliation. Therefore, Complainant failed to prove, by the preponderance of the evidence, that Respondent retaliated against her in violation of CADA.

C. COMPLAINANT'S LOST WAGES

The evidence in the record includes Complainant's responses to Respondent's interrogatories. These responses included the amount of Complainant's base pay per month ($4,241), an estimation of her overtime per month, and an estimation of the amount of benefits per month. The responses also note that Complainant had not received unemployment insurance benefits at the time she completed the interrogatories.

As a result of the deficiencies in the Board Rule 6-10 process, discussed above, Complainant is entitled to her base salary from August 16, 2021 (date of termination) to December 8, 2021 (date of the evidentiary hearing). Complainant is entitled to 3 months ($12,723), 3 weeks ($2,936.08), and 2 days ($391.48) of base pay, for a total of $16,050.56.

CONCLUSIONS OF LAW

1. Complainant committed the alleged misconduct for which she was disciplined.

2. The appointing authority violated Board Rule 6-10. Respondent, however, had just cause to terminate Complainant's employment. Respondent's ultimate decision to terminate Complainant was not arbitrary, capricious, or contrary to rule or law.

3. Respondent did not discriminate against Complainant on the basis of disability in violation of the Colorado Anti-Discrimination Act.

4. Respondent did not retaliate against Complainant in violation of the Colorado Anti-Discrimination Act.

ORDER

1. Respondent's termination of Complainant's employment is **affirmed.**

2. Respondent shall reimburse Complainant for her lost wages from August 15, 2021, the date of her termination, to December 8, 2021, the date of the hearing, in the amount of $16,050.56. This amount is subject to the employer's PERA contribution and benefits contribution, as well as interest of 8% per annum to the date of payment.

Dated this 21st day,
of January, 2022,
at Denver, Colorado.

/s/ [redacted]

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 21st day of January, 2022, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Leanna Bernabei
[redacted]

Elliot Singer, Esq.
Assistant Attorney General
Elliot.Singer@coag.gov

[redacted]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits B, C, E, F, I, L, M, O, P, Q, R, Z, AA-2, CC, EE, FF, GG, KK, and LL. The following additional exhibits were admitted into evidence: Exhibits A, J, N, Y, BB, DD, JJ, and MM.

The following exhibits were offered but not admitted into evidence: Exhibits W and II.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 1-12, 14-19, 24-26, 29, 32-34, and 36-38. The following additional exhibits were admitted into evidence: Exhibits 20, 22, 30, and 31.

WITNESSES

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

Associate Warden Dave Lisac

Investigator Mike Barnett

Leanna Bernabei

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).