STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2022B045**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KAREN SELMAN,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the evidentiary hearing via web conference on March 17, 2022. The record was closed on March 17, 2022.

Throughout the hearing, Complainant appeared in person, representing herself. Respondent appeared through its attorney, Assistant Attorney General Amanda C. Swartz, Esq. Respondent's advisory witness was Laura Koeneman, Respondent's Deputy Director of Human Resources.

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

MATTER APPEALED

Complainant, a certified employee, appeals the termination of her employment for refusing to comply with the vaccination attestation and serial testing requirements of the State Universal Policy and Respondent's Vaccination Policy. Complainant admits that she refused to attest to her vaccination status and refused to undergo serial testing, in violation of these policies. Complainant argues that, as a 100% remote worker, she does not pose a threat to anyone in the workplace. Complainant also argues that the attestation and serial testing requirements would result in her protected health information becoming known to her co-workers without her consent.

Respondent argues that its decision to terminate Complainant's employment was not arbitrary or capricious, or contrary to rule or law. Respondent argues that, even though Complainant worked 100% remotely and did not report to the workplace, her refusal to engage in serial testing constituted a danger to the general public when Complainant left her home outside of her work hours. Respondent further argues that requiring employees to attest to their vaccination status did not violate the American with Disabilities Act (ADA), 42 U.S.C. §12101, *et seq.,* as amended.

On February 22, 2022, Respondent filed a Motion for Summary Judgment and Complainant filed a Response. After reviewing the parties' submissions, the ALJ found that the undisputed facts established that Complainant committed the acts for which she was disciplined. The ALJ granted Summary Judgment on this issue. However, the ALJ found that Respondent failed to establish the absence of disputed material facts concerning whether Respondent's termination of Complainant's employment was arbitrary and capricious, or contrary to rule or law.

Therefore, Respondent's Motion For Summary Judgment was denied as to this issue, and the evidentiary hearing proceeded on this issue.

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

ISSUES TO BE DETERMINED

Was Respondent's termination of Complainant's employment arbitrary, capricious, or contrary to rule or law? If so, what is the appropriate remedy?

FINDINGS OF FACT

Background

1. Complainant Karen Selman was employed by Respondent Colorado Department of Human Services (CDHS) as a Data Analyst / General Professional II.

2. As a Data Analyst, Complainant prepared reports for managers and for the Colorado Legislature's Joint Budget Committee.

3. Complainant's work was performed using her computer. She did not have any contact with members of the public and had minimal contact with other employees.

4. Prior to the COVID pandemic, Complainant worked from home two days a week. With the onset of the pandemic, Complainant worked from home full time, using Zoom when she needed to communicate with other employees.

5. At the time of Respondent's termination of her employment, Complainant was working 100% from home. (Stipulated fact.)

6. Complainant was consistently rated "Successful" in her annual performance evaluations, with the exception of the April 2017 - March 2018 performance cycle, when Complainant was rated "Outstanding."

7. Prior to October 8, 2021, Complainant had no history of performance issues.

8. At all relevant times, Complainant's appointing authority was Laura Koeneman, Respondent's Deputy Director of Human Resources.

The Universal Policy

9. On March 10, 2020, Governor Jared Polis verbally declared a disaster emergency regarding the COVID-19 pandemic in Colorado. The Governor's verbal declaration of a disaster emergency was memorialized in Executive Order D 2021 122.

10. On July 30, 2021, Governor Polis announced the "necessary measures that must occur to ensure the State of Colorado is a model employer and to maximize every tool at our disposal to keep both state employees and the public safe from the COVID-19 pandemic." Among these measures was that all state employees would be required to attest whether they were fully vaccinated against COVID-19.

11. On August 30, 2021, the State instituted the measures announced by Governor Polis by issuing the State Universal Policy – COVID-19 Vaccination and Serial Testing Requirements (Universal Policy).

12. The Universal Policy states:

> Effective September 20, 2021, all state employees must attest to their vaccination status as either fully vaccinated or not fully vaccinated in the State's tracking system. Those who are not fully vaccinated are required to submit to COVID-19 serial testing twice-weekly at an established test location and report results in the State's tracking system…
>
> [E]mployees who have not attested to their fully vaccination [sic] status as required, who are in the process of receiving the vaccine until they are fully vaccinated, or who have identified that they are not vaccinated, shall submit to serial testing and report their results on a twice-weekly basis as directed by their department, unless departmental policy differs, as provided herein.

13. The Universal Policy applied to "[a]ll employees, including those who have fully remote or hybrid work location arrangements under the Flexible Work Arrangement Universal Policy."

14. The Universal Policy included the following provisions concerning "Confidentiality and Data Security":

> The security of sensitive and confidential data is of critical importance to the State of Colorado. All records and data associated with this Policy will be collected, transmitted, and stored in a manner compliant with the State's data security policy.
>
> Asking for proof of vaccination does not violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA).
>
> In accordance with the Americans with Disabilities Act as Amended, the medical information provided by employees to their department's human resources office is considered confidential. If the information is stored in paper format, it must be stored in a medical file separate and apart from personnel files.

15. The Universal Policy included the following provisions concerning "Consequences for Noncompliance":

> Employees who fail to comply with the requirements of this Policy and/or their department's vaccination or testing policy may be subject to corrective action and/or discipline, up to and including termination pursuant to the State

> Personnel Board Rules and Director's Administrative Procedures and Executive Order D 2021 132 Colorado's Disaster Recovery Order.[1]

Respondent's Vaccination Policy

16. On September 8, 10 and 14, 2021, Respondent notified its employees, including Complainant, about its vaccination and testing requirements, and provided information about how to request an exemption, via email.

17. On or about September 17, 2021, Ms. Koeneman created an initial draft of Respondent's COVID-19 Mandatory Vaccination and Testing Policy (Vaccination Policy).

18. After meetings with Respondent's leadership to discuss and revise Ms. Koeneman's draft, Executive Director Michelle Barnes issued Respondent's Vaccination Policy, effective September 30, 2021.

19. On September 30, 2021, Respondent emailed its employees, including Complainant, a copy of its Vaccination Policy.

20. Ms. Koeneman understood that the purpose of Respondent's Vaccination Policy was to "slow the spread of COVID."

21. Respondent's Vaccination Policy applied "to all CDHS employees, including those who have fully remote or hybrid work location arrangements."

22. Respondent's Vaccination Policy states: "Effective September 20, 2021, employees shall attest to their vaccination status in the State testing system. Vaccinated employees must provide verification through attestation, with a copy of their official COVID-19 vaccination record or card, as directed by CDHS."

23. Respondent's Vaccination Policy informed employees that "not providing the attestation, untruthful attestations, and/or failure to provide vaccination documentation, may subject the employee to corrective and/or disciplinary action, up to and including termination."

24. Respondent's Vaccination Policy included the following provisions concerning "Confidentiality":

> Vaccination and testing status will be used to the extent necessary for business operations. All documents related to vaccination or testing, including the proof of vaccination and approved medical and religious exemptions, will be stored securely and will be maintained separately from the personnel file.

[1] Executive Order D 2021 132 temporarily suspended portions of certain Board Rules "for the limited purpose of pursuing the pre-disciplinary process for State employees out of compliance with the State's COVID-19 vaccination requirement." This vaccination requirement applied to State certified employees "that interact with vulnerable populations and populations living in congregate living settings." Because Complainant did not interact with vulnerable populations and populations living in congregate living settings, Executive Order D 2021 132 did not apply to her.

Respondent's Collection and Maintenance of Employees' Vaccination Information

25. State employees send their vaccination cards to Respondent's Human Resources office. Each vaccination card is uploaded to a system called Origami.

26. Origami is a Risk Management Information System used to track employees' vaccination status for state agencies. Origami is owned and managed by the State Office of Risk Management.

27. Respondent's COVID project manager generates reports showing each employee's name, ID and vaccination status.

28. Access to employees' information in Origami is limited to individuals who administer Respondent's vaccination policy, including Ms. Koeneman. These individuals are required to keep this information confidential.

29. Respondent maintains employees' vaccination information separately from personnel files.

Respondent's Disciplinary Action

30. Complainant refused to attest to her vaccination status as required by the Universal Policy and Respondent's Vaccination Policy.

31. Complainant believed that Respondent could not require her to participate in twice-weekly COVID-19 testing and refused to comply with this requirement.

32. On October 8, 2021, Ms. Koeneman issued Complainant a Corrective Action for failure to attest to her vaccination status. The Corrective Action instructed Complainant to, on or before October 12, 2021, attest to her vaccination status or submit to twice-weekly COVID-19 testing.

33. In the Corrective Action, Ms. Koeneman explained the reasons for requiring Complainant to comply with the Universal Policy:

> The health and safety of State of Colorado employees, their families, and the communities we serve remain our highest priority. This pandemic is aggressive, and we must react to effectively recover as a state. As state employees, we are responsible for leading by example while keeping in mind the public's interest, trust and common goals for our communities. To that end, all state employees must comply with the requirements of the COVID-19 Vaccination and Testing Universal Policy. Your failure to comply with the Universal Policy places the health and safety of your co-workers and the population we serve at risk.

34. Following the October 8, 2021 Corrective Action, Complainant did not attest to her vaccination status or submit to twice-weekly COVID-19 testing.

35. On October 15, 2021, Ms. Koeneman notified Complainant that she was considering disciplinary action due to her failure to comply with the Universal Policy, Respondent's Vaccination Policy and the October 8, 2021 Corrective Action.

36. On October 25, 2021, Ms. Koeneman held a pre-disciplinary meeting with Complainant pursuant to Board Rule 6-10.

37. On November 1, 2021, Complainant submitted a written response to the issues discussed at the Rule 6-10 meeting. In this response, Complainant stated that, as a 100% remote worker, she did not pose a threat to anyone in the workplace. Complainant also alleged that the attestation and serial testing requirements would result in her protected health information becoming known to her co-workers without her consent.

38. On November 2, 2021, Ms. Koeneman held a follow up meeting with Complainant. Ms. Koeneman asked whether Complainant wished to request a religious exemption to the vaccine. Complainant responded that she did not want to request an exemption because she did not want to provide her private medical information to Respondent.

39. On November 12, 2021, Ms. Koeneman held another follow up meeting with Complainant. Ms. Koeneman asked whether Complainant intended to comply with the serial testing requirement. Complainant stated that she had no intention to comply with the serial testing requirement.

40. Ms. Koeneman provided Complainant with seven days to provide additional information. Complainant reiterated her concerns about the privacy of her confidential vaccination information.

41. On November 23, 2021, based upon all the information Ms. Koeneman received during the Rule 6-10 process, she found that Complainant violated the Universal Policy and the Respondent's Vaccination Policy by failing to attest to her vaccination status or submit to twice-weekly COVID-19 testing. Ms. Koeneman found that these policy violations "constitute[d] unsatisfactory performance, insubordination, and willful misconduct, as set forth in Board Rules 6-12(B)(1), 6-12(B)(2), and 6-12(B)(3)." Ms. Koeneman concluded:

> I arrived at my decision because your failure to comply with the Universal Policy and CDHS Policy places the health and safety of your co-workers, our Colorado communities, and the population we serve at risk. Therefore, your refusal to comply with the Universal Policy and the CDHS Policy could have life-threatening effects. The serious and flagrant nature of your insubordination and misconduct justify immediate termination.

42. At the time of Respondent's termination of her employment, Complainant was working 100% from home. (Stipulated fact.)

43. On December 3, 2021, Complainant timely appealed Respondent's termination of her employment to the Board.

Complainant's Earnings

44. At the time of Respondent's termination of her employment, Complainant was making $4,476.00 per month. (Stipulated fact.)

45. Since February 1, 2022, Complainant has earned $16.00 per hour, working 36 hours per week, for a total of $536.00 per week.

ANALYSIS

A. BURDEN OF PROOF

The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service." Colo. Const. Art. XII, § 13(8). A certified state employee may be disciplined "only for just cause based on constitutionally specified criteria." *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994).

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

> … 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).

The Colorado Supreme Court has clarified certified employees' rights in two crucial decisions. In *Kinchen*, the Supreme Court held that Respondent has the burden to prove by a preponderance of the evidence that the alleged misconduct on which the discipline was based occurred in a *de novo* hearing. *Kinchen*, 886 P.2d at 706-708. In discharging an employee, an appointing authority must establish a constitutionally authorized ground. *Id.* at 707. The ALJ is required to make "an independent finding of whether the evidence presented justifies a dismissal for cause." *Id.* at 706. 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" by 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 Corrections v. Stiles, 477 P.3d 709, 717 (Colo. 2020). 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:

> If 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 decision 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. RESPONDENT'S TERMINATION OF COMPLAINANT'S EMPLOYMENT WAS CONTRARY TO LAW.

1. Respondent's Regulation of Off-Duty Conduct

Respondent terminated Complainant's employment for refusal to submit to serial testing for COVID-19. The ADA provides that an employer may require a medical examination of an employee when the examination is "job-related and consistent with business necessity." 29 C.F.R. §1630.14(c). These criteria are met when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will post a direct threat due to a medical condition." *See* EEOC-CVG-2000-4, "Enforcement Guidance on Disability Related Inquiries and Medical Examinations Under the Americans with Disabilities Act," Question and Answer A.5 (7-26-2000).

In the termination letter issued to Complainant, Ms. Koeneman stated that Complainant's refusal to submit to serial testing constituted a threat to "the health and safety of your co-workers, our Colorado communities, and the population we serve" and "could have life-threatening effects." Under the ADA, a "direct threat" justifying medical testing means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. 42 U.S.C. §1211(3). Direct threat determinations must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. 29 C.F.R. §1630.2(r) (as amended, 2011). An employer's reasonable belief that an employee will pose a direct threat must be based on objective evidence and cannot be based on general assumptions. EEOC-CVG-2000-4, *supra*, Question and Answer A.5. An employer is only entitled to the medical information necessary to determine whether an employee can do the essential functions of the job or work without posing a direct threat. *Id.*, Question and Answer B.13.

The Equal Employment Opportunity Commission (EEOC) has issued Technical Assistance titled "What You Should Know About COVID-19, the ADA, the Rehabilitation Act, and other EEO Law," available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K (EEOC Technical Assistance). Question and Answer A.6 of this EEOC Technical Assistance addresses COVID-19 testing of employees:

> The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

This EEOC Technical Assistance provides that, in order to require mandatory COVID-19 testing of employees under the ADA, such testing must be intended to prevent employees who have COVID-19 from entering the workplace. The parties stipulated that, at the time Complainant was terminated, she worked remotely 100% of the time. Therefore, Complainant did not enter

the workplace to perform her job duties and did not constitute a "direct threat" to anyone in the workplace.

Ms. Koeneman testified that the application of the Universal Policy and Respondent's vaccination policy to remote workers was necessary because "Colorado, I think, needed to stop the spread of COVID … in whatever ways that we possibly could." Ms. Koeneman explained that "having the employees submit to serial testing was one way to ensure that people were staying at home and not going out into the community and infecting others who would then potentially infect other people and spread it even further." Ms. Koeneman testified that "we as a State and at CDHS made the decision that we really needed to be much more aggressive in slowing the spread of COVID …"

Ms. Koeneman believed that Complainant's refusal to submit to serial testing constituted a danger to the general public when Complainant left her home and went into the community outside of her work hours. Ms. Koeneman explained that Complainant's refusal to submit to serial testing could contribute to the spread of COVID-19 through the general public. When questioned further about the business necessity for such testing, Ms. Koeneman stated that such an increase in COVID-19 through the general public could ultimately result in an outbreak in Respondent's facilities. For these reasons, Ms. Koeneman believed that it was essential that Complainant be required to submit to serial testing in an attempt to limit the spread of COVID-19 through the general public. Ms. Koeneman believed that Complainant's refusal to submit to such testing justified the termination of her employment.

Employee testing intended to limit the spread of COVID-19 in the general population outside of the workplace is not "job related and consistent with business necessity," as required by the ADA. 29 C.F.R. §1630.2(r) (1998) requires that direct threat determinations must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The preponderance of the evidence establishes that Complainant could, and did, satisfactorily and safely perform 100% of the essential functions of her job from her home without the need for serial testing. Further, Ms. Koeneman's belief that Complainant could spread COVID-19 into the general population, ultimately resulting in outbreaks in Respondent's facilities, is not based on objective evidence but rather on speculation, contrary to the guidance issued by the EEOC. *See* EEOC-CVG-2000-4, "JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY," Question and Answer A.5.

In addition to violating the ADA, employee testing intended to limit the spread of COVID-19 in the general population outside of the workplace constitutes regulation of an employee's legal off-duty conduct. Such regulation of an employee's off-duty conduct violates § 24-34-402.5, C.R.S., "Unlawful prohibition of legal activities as a condition of employment." Section 24-34-402.5, C.R.S., provides, in pertinent part:

> (1) It shall be a discriminatory or unfair employment practice for an employer[2] to terminate the employment of any employee due that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:
>
> (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a

[2] The term "employer" in this statute includes the State of Colorado. § 24-34-401(3), C.R.S.

> particular employee or a particular group of employees, rather than to all employees of the employer…

Ms. Koeneman's application of the State Universal Policy and Respondent's Vaccination Policy to terminate Complainant's employment as a 100% remote worker constituted improper regulation of Complainant's legal off-duty conduct. When questioned, Ms. Koeneman was unable to articulate a bona fide occupational requirement, or a reasonable and rational relation to Complainant's employment activities and responsibilities, of the attestation and serial testing mandates for a 100% remote worker like Complainant. Neither the Governor nor the Colorado legislature required members of the general public to engage in serial testing. Therefore, Ms. Koeneman's decision to terminate Complainant for failing to submit to testing in order to protect the general public from COVID-19 outside of the workplace during nonworking hours violates § 24-34-402.5, C.R.S.

In its closing argument, Respondent maintained that, even if such regulation of off-duty conduct constituted "overreach," that question was not properly before the Board. However, one of the Board's statutory responsibilities is to determine whether a disciplinary action was contrary to law. *Dep't of Corrections v. Stiles*, 477 P.3d at 718. *See also* § 24-50-103(6), C.R.S.

The ALJ finds that Respondent's regulation of Complainant's legal off-duty conduct – i.e., requiring Complainant to engage in serial testing in order to protect the general public outside of the workplace during nonworking hours - constituted an unlawful prohibition of legal activities as a condition of employment under § 24-34-402.5, C.R.S. The ALJ further finds that Respondent's discipline of a 100% remote worker like Complainant for refusing to submit to serial testing violates the ADA's "business necessity" standard. 29 C.F.R. §1630.14(c). *See also* EEOC Technical Assistance, "What You Should Know About COVID-19, the ADA, the Rehabilitation Act, and other EEO Law," Question and Answer A.6. Therefore, Respondent's termination of Complainant's employment was contrary to law.

2. Complainant's Privacy Concerns

Complainant raised concerns about the privacy of her confidential medical information as justification for her refusal to attest to her vaccination status or undergo serial testing. Respondent correctly states that inquiring about an employee's vaccination status does not violate the ADA. *See* 29 C.F.R. §1630.2(r) (as amended, 2011); Question and Answer K.9, EEOC Technical Assistance. However, the EEOC advises that information about an employee's COVID-19 vaccination information constitutes confidential medical information under the ADA:

> The ADA requires an employer to maintain the confidentiality of employee medical information. Although the EEO laws do not prevent employers from requiring employees to provide documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

EEOC-CVG-2000-4, "JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY," Question and Answer K.4. In addition, Personnel Director's Administrative Procedure 1-24 provides: "Any medical information on the employee or a family member shall be maintained in a separate, confidential medical file with limited access in accordance with law."

The evidence presented during the hearing established that Respondent made every possible effort to protect the privacy of its employees' confidential vaccination information. This

information was maintained separately from employees' personnel files. Access to this information was restricted to those individuals with a business need to know in order to administer the State Universal Policy and Respondent's Vaccination Policy. These protections complied with EEOC guidance, *supra*, and Personnel Director's Administrative Procedure 1-24. However, the Board does not have jurisdiction to review this issue. Rather, the State Personnel Director has jurisdiction to review alleged violations of Personnel Director's Administrative Procedures or of federal laws, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191. *See* §24-50-104.5, C.R.S. Therefore, the ALJ finds that Complainant's concerns about the privacy of employees' vaccination information maintained by Respondent should be referred to the State Personnel Director for review.

C. RESPONDENT'S TERMINATION OF COMPLAINANT'S EMPLOYMENT WAS ARBITRARY AND CAPRICIOUS.

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). The ALJ finds that Ms. Koeneman's decision to terminate Complainant's employment was "based on conclusions from the evidence such that reasonable [persons] fairly and honestly considering the evidence must reach contrary conclusions."

As discussed above, Ms. Koeneman concluded that Complainant's refusal to engage in serial testing posed a risk to the community at large outside of her work hours. For this reason, Ms. Koeneman concluded that she had no choice but to terminate Complainant's employment. However, neither the Universal Policy nor Respondent's Vaccination Policy require any specific discipline of employees who refuse to be tested. Instead, both of these policies provide that employees who refuse to test "may" be subject to corrective or disciplinary action.

Board Rule 6-11, "Factors to Consider in Taking Discipline," provides, in pertinent part:

> A. The decision to take disciplinary action of a certified state employee shall be based upon:
>
> 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.

Ms. Koeneman testified that Complainant was "a valued employee." Complainant was an efficient and dedicated worker who had no prior corrective or disciplinary actions during her tenure

with Respondent. During her seven years of employment with Respondent, Complainant received consistently satisfactory performance evaluations, and at times demonstrated exceptional performance. Complainant was a reliable employee who understood the importance of meeting demanding deadlines for legislative reports. Complainant testified that, even on the day she was fired, she made sure to finish her final legislative report before attending the termination meeting with Ms. Koeneman. It was evident from Ms. Koeneman's testimony that she had a great deal of respect for Complainant and appreciation of her strong work ethic. Ms. Koeneman testified that her decision to terminate Complainant's employment was extremely difficult. However, Ms. Koeneman concluded that, in the absence of testing, Complainant's contact with the general public during her nonworking hours represented a grave risk that outweighed the other factors listed in Rule 6-11. Ms. Koeneman considered this risk to be so serious that she had no choice but to terminate Complainant's employment.

In its "Considerations when testing," the CDC recommends that employers consider providing alternatives for employees who refuse serial testing, "as feasible and appropriate, such as reassignment to tasks that can be performed via telework." *See* "Considerations when testing" from the CDC's Interim Guidance for SARS-CoV-2 Testing in Non-Healthcare Workplaces, updated October 6, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html. There is no dispute that it was "feasible and appropriate" for Complainant to perform 100% of her work remotely during the pandemic. Therefore, under the CDC guidance, allowing Complainant to continue to work remotely, rather than terminating her employment for refusing serial testing, is a reasonable alternative. Similarly, reasonable persons, "fairly and honestly considering the evidence" presented in this case, must conclude that a 100% remote worker, who had no physical contact with coworkers or the public during her work hours, did not present a risk in the workplace and therefore should be permitted to continue to work remotely.

Ms. Koeneman's decision to terminate the employment of a 100% remote worker for posing a potential risk to the general public during her non-working hours due to her refusal to be tested for COVID-19 was not reasonable; i.e., was "based on conclusions from the evidence such that reasonable [persons] fairly and honestly considering the evidence must reach contrary conclusions." *Lawley,* 36 P.3d at 1252. Therefore, the ALJ finds that the decision to terminate Complainant's employment was arbitrary and capricious. §24-50-103(6), C.R.S.

D. THE APPROPRIATE REMEDY.

Because Respondent's termination of Complainant's employment was arbitrary and capricious, as well as contrary to law, Complainant is entitled to be reinstated to her former position as a Data Analyst / General Professional II with full back pay and benefits, minus any earnings she received after her employment with Respondent was terminated. *See Department of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984) (explaining that "[w]here a legal injury is of an economic character ... legal redress in the form of compensation should be equal to the injury.")

The parties stipulated that, prior to the termination of her employment, Complainant was earning $4,476 per month, or $1,119 per week. Complainant was unemployed from November 24, 2021 through January 31, 2022, and lost a total of $10,071 in earnings.

On February 1, 2022, Complainant began earning $16.00 per hour, working 36 hours per week, for a total of $576 per week. Therefore, beginning February 1, 2022, Complainant lost $543 in earnings per week. Between February 1 and March 31, 2022, Complainant lost $4,887 in earnings.

As of April 1, 2022, Complainant's back pay award totals $14,958, plus applicable interest.

CONCLUSIONS OF LAW

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

2. Respondent's decision to terminate Complainant's employment was arbitrary and capricious, and contrary to law.

3. The appropriate remedy is rescission of Respondent's termination of Complainant's employment, reinstatement of Complainant to her former position as a Data Analyst / General Professional II, and an award of back pay and benefits.

4. The Board does not have jurisdiction to review Complainant's concerns about the privacy of employees' vaccination information maintained by Respondent. These concerns should be referred to the State Personnel Director for review.

ORDER

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

2. Respondent shall **reinstate** Complainant to her former position as a Data Analyst / General Professional II.

3. Respondent shall **reimburse** Complainant for her lost wages in the amount of $10,071 for the period she was unemployed from November 24, 2021 through January 31, 2022, plus applicable interest. Respondent shall further **reimburse** Complainant for the additional amount of $543 for each week from February 1, 2022 until she is reinstated, plus applicable interest. This amount is subject to the employer's PERA contribution, as well as interest of 8% per annum to the date of reinstatement. Respondent shall also **restore** all lost benefits denied Complainant due to the termination of her employment.

4. Complainant's concerns about the privacy of employees' vaccination information maintained by Respondent are referred to the State Personnel Director for review.

Dated this 1st day
of April, 2022, at
Denver, Colorado.

[redacted]

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

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of April, 2022, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and the attached **NOTICE OF APPEAL RIGHTS** addressed as follows:

Karen Selman
[redacted]

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

DHR Consulting Services
Department of Personnel & Administration
1525 Sherman Street, 2nd Floor
Denver, CO 80203
Dhr_consultingservices@state.co.us

[redacted]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: Complainant did not offer any exhibits.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

WITNESSES

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

Laura Koeneman, Respondent's Deputy Director of Human Resources
Karen Selman, Complainant

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).