

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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**KRISTEN FOUST,**  
Complainant,

v.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,**  
Respondent.

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Administrative Law Judge (“ALJ”) McCabe held the evidentiary hearing on April 4, 2022, via web conference using Google Meet. The record was closed on April 5, 2022.

Kristen Foust, Complainant, appeared on her own behalf. Respondent appeared through its attorney, Senior Assistant Attorney General Vincent Morscher, Esq. Respondent’s advisory witness was Complainant’s Appointing Authority, Major Mark Mason.

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 former certified state employee, appeals Respondent’s disciplinary demotion of Complainant. Complainant argues the discipline imposed was arbitrary and capricious. She also alleges that Respondent discriminated and retaliated against her in violation of the Colorado Anti-Discrimination Act (“CADA”).

Respondent argues the discipline imposed was not arbitrary, capricious, or contrary to rule or law.

For the reasons discussed below, Respondent’s decision to disciplinarily demote Complainant is **affirmed**.

**ISSUE**

1. Did Complainant commit the acts for which she was disciplined?
2. Was Respondent’s decision to demote Complainant arbitrary, capricious, or contrary to rule or law?
3. Did Respondent discriminate or retaliate against Complainant in violation of CADA?

## FINDINGS OF FACT

### Background

1. In January 2000, Respondent hired Complainant to work as a Victim Advocate.
2. In approximately September 2017, Respondent promoted Complainant to Deputy Director of its Victim Services Unit. This is a supervisory position. As a supervisor, Complainant was responsible for understanding policies and procedures, and directing others on how to follow policies and procedures. Complainant's job duties also required her to oversee and participate in budget development, forecast funds needed for supplies, and supervise implementation of grants.
3. Other than the misconduct that resulted in disciplinary demotion, Complainant was an exemplary employee. Complainant received positive performance reviews throughout her career.
4. Mark Mason, Major over the Criminal Investigations Branch for the Colorado State Patrol, was Complainant's Appointing Authority at the time of her demotion.
5. Delores Poeppel, Director of Victim Services Unit, was Complainant's supervisor throughout Complainant's employment with Respondent.
6. On November 22, 2021, Respondent demoted Complainant.
7. On December 2, 2021, Complainant timely appealed her demotion.
8. On December 3, 2021, Complainant resigned from employment with Respondent.
9. Respondent provided Complainant with an acknowledgement of her resignation and appeal rights, which she signed on December 8, 2021. (Stipulated).<sup>1</sup>
10. Between the time of her demotion and the time of her resignation, Complainant received \$382.55 less in pay as a result of the demotion.<sup>2</sup>

### Relevant Policies

11. Respondent has a General Orders Policy. It requires employees to be truthful and complete in accounts and reports, conduct themselves in a manner that preserves public trust, to avoid conduct that can discredit the employee or Respondent, and to conduct themselves in a way that maintains the highest degree of professionalism.

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<sup>1</sup> Complainant submitted her resignation after she initiated the appeal of her demotion with the Board. Complainant did not file an appeal of her resignation from employment with the Board. Therefore, Complainant's resignation from employment is not an issue before the Board.

<sup>2</sup> Complainant requests approximately \$100,000 in damages related to her resignation from employment. Because Complainant did not appeal her resignation from employment, even if the Board reversed the demotion, the Board cannot return Complainant to work and Complainant's damages awarded by the Board cannot exceed \$382.55 (the difference in her salary from the time of her demotion to the time of her resignation).

12. Respondent has an Off-Duty Conduct Policy. It requires employees to conduct themselves in a manner that does not bring discredit or embarrassment to Respondent.
13. Respondent has a Code of Ethics. It requires employees to conduct themselves with “unwavering professionalism.”
14. Respondent has a Core Values Policy. The core values are honor, duty, and respect.
15. Respondent has a Travel Request, Expenses, and Reimbursement Policy. The policy addresses use of the state issued travel card (“Travel Card”). The policy specifies the Travel Card “should be used for business related travel expenses except airline travel.” The policy also specifies that alcoholic beverages are not reimbursable travel expenses.
16. Respondent has a Travel for State Business policy. The policy requires employees to know and comply with rules set for Travel Cards.
17. State Fiscal Rule 5.1 specifies that alcohol is not an allowable travel expense.

#### Travel Card History

18. Respondent issued Complainant a Travel Card on approximately three occasions between 2003 and 2015.
19. Complainant was responsible for paying her Travel Card account balance from her own funds. In order to receive reimbursement for travel expenses charged to the Travel Card, Complainant was responsible for completing and submitting expense reports.
20. Each time Respondent issued Complainant a Travel Card between 2003 and 2015, Complainant failed to timely pay the Travel Card or misused it by making personal purchases. As a result, Complainant’s Travel Card privileges were suspended after each issuance. Respondent also garnished Complainant’s wages to pay past due amounts on her Travel Card. Respondent did not issue Complainant any formal corrective or disciplinary action as a result of her Travel Card misuse between 2003 and 2015.
21. After the second issuance of the Travel Card, Respondent conducted an Internal Affairs investigation of Complainant’s misuse of the Travel Card. Complainant was aware of, and participated in, the investigation.
22. On February 4, 2019, prior to the issuance of a fourth Travel Card, Complainant signed the Cardholder Application for a Travel Card. In the Cardholder Application, Complainant agreed to the following:
  1. Use the Individual Travel Card only for the purpose of paying vendors for allowable purchases of goods and services for official state government travel;
  2. Not allow others to use the Individual Travel Card;
  3. Not use the Individual Travel Card for personal purchases or personal travel;
  4. Submit travel expense report for reimbursement of travel charges within 30 days of the date traveled;

5. Immediately notify Citibank of any disputed and/or fraudulent charges and copy Approving Official and Program Administrator;
6. Notify the Program Administrator of any changes to mailing address, telephone number, and/or other account information listed on this form;
7. Document any Individual Travel Card violations with Approving Official and the Program Administrator;
8. Notify Citibank, within 60 business days of the statement date, of any disputed and/or fraudulent charges and copy Approving Official and Program Administrator;
9. Submit to random monitoring and documentation requests of purchases, by the Program Administrator.

23. In April 2019, Respondent issued Complainant a Travel Card for job related travel expenses. (Stipulated). This was the fourth issuance of a Travel Card to Complainant. Complainant completed training and passed a test prior to the issuance of the Travel Card.

24. In July 2019, Complainant was past due on her Travel Card payment. Complainant moved and forgot to update her address with the Travel Card company.

25. In March 2020, Complainant again signed the Cardholder Application for a Travel Card. Complainant agreed to the same nine conditions agreed to in February 2019.<sup>3</sup>

#### Unauthorized Travel Card Charges Resulting in Discipline

26. Complainant was not approved for state travel when she made the following six charges ("Unauthorized Charges").

27. On May 4, 2019, Complainant used her Travel Card at a hotel in Black Hawk, Colorado. Complainant had a meeting in Denver, Colorado the following day around noon. Complainant could have traveled to Denver on the day of the meeting, but chose to start travel the night before.

28. On approximately August 6, 2019, Complainant used her Travel Card to pay for a hotel room at a hotel in Grand Junction, Colorado. The purpose of the trip is unknown.<sup>4</sup>

29. On September 22, 2019, Complainant used her Travel Card to have food delivered to her home the day before travel. Complainant ordered the food for meal prep for the travel.

30. On February 21, 2020, Complainant used her Travel Card at a hotel in Golden, Colorado. On that date, Complainant was in Golden for a work related event followed by a birthday party for Director Poeppel. Complainant decided to stay at a hotel rather than drive home for the night.

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<sup>3</sup> The parties did not explain why Complainant signed this again.

<sup>4</sup> Complainant could not recall the purpose of this trip in the investigatory process or at the Board Rule 6-10 meeting.

31. On December 22, 2020, Complainant's child used Complainant's Travel Card to order Door Dash at Complainant's home. Complainant was on leave from work at the time of the charge. Complainant noticed the accidental charge, but did not report it to Respondent.

32. On approximately February 28, 2021, Complainant used her Travel Card to reserve a hotel room in Las Vegas for personal travel. Complainant later provided the hotel another card but the hotel charged her Travel Card. The hotel later reversed the charge. Complainant was on leave from work at the time of the charge.

33. Complainant did not complete an expense report and request reimbursement for any of the Unauthorized Charges.

34. In addition to the Unauthorized Charges, Complainant used her Travel Card to purchase alcoholic beverages with meals while traveling.

#### Investigation of Complainant's Travel Card

35. In February 2021, Complainant was again past due on her Travel Card payment.

36. On February 24, 2021, Dannette Cayongcong, Respondent's Commercial Card Administrator, emailed Complainant to notify Complainant her Travel Card payment was 60 days past due in the amount of \$382.41. Complainant responded by email and explained the account was past due because of a disputed charge.

37. On March 2, 2021, Ms. Cayongcong emailed Complainant and Director Poeppel to notify them that Complainant's Travel Card payment was 60 days past due in the amount of \$194.89.

38. Director Poeppel notified Major Mason Complainant's Travel Card payment was past due. On the same date Director Poeppel provided information on the past due payment, Major Mason learned about a pending Las Vegas hotel charge on Complainant's Travel Card. Major Mason was aware the charge was made while Complainant was on leave. Major Mason then requested Director Poeppel and Ms. Cayongcong conduct additional review of Complainant's Travel Card.

39. Director Poeppel and Ms. Cayongcong conducted review of Complainant's Travel Card. During the review, Director Poeppel and Ms. Cayongcong noted the Unauthorized Charges on Complainant's Travel Card.

40. On March 7, 2021, by memo, Director Poeppel provided Major Mason an update on the review of Complainant's Travel Card charges.

41. On approximately March 9, 2021, Major Mason requested that Internal Affairs initiate an investigation of Complainant's Travel Card use. Sergeant Brian DeLange investigated Complainant's Travel Card use.

42. On April 9, 2021, Respondent suspended Complainant's Travel Card by memo addressed to Complainant. The memo informed Complainant, "This amended letter is to notify you that your [Travel Card] privileges have been suspended due to new information that has been brought to our attention." The memo identified the Unauthorized Charges as the cause of the Travel Card suspension.

43. On May 18, 2021, Sergeant DeLange interviewed Director Poeppel.
44. On May 21, 2021, Sergeant DeLange interviewed Complainant.
45. At the beginning of his interview with Complainant, Sergeant DeLange asked Complainant to tell him about any instances Complainant used her Travel Card for personal purchases or non-state business since 2011. Complainant informed Sergeant DeLange about the December 2020, Door Dash charge. Complainant said, "So, I know that's on there and that was not travel related. But other than that, everything on there that I'm aware of has been travel for the patrol related."
46. Near the beginning of the interview, Complainant said she did not "dissect things." Later in the interview, Complainant stated, "When I looked at it last night. And I was like oh, okay, well, looking at – because when I got the notice of this, I was like I need to go through and dissect this and see if I can figure out what the – you know, what's being talked about. I mean, what it's all about...".
47. During the interview, Complainant acknowledged each of the Unauthorized Charges were possible misuse of the Travel Card.
48. During the interview, when asked about the Las Vegas charge, Complainant responded, "Yeah, and that was one when I initially got this, I was like I know what it is, because I shouldn't have done this...I just wasn't – I didn't have another option at that point, because I was still waiting on my other debit card, and so – I feel bad. I mean, I just have to own that."
49. During the interview, Complainant informed Sergeant DeLange that she occasionally used her Travel Card to purchase alcohol with meals while traveling.
50. Immediately after the interview, Complainant provided Sergeant DeLange with a list that she made of possible misuses of her Travel Card.
51. During the investigation, Sergeant DeLange also spoke with the investigator that conducted the previous Internal Affairs investigation of Complainant's earlier Travel Card misuse.
52. On June 4, 2021, Sergeant DeLange completed an Investigative Report. In the Investigative Report, Sergeant DeLange found it was more likely than not that Complainant was dishonest (lacked candor during interview and made contradictory statements), rude/discourteous/unprofessional/inappropriate in her comments and behavior (failed to follow rules, used the Travel Card to pay for alcohol, pushed the boundaries on appropriate Travel Card charges), abused her authority (used privileges of employment for personal gain when using Travel Card for personal purchases), and engaged in off-duty misconduct (used Travel Card for non-work related purchases and in a manner that could bring discredit upon Respondent).
53. Sergeant DeLange provided the Investigative Report to his supervisor.
54. On June 9, 2021, Sergeant DeLange's supervisor approved the Investigative Report.

### Complainant's Sexual Harassment and Hostile Work Environment Complaint

55. On June 9, 2021, Complainant filed a hostile work environment and sexual harassment complaint against Director Poeppel.<sup>5</sup> Major Mason acknowledged receipt of Complainant's complaint and referred it to Internal Affairs for investigation.

56. Major Mason held a Rule 6-10 meeting related to Complainant's complaint with Director Poeppel in August 2021.

57. In October, Major Mason made a determination related to Complainant's complaint against Director Poeppel.<sup>6</sup> Major Mason believed it was important to resolve Complainant's complaint against Director Poeppel before making a decision on Complainant's Travel Card misuse. Major Mason did this to maintain objectivity when he reviewed Complainant's Travel Card misuse.

### Board Rule 6-10 Process and Disciplinary Action

58. During Complainant's Board Rule 6-10 process, Major Mason requested Complainant's Performance Evaluations and received four years of evaluations.

59. Major Mason conducted a Board Rule 6-10 meeting with Complainant on August 26, 2021.

60. Complainant, Major Mason, and Major Jeff Sewell were present for the Board Rule 6-10 meeting. Major Sewell was Major Mason's representative. Complainant chose not to have a representative at the Board Rule 6-10 meeting.

61. Major Mason discussed each of the Unauthorized Charges and purchase of alcohol with Complainant during the Board Rule 6-10 meeting.

62. At the Board Rule 6-10 meeting, Complainant admitted to some of the allegations related to the misuse of the Travel Card. (Stipulated). Complainant explained she should have stood up for herself more during the investigative interview. Complainant asserted there were some state travel related reasons for most of the Unauthorized Charges.

63. Complainant admitted to purchasing alcoholic beverages with her Travel Card.

64. During the Board Rule 6-10 meeting, Complainant explained that she believed her Travel Card misuse in these instances was different from her past Travel Card misuse. Complainant also explained that Travel Card use was previously not as controlled as it was in the current time-period. Complainant explained that in earlier time-periods people were given permission to use the Travel Card for personal purchases.

65. Near the end of the Board Rule 6-10 meeting, Major Mason asked, "So if you were in my position, what would you do?" Complainant responded, in part:

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<sup>5</sup> The parties did not provide details of the complaint.

<sup>6</sup> The parties did not provide evidence on what Major Mason's determination was.

I don't want to say something and appear as though, I don't, again, I don't take this situation seriously. So before I even say that, I want you to understand I do – I do get that. I understand that and I respect that.

I do think correction – there needs to be some type of corrective action on this. I don't know if a corrective letter is an appropriate thing and making me retake the training again.

But, beyond that...I think I definitely deserve a corrective action for it. And I don't want to say that be like: Oh, give me the very little – the least you have to give me or the least you can give me.

I just think that, if we're looking at just these things, I think – and not looking at the totality of everything, I think that's appropriate.

I work hard. Outside of this, I've never been in trouble for anything. I follow the rules. I try to always make the Agency look good and be a great example for the Agency and for my people. And that's important to me.

So I'm going to hope that something more isn't a consideration on your part, but I do think, when you make a mistake, you have to, you have to own it and take what comes. So respectfully I say that. I just don't know what other avenues there are for something like this.

66. In making his decision, Major Mason considered terminating Complainant's employment. Major Mason decided not to terminate Complainant's employment because of her exemplary performance and because she never sought reimbursement for the Unauthorized Charges.

67. Major Mason issued a Disciplinary and Corrective Action ("Notice of Disciplinary Action") on November 22, 2021. (Stipulated).

68. The Notice of Disciplinary Action contained a list of the Board Rule 6-11 factors considered by Major Mason. Major Mason considered each of the factors listed in Board Rule 6-11.

69. For nature, extent, seriousness, and effect, Major Mason expressed concern about Complainant's repeated misuse of, and failure to pay, the Travel Card. He wrote, "This behavior is not becoming of a supervisor." Major Mason also concluded Complainant's job duties required her to ensure adherence to policies and procedures, oversee and participate in budget development, forecast funds needed for supplies, and supervise implementation of grants. Major Mason believed Complainant's Travel Card misuse caused concern for her ability to perform these job functions.

70. For type and frequency of prior unsatisfactory conduct, Major Mason described Complainant's Travel Card misuse as a "prevalent theme throughout [Complainant's] CSP career" and noted Respondent suspended Complainant's Travel Card four times, including the April 9, 2021, suspension of the Travel Card for the Unauthorized Charges leading to discipline. Major Mason noted that Complainant had not received formal corrective for past misuse of the Travel Card, but considered the past wage garnishment to be disciplinary action.



71. For prior performance evaluations, Major Mason noted Complainant received Exceptional or Successful performance ratings since the 2017-2018 performance year.
72. For mitigating circumstances, Major Mason considered that Complainant never claimed any of the Unauthorized Charges on her Travel Card on an expense report requesting reimbursement.
73. Major Mason concluded Complainant misused her Travel Card on the dates of each of the Unauthorized Charges.
74. Major Mason concluded Complainant contradicted herself in the interview with Sergeant DeLange and was not forthcoming.
75. Major Mason also concluded Complainant used her Travel Card to purchase alcohol with meals.
76. Major Mason concluded Complainant violated Respondent's General Orders Policy (truthful and complete in accounts, preserve public trust, to avoid conduct that brings discredit, professionalism obey policies), Travel Request, Expenses and Reimbursement Policy (Travel Card for business related travel, member responsible for paying bill, and alcohol non-reimbursable), Core Values (honor, integrity), Off-Duty Misconduct Policy (discredit to Respondent), Code of Ethics (honesty, public faith, unwavering professionalism), and Travel for State Business Policy (responsible to comply with rules). Major Mason also concluded Complainant violated State Fiscal Rule 5-1 (alcohol not reimbursable) and Board Rule 6-12 by failing to perform competently, engaging in willful misconduct, failing to comply with rules and policies, and omitting material facts.
77. Major Mason disciplinarily demoted Complainant from Deputy Director to Victim Advocate, effective November 22, 2021. (Stipulated).

## **ANALYSIS**

### **A. 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...6. False statements or omissions of material facts during the course of employment.”

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.

## **B. COMPLAINANT COMMITTED THE ACTS FOR WHICH SHE WAS DISCIPLINED.**

Complainant misused her Travel Card and presented contradictory information to Sergeant DeLange during the investigatory interview. Complainant committed the acts for which Respondent disciplined Complainant.

Complainant willfully and blatantly misused her Travel Card when she used it to reserve a hotel for personal travel in Las Vegas. Complainant stated of this use, “...I shouldn’t have done

this...I just wasn't – I didn't have another option at that point, because I was still waiting on my other debit card, and so – I feel bad. I mean, I just have to own that." Complainant also willfully misused her card when she used it to buy alcohol with meals and for a hotel charge following a birthday party for her supervisor. Although an accident, Complainant's child's use of Complainant's Travel Card is misuse of the Travel Card and should have been reported to Respondent after it was discovered by Complainant. Despite Complainant's state travel related explanations, the other three unauthorized charges included in the Notice of Disciplinary Action also constituted misuse of Complainant's Travel Card, as Complainant was not authorized for state travel when the charges were made.

Complainant's misuse of her Travel Card does not demonstrate the highest degree of professionalism and could bring discredit upon Complainant or Respondent in violation of Respondent's General Orders Policy, Core Values Policy, Off-Duty Misconduct Policy, and Code of Ethics. Complainant's misuse of the Travel Card violates Respondent's Travel for State Business Policy as Complainant did not comply with applicable processes and rules associated with use of the Travel Card. Complainant violated Respondent's Travel Request, Expenses, and Reimbursement Policy and State Fiscal Rule 5.1 by using her travel card to purchase alcoholic beverages with meals. Complainant violated Respondent's Travel Request, Expenses, and Reimbursement Policy and Travel for State Business Policy by using her Travel Card when she was not authorized for travel and for personal travel. The preponderance of the evidence establishes that Complainant misused her Travel Card in violation of multiple policies.

Complainant was not forthcoming and presented contradictory information during her interview with Sergeant DeLange. At the beginning of the interview, Sergeant DeLange gave Complainant an opportunity to provide information on any known misuse of the Travel Card since 2011. Complainant provided information only on the Door Dash charge made by her child. Although it was likely not reasonable to ask Complainant to recall details dating back to 2011, Complainant failed to disclose to Sergeant DeLange known recent misuse of the Travel Card. Complainant's statements in the interview demonstrate she was aware that reserving a room for personal travel in Las Vegas was a misuse of her Travel Card. Complainant was not forthcoming with information about this misuse to Sergeant DeLange.

Further, Complainant contradicted herself during the interview. At the beginning of the interview, Complainant stated that she did not "dissect things." Later in the interview, Complainant stated she knew she needed "to go through and dissect" things while making statements that demonstrated she had carefully gone through the charges on her Travel Card. This contradiction and failure to be forthcoming is evidenced by the fact that immediately after the interview, Complainant provided a list of the questionable charges that she identified prior to the interview to Sergeant DeLange. This is an omission of material information and a failure to be complete in accounts in violation of Respondent's General Orders Policy. Therefore, the preponderance of the evidence establishes that Complainant committed the misconduct for which she was disciplined.

**C. RESPONDENT'S DECISION TO TERMINATE COMPLAINANT FROM EMPLOYMENT 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).

1. *Major Mason used reasonable diligence and care to procure evidence.*

As to the first *Lawley* prong, Respondent established Major Mason used reasonable diligence and care to procure evidence related to Complainant's misuse of the Travel Card. After learning of the possible Travel Card misuse, Major Mason began collecting information and initiated an investigation. It was reasonable for Major Mason to initiate an investigation. The investigation included interviews of Complainant's supervisor, Complainant, and the person who previously investigated Complainant's Travel Card misuse. Major Mason requested, received, and reviewed four past performance evaluations for Complainant. This was a reasonable number of performance evaluations for Major Mason to consider. Major Mason conducted the Board Rule 6-10 meeting and provided Complainant an opportunity to give information. Major Mason used reasonable diligence and care to procure evidence.

2. *Major Mason gave candid and honest consideration to the evidence.*

As to the second *Lawley* prong, Respondent established Major Mason gave candid and honest consideration to the evidence. "This prong is satisfied if the appointing authority considered, in good faith, the relevant evidence..." including the factors set forth in Board Rule.<sup>7</sup> *Stiles* 477 P.3d at 719. Board Rule 6-11 (A)(1-6) lists the following factors to be considered by the appointing authority:

1. The nature, extent, seriousness, and effect of the performance issues or conduct;
2. Type and frequency of prior unsatisfactory performance or conduct (including any prior performance improvement plans, corrective actions or disciplinary actions);
3. The period of time since any prior unsatisfactory performance or conduct;
4. Prior performance evaluations;
5. Mitigating circumstances; and
6. Information discussed during the Rule 6-10 meeting, including information presented by the employee.

It is evident from Major Mason's testimony and the analysis and discussion in the Notice of Disciplinary Action that Major Mason considered the evidence before him and the factors set

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<sup>7</sup> *Stiles* references Board Rule 6-9, which was amended. Language similar to the old Board Rule 6-9 is now included in Board Rule 6-11.

forth in Board Rule 6-11 in good faith. The Notice of Disciplinary Action demonstrates Major Mason considered each of the factors set forth in Board Rule 6-11.

The evidence in the record demonstrates Complainant, a supervisor, continued to misuse her Travel Card after Respondent provided her a fourth opportunity to have a Travel Card. In good faith, Major Mason considered Complainant's misuse of the Travel Card to be serious in nature and a demonstration that Complainant could not comply with established rules as to use of the Travel Card.

In this case, Major Mason credibly testified that he considered termination of Complainant's employment – a more serious discipline than demotion. It is not in dispute that other than Complainant's repeated issues with Travel Card use, Complainant was a high performing employee. Major Mason credibly testified it was Complainant's exemplary performance combined with the fact that she did not seek reimbursement for improper charges that led him to the decision to demote, rather than terminate, Complainant. This demonstrates a good faith consideration of Complainant's past performance and performance evaluations in making the disciplinary decision.

Complainant argued there was no "recency" in this case and that Respondent erred in considering her past Travel Card history. Complainant's argument is not persuasive. First, Complainant engaged in Travel Card misuse in the days immediately preceding Respondent's initial review of her Travel Card use. It was an active past due payment and a pending charge at a hotel in Las Vegas that occurred while Complainant was on leave that drew Respondent's attention to Complainant's Travel Card. Second, Board Rule 6-11(2) required Major Mason to consider past unsatisfactory performance. As above, although Complainant was otherwise an exemplary employee, Complainant repeatedly misused her Travel Card throughout her employment. While Respondent failed to administer formal corrective or disciplinary action for past misuse, Complainant was on notice that her past conduct was unacceptable because Respondent previously investigated her Travel Card use, she did not have a Travel Card for long periods of time after misuse, and Respondent garnished her wages to pay past due amounts on the Travel Card. It was reasonable for Major Mason to consider this past unsatisfactory performance in making his decision.

Respondent proved by a preponderance of the evidence that Major Mason candidly and honestly considered the relevant evidence in this matter.

3. *Major Mason did not exercise his discretion in such a manner that reasonable persons, after fair and honest consideration of the evidence, must reach a contrary conclusion.*

As to the third *Lawley* prong, the evidence in the record does not support that reasonable persons, after fair and honest consideration of the evidence, must reach a contrary conclusion to that of Major Mason.

In the time-period leading to disciplinary action (2019-2020), Complainant knowingly misused her Travel Card and failed to follow basic requirements for Travel Card use. The Cardholder Application, signed by Complainant in 2019 and 2020, set forth basic requirements for use of the Travel Card. These basic requirements included only using the card for allowable purchases, not using the card for personal travel, immediately notifying the approving official and card administrator of disputed charges, and documenting any Travel Card violations with the

approving official and card administrator. Complainant misused her card by making non-allowable purchases of alcohol with it. Complainant misused her Travel Card to reserve a hotel room in Las Vegas for personal travel. Complainant misused her Travel Card by not reporting a known violation to Respondent (charge made by child). Complainant, a supervisor, repeatedly failed to comply with the basic requirements for Travel Card use.

Significant to Major Mason's decision were Complainant's supervisory responsibilities. As a result of Complainant's repeated misuse of her Travel Card, Major Mason felt he could no longer trust Complainant to be in a supervisory position where she was in charge of ensuring others complied with rules. Complainant demonstrated no ability to correct the behavior or to comply even with basic Travel Card requirements. Complainant continued to be past due on payments and misuse her Travel Card after having it suspended not once, but three times, for past due payments and/or misuse. Demotion then is a reasonable disciplinary action after fair and honest consideration of the evidence. The evidence in the record does not demonstrate that after fair and honest consideration of the evidence a contrary conclusion must be made.

Complainant argued that Major Mason's discipline was too severe. The standard set forth under the third prong of *Lawley* is that a different conclusion *must* be reached after fair and honest consideration of the evidence. Although a substantial disciplinary action, Major Mason fairly and honestly considered the evidence and decided demotion was an appropriate action. The Board must give deference to that decision. See *Stiles* 477 P.3d at 714. As discussed above, review of the evidence does not demonstrate that reasonable persons, fairly and honestly considering the evidence, *must* reach a contrary conclusion.

The preponderance of the evidence does not support that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions.

4. *Major Mason's decision was not contrary to rule or law.*

Finally, Respondent established that Major Mason's decision was not contrary to rule or law.

Respondent had cause to discipline Complainant under Board Rule 6-12. Respondent's misuse of the Travel Card is failure to perform competently (misuse of privilege received during the course of employment), willful misconduct (Complainant blatantly used her card in violation of policy on at least one occasion when she used the Travel Card to reserve a room for personal travel in Las Vegas), failure to comply with policies (as discussed above Complainant's Travel Card misuse violated multiple policies), and omission of material fact (Complainant omitted material facts when she did not disclose known misuse of her Travel Card to Investigator DeLange when given an opportunity to do so).

Complainant argued Respondent's disciplinary action was improper because she had not previously received corrective or disciplinary action. Board Rule 6-2 states:

A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

Major Mason did not violate Board Rule 6-2 when he disciplined Respondent for the misuse of her Travel Card. Although Board Rule 6-2 encourages corrective action before discipline, it does not require it. Complainant's misuse of her Travel Card was just cause for discipline under Board Rule 6-12 and significantly serious to warrant discipline without prior corrective action.

As discussed below, the evidence in the record does not demonstrate Respondent violated CADA in its disciplinary demotion of Complainant. Ultimately, Respondent had a legitimate reason for discipline of Complainant, and the evidence in the record does not demonstrate that legitimate business reason was pretext for discrimination or retaliation.

Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law.

**D. RESPONDENT DID NOT DISCRIMINATE OR RETALIATE AGAINST COMPLAINANT IN VIOLATION OF THE COLORADO ANTI-DISCRIMINATION ACT.**

Complainant alleged Respondent discriminated and retaliated against her in violation of CADA.<sup>8</sup> Complainant has the burden to prove by a preponderance of the evidence that Respondent violated CADA. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400-01 (Colo. 1997). Complainant did not meet her burden to prove Respondent violated the CADA by discriminating or retaliating against her. Complainant did not demonstrate a *prima facie* case of discrimination or retaliation in violation of CADA.

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 [she] belongs to a protected class. Second, the employee must prove that [she] was qualified for the job at issue. Third, the employee must show that [she] 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 proved the first three elements of a *prima facie* case of discrimination (she is female and a member of a protected class, she was qualified for her job, and she suffered the adverse employment action of demotion). Complainant did not, however, present any evidence that raises an inference of discrimination.

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

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<sup>8</sup> Complainant largely abandoned her CADA claims as to Respondent's disciplinary demotion. Complainant's prehearing statement focused on a constructive discharge issue. As explained above, Complainant failed to appeal her resignation from employment and the separation issue (alleged constructive discharge) is not before the Board. To the extent CADA violations were not abandoned, the issue is addressed here.

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 established the first two elements of a *prima facie* case of retaliation (Complainant filed a sexual harassment/hostile work environment complaint and suffered the adverse employment action of demotion). Complainant did not demonstrate a causal connection between her demotion and the adverse employment action. Respondent initiated investigation<sup>9</sup> of Complainant's Travel Card use months before she engaged in protected opposition to discrimination. Further, the investigation and Sergeant DeLange's investigative report were completed prior to Complainant's protected opposition to discrimination. The other evidence in the record does not demonstrate the protected activity caused the demotion.

Had Complainant established a *prima facie* case of discrimination or retaliation in violation of CADA, Respondent articulated legitimate reasons for the adverse action. Complainant did not demonstrate that those reasons were pretext for discrimination or retaliation. "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 (10<sup>th</sup> Cir. 1997). As discussed above, Complainant misused her Travel Card in violation of multiple policies after Respondent provided her a fourth opportunity to have a Travel Card. Respondent had a legitimate business reason to discipline Complainant.

Complainant did not demonstrate Respondent's legitimate business reason for the adverse employment action was pretext for discrimination or retaliation. In the Board Rule 6-10 meeting, Complainant, herself, acknowledged the need for some action to be taken as a result of her Travel Card misuse. There is no evidence in the record that demonstrates by a preponderance of the evidence that Respondent's legitimate business reasons for Complainant's demotion are unworthy of credence and that Respondent acted for a reason other than the asserted non-discriminatory reasons.

The preponderance of the evidence does not demonstrate Respondent violated CADA when it disciplined Complainant.

### **CONCLUSIONS OF LAW**

1. Complainant committed the acts for which she was disciplined.
2. Respondent's decision to demote Complainant was not arbitrary, capricious, or contrary to rule or law.
3. Respondent did not discriminate or retaliate against Complainant in violation of CADA.

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<sup>9</sup> It was reasonable for Respondent to initiate an investigation after learning of the past due payment and the Las Vegas hotel charge. There is no evidence in the record that the investigation was abnormal or exceeded what was necessary for this situation. Further, the investigation itself could not have been retaliatory because the protected opposition to discrimination had not yet occurred and the Internal Affairs investigation completed before Complainant filed her complaint.



**ORDER**

1. Respondent's disciplinary demotion of Complainant is **affirmed**.

Dated this 4th day, of  
**May, 2022**, at,  
Denver, Colorado.

[REDACTED]

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

**CERTIFICATE OF SERVICE**

This is to certify that on the 4th day of **May, 2022**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Kristen L. Foust

[REDACTED]

Vincent Morscher, Esq.  
Senior Assistant Attorney General  
[Vincent.Morscher@coag.gov](mailto:Vincent.Morscher@coag.gov)

[REDACTED]

**APPENDIX**

**EXHIBITS**

**COMPLAINANT'S EXHIBITS ADMITTED:** The following exhibits were admitted into evidence: B and F-L.

**RESPONDENT'S EXHIBITS ADMITTED:** The following exhibits were admitted into evidence: 1-17, 19, and 21.

**RESPONDENT'S EXHIBIT OFFERED and NOT ADMITTED:** 18

**WITNESSES**

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

Delores Poeppel

Brian DeLange

Kristen Foust

Mark Mason

## 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](mailto: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).