STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2022B060**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOY FERNANDEZ,
Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the evidentiary hearing via web conference on April 25 and 26, 2023. The record was closed on May 3, 2023 after receipt of post-hearing submissions from the parties.

Throughout the hearing, Complainant appeared via Google Meet, representing herself. Respondent appeared through its attorneys, Assistant Attorney General Dayna Zolle Hauser, Esq., and Senior Assistant Attorney General Vincent E. Morscher, Esq., via Google Meet. Respondent's advisory witness was Susan Redmond, Chief Human Resources Officer.

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 Respondent's termination of her employment, alleging discrimination on the basis of religion in violation of the Colorado Anti-Discrimination Act (CADA), § 24-34-401, C.R.S., *et seq*. Complainant argues that Respondent's disciplinary action was arbitrary, capricious, and contrary to rule and law. Complainant also argues that Respondent's failure to engage in a good faith interactive process concerning her request for accommodation of her religious beliefs, and Respondent's denial of her request for accommodation, constitute discrimination on the basis of religion under CADA.

Respondent denies Complainant's claims and alleges that Complainant committed the act for which she was disciplined. Respondent argues that its disciplinary action was not arbitrary, capricious, or contrary to rule or law. Respondent denies that it discriminated against Complainant and argues that it was unable to accommodate Complainant's religious beliefs because of undue hardship.

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

ISSUES TO BE DETERMINED

1.) Did Complainant commit the act for which she was disciplined?

2.) Was Respondent's disciplinary action arbitrary, capricious, or contrary to rule or law? If so, what is the appropriate remedy?

3.) Did Respondent discriminate against Complainant on the basis of religion in violation of CADA? If so, what is the appropriate remedy?

FINDINGS OF FACT

Background

1. Complainant was hired by DPS and began working in the Division of Fire Prevention and Control (DFPC) on September 8, 2015. (Stipulated.)

2. Complainant was employed as an Administrative Assistant III. (Stipulated.)

3. Complainant worked in DFPC's Fire and Life Safety Section, which administers the fire, building, and life safety codes adopted by DFPC.

4. When Complainant was initially hired, she was the only Administrative Assistant in DFPC's Fire and Life Safety Section. For the first year of her employment, Complainant performed all, or almost all, of the administrative work for DFPC's Fire and Life Safety Section.

5. Prior to November 2021, Complainant received consistently "Satisfactory" performance evaluations.

6. The majority of Complainant's work is performed online.

7. At the time her employment was terminated, Complainant was one of two Administrative Assistants in her office. Complainant shared some duties with the other Administrative Assistant.

8. At all relevant times, William Bischof was Complainant's first level supervisor.

9. At all relevant times, Christopher Brunette, Fire & Life Safety Section Chief, was Complainant's second level supervisor.

10. At all relevant times, Melissa Lineberger, Chief of Staff, was Complainant's Appointing Authority.

Universal Policy

11. On July 30, 2021, Governor Jared Polis announced that all state employees must submit proof of COVID-19 vaccination or submit to COVID-19 testing twice per week.

12. On August 30, 2021, the state issued the State Universal Policy – COVID-19 Vaccination and Serial Testing Requirements (Universal Policy) to implement measures announced by Governor Polis. (Stipulated.)

13. The Universal Policy imposed the following requirements:

> 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 test results in the State's tracking system.

14. To avoid exposure to the COVID-19 virus, for some period of time, all of Respondent's employees, including Complainant, worked remotely.

15. At some point prior to September 2021, Chief Burnette ordered Complainant and the other Administrative Assistant to return to work in the Fire and Life Safety Section office on a part-time basis. Complainant and the other Administrative Assistant took turns working in the Fire and Life Safety Section office on Mondays, Wednesdays and Fridays on alternate weeks.

16. The other Administrative Assistant in the Fire and Life Safety Section office has received the COVID-19 vaccine.

17. Due to the ongoing pandemic**,** the Fire and Life Safety Section office was not open to the public. However, someone had to be in the DFPC office on a part-time basis to process incoming mail and assist other employees who may come into the office.

18. At some point, it was anticipated that the Fire and Life Safety Section office would reopen to allow members of the public to obtain necessary permits or other documents in person.

19. When Complainant returned to work in the Fire and Life Safety Section office, she was often the only person there. Occasionally, another employee would come in to work in the Fire and Life Safety Section office.

20. When Complainant returned to work in the Fire and Life Safety Section office, she practiced social distancing and wore a mask, in compliance with Respondent's policies.

Complainant's Request for Accommodation

21. On September 21, 2021, Complainant asked to be exempted from the requirements of the Universal Policy by submitting an email to her supervisor and DPS Human Resources. Her email included an attachment titled "Assertion of Religious Exemption to forced serial testing." (Stipulated.)

22. Complainant requested "a religious exemption from forced serial testing" as "[a] Believer in Islamism (the Practice of Peace)" and "its basic Holy principles as stated in the Holy Koran of the Moorish Science Temple of America aka the Circle 7."

23. On September 23, 2021, Respondent's COVID-19 CDPS Q & A Team (COVID-19 Team) emailed Complainant a COVID-19 Vaccination/Testing Request for Religious Exemption/Accommodation Form, and asked Complainant to complete and submit this Form. The COVID-19 Team informed Complainant that her completed Form would be "submitted to an assigned committee for review and decision," and Complainant would "be emailed with the next steps."

24. On September 24, 2021, Complainant completed the COVID-19 Vaccination/Testing Request for Religious Exemption/Accommodation Form. Complainant provided the following grounds for her Request:

> My Religion is Islamism, and my Holy Book is the Circle 7 (Also known as the Holy Koran of the Moorish Science Temple of America).
>
> This Religion has 5 Divine Principles of Love, Truth, Peace, Freedom and Justice. With these principles in Mind the Circle 7 mandates in many different parts such as the importance of health and keeping my body pure. According to Chapter 23, Verse 10: "Teach him Temperance and he shall have health; teach him Prudence and Fortune shall attend him."
>
> Meaning my Health depends on what I put in my body and how careful I am with what I choose to do.
>
> **I would need a [sic] exemption to the Covid Vaccine/Testing due to its unsafeness. As an alternative to invasive testing if it is required with the same diligence I would choose to continue wearing my mask /w [sic] social distancing and self isolate if any illness/seasonal change takes place.**
>
> (Bold emphasis in original.)

25. On September 24, 2021, at 3:55 p.m., Complainant emailed her completed COVID-19 Vaccination/Testing Request for Religious Exemption/Accommodation Form to the COVID-19 Team.

26. On September 24, 2021, at 4:01 p.m., the COVID-19 Team emailed Complainant the following response:

> Your Request for Religious Exemption from COVID Testing is being submitted to a committee for review and decision. You are temporarily exempt from testing until the decision is reached.

27. On October 21, 2021, the COVID-19 Team emailed Complainant the following information:

> We want to provide you with some additional information in hopes it is helpful to you.
>
> CDPS HR has submitted your exemption request to the Statewide Exemption Group in DPA's Division of Human Resources (DHR) for evaluation.
>
> The Statewide Exemption Group (in DHR) will develop and submit an analysis to CDPS. We will use this analysis and any additional information you provide to engage in an interactive process with you to determine whether you are eligible for an exemption or accommodation. DHR's analysis and any information you provide will be treated confidentially throughout. CDPS will review and evaluate each request on a case-by-case basis and cannot guarantee any exemptions or reasonable accommodations. To properly process your request, CDPS may

> request additional information or documentation to engage during the interactive process to determine whether you are eligible for an exemption or accommodation.
>
> Due to the volume of requests going to DHR, we expect this process may take multiple weeks. You are not required to test while your religious exemption request is under consideration but please continue to take every precaution to protect your health and minimize risks related to the spread of the COVID-19 virus. We will reach out to you when we reach the next step, and please feel free to reply to this email address with any questions along the way.

DPA'S Division of Human Resources Guidance Concerning Complainant's Request for Accommodation

28. The Department of Personnel & Administration's (DPA) Division of Human Resources (HR Division) conducted initial reviews of employees' accommodation requests on behalf of Respondent.

29. On November 22, 2021, Jennifer Swanson, an employee with DPA's HR Division, forwarded an "Exemption Request Analysis & Summary COVID-19 Testing" concerning Complainant's Request for Religious Exemption to Respondent. This Analysis & Summary stated:

> The employee feels that both vaccines and testing are unsafe and can affect doing what is morally right in the eyes of God. The request as submitted demonstrates, [sic] need for accommodation. There is sufficient information that the vaccination requirement needs accommodation to eliminate that conflict. It should be noted that this role is not a role identified for the vaccine mandate, and as such, an accommodation from vaccination is not required.
>
> In regards to testing, however, the employee has not provided sufficient information to support the request for a religious exemption from testing to eliminate that conflict. Based on the lack of information submitted to differentiate the COVID testing as being unsafe, the agency is strongly encouraged to work with the employee through the interactive process to establish how the employee's religion is in conflict with the COVID testing alternatives.

30. Attached to Swanson's Analysis & Summary was a copy of DPA's HR Division guidance concerning "COVID-19 Vaccination Medical & Religious Reasonable Accommodations," issued October 11, 2021. This guidance provides, in pertinent part:

> The State of Colorado allows for exemptions to COVID-19 vaccination and testing requirements as a reasonable accommodation to assist any employee … who objects based on sincerely held religious beliefs and practices. Agencies are strongly encouraged to provide reasonable work accommodations when they do not cause undue hardship or present a direct threat to the workplace…

31. DPA's HR Division guidance lists reasonable accommodations that agencies can provide employees who request exemptions to COVID-19 vaccination and testing requirements. These reasonable accommodations include changing an employee's job or providing equipment that allows an employee to work from home or at another site, restructuring an employee's job to

reduce interactions with others, reassigning tasks or job duties, and requiring employees to use personal protective equipment and practice social distancing.

32. DPA's HR Division guidance concludes: "There are many different reasonable accommodations agencies can provide. Agencies should work with employees to determine the accommodation." Agencies are referred to several resources for "reasonable accommodation options," including a national Job Accommodation Network and the Equal Employment Opportunity Commission's online technical assistance.

Respondent's Denial of Complainant's Request for Accommodation

33. On November 24, 2021, at 8:00 a.m., Compliance Officer Rebecca Mooney emailed Complainant a copy of a letter denying Complainant's religious testing accommodation request. This letter stated, in pertinent part:

> CDPS HR submitted to the Statewide Exemption Group all of the information you had provided to us regarding your request. Based on their analysis and a careful review of your request, we have determined that the information provided is insufficient to establish that you have a sincerely held religious belief that conflicts with the COVID-19 testing requirement. Specifically, we have determined that the information you provided failed to demonstrate how testing specifically conflicts with your religious belief. Therefore you are not entitled to an accommodation from testing and the Department is denying your request.
>
> . . . . .
>
> Please connect with your supervisor as soon as possible to establish a plan to start your serial testing no later than during the week beginning Monday, November 29, 2021.
>
> (Bold emphasis omitted.)

34. On November 24, 2021, at 8:28 a.m., the COVID-19 Team emailed Complainant that she was required to start COVID-19 serial testing.

35. On November 24, 2021, at 9:11 a.m., Compliance Officer Mooney notified Supervisor Bischof, via email, that "CDPS HR has reviewed and denied [Complainant's] request for an accommodation/exemption to the COVID testing requirement" and was therefore required to start serial COVID testing "no later than during the week beginning Monday November 29, 2021." (Bold emphasis omitted.)

Complainant's Step One Grievance Re: Denial of Accommodation

36. On November 29, 2021, Complainant emailed Compliance Officer Mooney with questions about the decision to deny her request for religious accommodation. At the same time, Complainant initiated the grievance process. (Stipulated.)

37. On December 7, 2021, Complainant met with Compliance Officer Mooney to discuss her first step grievance.

38. On December 9, 2021, Supervisor Bischof emailed Complainant:

> I wanted to recap our phone call yesterday about the required covid testing.
>
> You are currently appealing the serial covid testing requirement. I informed you that the serial covid testing requirement must be adhered to while your appeal is being reviewed. The testing requirement must be implemented within one business day or corrective action may be required.

39. On December 9, 2021, Complainant responded to Supervisor Bischof via email, informing him that she would not "be taking the Covid Testing due to my religious belief/practice…"

40. Complainant's response was forwarded to Appointing Authority Lineberger.

41. On December 10, 2021, Complainant submitted additional information to Compliance Officer Mooney concerning the basis for her religious beliefs. Complainant also suggested that she be allowed to work from home, changing her status to "full time remote."

42. On December 14, 2021, at 1:20 p.m., Compliance Officer Mooney sent Complainant an email clarifying the grievance process. This email included the following instruction:

> Please understand that during the grievance process, you would be required to submit to and report COVID-19 serial testing. Initiating the grievance does not delay the expectation that you come into compliance with the Universal Policy.

43. On December 14, 2021, at 2:14 p.m., Complainant emailed Compliance Officer Mooney the following response:

> Thank you for clarifying. I will continue to submit the missed serial testing submission form and list Religious Observance as my reason for missing it.

44. On December 15, 2021, Compliance Officer Mooney sent Complainant the following email:

> I want to be clear that Religious Observance is not an acceptable reason for a missed test. We are in the grievance process now, but as I have said in the past, engaging in a grievance does not delay the expectation that you currently comply with the requirement that you test twice a week. As of the date your exemption was denied and continually, the expectation is that you comply with the testing requirements. Failure to do so may result in a corrective or disciplinary action. To achieve compliance with the policy, you must begin testing twice per week and reporting the results through the CDPS Testing Portal.

45. On December 17, 2021, Complainant responded to Compliance Officer Mooney via email:

> Thank you for the information. From what I am aware of, I have the right to religious conscience objections for things contrary to my religious beliefs. I'll do more research into it.

46. On December 21, 2021, Compliance Officer Mooney issued a written Step One Grievance Response to Complainant that reiterated the requirement that Complainant comply with serial testing during her grievance process. (Stipulated.)

47. In the Step One Grievance Response, Compliance Officer Mooney reconsidered Complainant's religious exemption request and reached the following conclusions:

> After a careful consideration of your request and the additional information you provided, CDPS has determined that we cannot accommodate your requested accommodations without imposing an undue hardship on our operations. Accepting that you have sincerely held religious beliefs that conflict with the testing requirements, we reconsidered your request and have found that the accommodation you have requested would place an unacceptable burden on our operations.
>
> . . . . .
>
> [Y]our requested accommodation to abstain from testing would create an undue hardship on CDSP by limiting CDPS's ability to ensure a safe workplace. The Universal Policy does not create an exception for employees who work from home due to the fact that any employee may need to physically report to the office or other worksite in order to meet business needs. Requiring all employees to either vaccinate or conduct serial testing is necessary in order to ensure a safe work environment to best protect both state employees and the public. Therefore, an accommodation allowing an unvaccinated employee to refrain from testing would place an undue hardship on CDSP. As a result, we are denying your requested accommodations to refrain from testing.

48. Neither Supervisor Bischof nor Appointing Authority Lineberger were consulted as part of an interactive process to determine whether Respondent could accommodate Complainant's religious beliefs and practices.

49. Chief Brunette thought he was involved in one meeting with Complainant and Compliance Officer Mooney, and stated that he "didn't contribute much" to that meeting.

Corrective Action

50. On December 21, 2021, Chief Brunette issued a Corrective Action to Complainant due to her "failure to adhere to the requirements of the COVID-19 Vaccination and Serial Testing Requirements Universal Policy and related department expectations."

51. In the Corrective Action, Chief Brunette instructed Complainant:

> You must immediately submit to testing on your next scheduled testing date and continue to be tested according to your schedule until such time as you are fully vaccinated or the requirement is lifted.
>
> Failure to comply with the requirements of this corrective action will result in further corrective and/or disciplinary action, up to and including termination.

52. Chief Brunette forwarded a copy of the Corrective Action to Appointing Authority Lineberger.

Complainant's Step Two Grievance Re: Denial of Accommodation

53. On December 25, 2021, Complainant notified DPS Chief Human Resources Officer, Susan Redmond, that she wanted to proceed with the Step 2 Grievance Process. (Stipulated.)

54. In her written Step Two Grievance, Complainant suggested the following accommodation: "I can continue to attend meetings and training virtually while working remotely full time (if the other Admin is willing to voluntary do the light paperwork in the office)."

55. A Step Two Grievance Meeting was held on January 19, 2022 between Complainant and Chief HR Officer Redmond. (Stipulated.)

56. Officer Redmond considered her grievance discussions with Complainant to be part of an ongoing interactive process.

57. Before Officer Redmond issued her Step 2 grievance decision, Appointing Authority Lineberger terminated Complainant's employment.

Rule 6-10 Meeting

58. Appointing Authority Lineberger was aware that Complainant was pursuing a second step grievance concerning Respondent's denial of her religious accommodation request.

59. Appointing Authority Lineberger had no involvement with, or input into, Respondent's consideration of Complainant's request for accommodation of her religious beliefs and practices.

60. On January 4, 2022, Appointing Authority Lineberger issued a Notice of Rule 6-10 Meeting to Complainant.

61. On January 12, 2022, Appointing Authority Lineberger held a Rule 6-10 meeting with Complainant to discuss Complainant's non-compliance with the Universal Policy and Respondent's testing requirements. Appointing Authority Lineberger appeared with her representative, Chris Brunette. Complainant appeared with her representative, Barbara Davis. (Stipulated.)

62. During the Rule 6-10 meeting, Complainant informed Appointing Authority Lineberger that she was unable to submit to serial testing due to her religious beliefs. Complainant explained her religious beliefs to Appointing Authority Lineberger.

63. Appointing Authority Lineberger informed Complainant that Complainant's religious beliefs and her request for an accommodation of those beliefs were "outside the purview" of the Rule 6-10 meeting.

64. Complainant informed Appointing Authority Lineberger that she was diligent about wearing a mask and practicing social distancing when she was working in the office, and did not

understand why those measures were insufficient.

65. Appointing Authority Lineberger did not respond to Complainant's question about why wearing a mask or practicing social distancing were insufficient.

66. Complainant asked Appointing Authority Lineberger whether her religious beliefs would be held against her.

67. Appointing Authority Lineberger responded:

> My role here is to collect information … and use that to make a decision. My decision has nothing to do with whether or not your religious beliefs are closely held, or whether or not a reasonable accommodation should or should not have been offered. My decision is strictly based on compliance with the policy and non-compliance with the policy…

68. Complainant asked Appointing Authority Lineberger whether they could "come to a solution where I'm not going to have to be feeling that my job is on the line?"

69. Appointing Authority Lineberger stated that she could not answer Complainant's question, as she had not yet made a decision about potential discipline.

70. Ms. Davis told Appointing Authority Lineberger that "every single factor" needed to be taken into account in reviewing Complainant's non-compliance with the Universal Policy.

71. At the conclusion of the meeting, Appointing Authority Lineberger invited Complainant to send her any other information Complainant would like Appointing Authority Lineberger to consider by January 19, 2022.

72. On January 18, 2022, Complainant provided Appointing Authority Lineberger a timeline detailing all of Complainant's efforts to obtain an accommodation for her religious beliefs.

Respondent's Disciplinary Action

73. On January 20, 2022, Appointing Authority Lineberger issued a Notice of Disciplinary Action, terminating Complainant's employment effective that same day.

74. In her Notice of Disciplinary Action, Appointing Authority Lineberger concluded that Complainant "violated the Universal Policy and department requirements by failing to submit to the required twice-weekly testing." Appointing Authority Lineberger further concluded that Complainant's "persistent refusal to comply with the Universal Policy, department policies, and directives from your supervisors constitutes 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."

75. On January 24, 2022, Complainant filed a timely appeal of the Disciplinary Action.

Complainant's Earnings

76. At the time her employment was terminated, Complainant was earning $3,921 per month.

77. Despite searching for new employment, Complainant has not received any income or unemployment benefits since January 20, 2022.

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. COMPLAINANT COMMITTED THE ACT FOR WHICH SHE WAS DISCIPLINED.

The preponderance of the evidence establishes that Complainant refused to comply with the Universal Policy's serial testing requirement. Therefore, Complainant committed the act for which she was disciplined.

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 persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.,* 36 P.3d 1239, 1252 (Colo. 2001).

The preponderance of the evidence presented by the parties establishes that Appointing Authority Lineberger acted arbitrarily and capriciously, as those terms are defined in *Lawley*, 36 P.3d at 1252, in terminating Complainant's employment. First, Appointing Authority Lineberger failed to use reasonable diligence and care to procure such evidence as the agency is by law authorized to consider in exercising the discretion vested in it. *Id*. At the time Appointing Authority Lineberger held the Rule 6-10 meeting with Complainant, she was aware that Complainant was still in the process of discussing her second step grievance with Officer Redmond. However, Appointing Authority Lineberger terminated Complainant's employment before those discussions concluded and a second step decision was issued by Officer Redmond. Before terminating Complainant's employment, Appointing Authority Lineberger did not talk with Officer Redmond to determine whether a reasonable accommodation of Complainant's religious beliefs was possible. Appointing Authority Lineberger also made no effort to determine whether Respondent had actually engaged in a good faith dialogue with Complainant to explore potential accommodations. Appointing Authority Lineberger's termination of Complainant's employment without procuring this information renders Appointing Authority Lineberger's termination decision arbitrary and capricious. *Id*.

Appointing Authority Lineberger also failed to give candid and honest consideration of the evidence presented by Complainant during the Rule 6-10 meeting. *Lawley,* 36 P.3d at 1252. During the Rule 6-10 meeting, Complainant attempted to present information concerning the conflict between her religious beliefs and Respondent's serial testing requirement. Appointing Authority Lineberger told Complainant that information was "outside the purview" of the Rule 6-10 meeting. Board Rules 6-11(A)(5) and (6) require an Appointing Authority to consider, among other things, "[m]itigating circumstances" and "information presented by the employee." Appointing Authority Lineberger's determination that the information Complainant attempted to present was "outside the purview" of the Rule 6-10 meeting renders Appointing Authority Lineberger's termination decision arbitrary and capricious. *Id*.

Finally, Appointing Authority Lineberger's termination of Complainant's employment

before completion of the second step grievance was not reasonable; i.e., this decision 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. DPA's HR Division guidance concerning "Medical & Religious Reasonable Accommodations" "strongly" encourages agencies to explore "exemptions to COVID-19 vaccination and testing requirements as a reasonable accommodation to assist any employee … who objects based on sincerely held religious beliefs and practices." This guidance also directs agencies to "work with employees" to determine reasonable accommodations. Officer Redmond testified that she believed that her second step grievance communications with Complainant constituted a continuation of the interactive process. Appointing Authority Lineberger's termination of Complainant's employment before the conclusion of the second step grievance discussions concerning Complainant's accommodation request was arbitrary and capricious. *Id*.

The preponderance of the evidence presented by the parties establishes that Appointing Authority Lineberger acted arbitrarily and capriciously, as those terms are defined in *Lawley*, 36 P.3d at 1252, in terminating Complainant's employment. Therefore, Respondent's decision to terminate Complainant's employment should be reversed, pursuant to § 24-50-103(6), C.R.S.

D. RESPONDENT'S TERMINATION OF COMPLAINANT'S EMPLOYMENT WAS CONTRARY TO CCRD RULE 50.1.

Board Rule 9-4 provides:

> In determining whether discrimination or harassment has occurred, the Board shall apply Colorado law, including the standards and guidelines adopted by the Colorado Civil Rights Commission. The Board may refer to federal law in the event Colorado legal standards are unclear.

Rule 50.1 of the Civil Rights Commission's Code of Colorado Regulations, 3 CCR 708-1, provides:

> (A) Duty to Accommodate.
>
> > It is unlawful for a covered entity to fail or refuse to reasonably accommodate the creed or religious practice of an individual, unless the requested accommodation would result in undue hardship. After an individual requests an accommodation of a creed or religious practice, the covered entity has a duty to engage in a good-faith interactive dialogue to determine an appropriate accommodation.
>
> (B) Undue Hardship.
>
> > A refusal to accommodate an individual's creed or religious practice is justified only when a covered entity can demonstrate that an undue hardship would result from each available alternative method of accommodation. A mere assumption that more people with the same creed or religious practices as the person being accommodated may also need accommodation is not evidence of undue hardship.

1.) Interactive Process

Pursuant to Rule 50.1(A) of the Civil Rights Commission's Code of Colorado Regulations, Respondent was required "to engage in a good-faith interactive dialogue to determine an appropriate accommodation" of Complainant's religious belief and practices. At the outset of the evidentiary hearing, the ALJ informed the parties that, after reviewing their stipulated exhibits, she was especially interested in hearing about their interactive process.

Respondent had the burden to establish that it initiated a meaningful interactive process with Complainant. *See Toledo v. Nobel-Sysco, Inc.,* 892 F.2d 1481, 1488-89 (10th Cir. 1989). Respondent failed to establish that its representatives engaged in a good-faith interactive dialogue to determine whether Respondent could accommodate Complainant's religious beliefs and practices. Respondent's initial communications with Complainant focused on the sincerity of Complainant's religious beliefs rather than accommodation of those beliefs. Respondent then denied Complainant's request for accommodation because it determined that Complainant failed to establish the sincerity of her alleged religious beliefs and how they conflicted with the serial testing requirement. After Complainant grieved Respondent's denial of her request for accommodation, Compliance Officer Mooney determined that Complainant's religious beliefs were sincere, but denied Complainant's request for accommodation due to "undue hardship." Compliance Officer Mooney's determination was made without any good faith dialogue with Complainant about potential accommodations.

Officer Redmond testified that she believed that Compliance Officer Mooney conducted an interactive process to determine whether Respondent could accommodate Complainant's religious beliefs and practices because that should have been the usual practice. However, Officer Redmond was not directly involved with, and did not have personal knowledge of, whatever process Compliance Officer Mooney conducted. Complainant credibly testified that Compliance Officer Mooney never engaged in an interactive dialogue with her concerning potential accommodations. Neither first level supervisor Bischof nor Appointing Authority Lineberger were consulted as part of an interactive process with Complainant. Chief Brunette thought he was involved in one meeting with Complainant and Compliance Officer Mooney, but stated that he "didn't contribute much" to that meeting.

Compliance Officer Mooney did not testify at the evidentiary hearing. The only evidence presented concerning Compliance Officer Mooney's decisions were her written responses to Complainant. In responding to Complainant's suggestion during the first step grievance that Complainant be allowed to work from home full time, Compliance Officer Mooney simply responded: "[A]n accommodation allowing an unvaccinated employee to refrain from testing would place an undue hardship on CDSP." Compliance Officer Mooney apparently concluded that no unvaccinated employees who asked to be excused from testing could be accommodated. However, changing an employee's job to allow an employee to work from home is one of the accommodations that DPA's HR Division "strongly encouraged" agencies to explore with an employee requesting an exemption from COVID-19 vaccination and testing requirements. Contrary to this guidance, Compliance Officer Mooney did not discuss this option with Complainant and did not consult with any of Complainant's supervisors to see whether such an accommodation would be possible.

After Complainant grieved Compliance Officer Mooney's denial of her first step grievance, Complainant filed a second step grievance and engaged in communications with Officer Redmond. Officer Redmond testified that she considered these discussions to be a continuation of the interactive process she believed had occurred with Compliance Officer Mooney. As part of

her second step grievance submission, Complainant suggested that she "could continue to attend meetings and training virtually while working remotely full time (if the other Admin is willing to voluntary do the light paperwork in the office)." Like Compliance Officer Mooney, Officer Redmond testified that she took no action concerning this suggested accommodation. Officer Redmond did not check with Complainant's supervisors to determine whether such an accommodation would be possible and did not have any discussion with Complainant about any potential accommodations.

Before the second step grievance process was completed, Appointing Authority Lineberger scheduled a Rule 6-10 meeting with Complainant. During the Rule 6-10 meeting, Appointing Authority Lineberger told Complainant that her decision concerning potential discipline for Complainant's failure to submit to serial testing "has nothing to do with whether or not your religious beliefs are closely held, or whether or not a reasonable accommodation should or should not have been offered." When Complainant attempted to initiate a conversation about her beliefs and how they might be accommodated, Appointing Authority Lineberger informed Complainant that such a discussion was "beyond the purview" of their Rule 6-10 meeting. Even though Appointing Authority Lineberger knew that Complainant was involved in second step grievance discussions with Officer Redmond, Appointing Authority Lineberger terminated Complainant's employment before those discussions concluded.

The preponderance of the evidence establishes that Respondent failed "to engage in a good-faith interactive dialogue to determine an appropriate accommodation" of Complainant's religious belief and practices, as required by Rule 50.1(A) of the Civil Rights Commission's Code of Colorado Regulations. Therefore, Respondent's termination of Complainant's employment was contrary to Rule 50.1(A). As a result, Respondent's decision to terminate Complainant's employment should be reversed, pursuant to § 24-50-103(6), C.R.S.

2.) Undue Hardship

Rule 50.1(B) of the Civil Rights Commission's Code of Colorado Regulations requires an employer to "demonstrate that an undue hardship would result from each available alternative method of accommodation." The preponderance of the evidence establishes that Respondent failed to consider, much less determine, that undue hardship would result "from each available alternative method of accommodation."

After Complainant grieved Respondent's denial of her request for accommodation, Compliance Officer Mooney determined that Complainant's religious beliefs were sincere, but denied Complainant's request for accommodation due to "undue hardship." Compliance Officer Mooney did not specifically respond to Complainant's request to work from home full time and did not consult with any of Complainant's supervisors to see whether such an accommodation would be possible. Similarly, during the second step grievance process, Officer Redmond made no effort to investigate Complainant's suggestion to restructure her work assignments to allow her to work "remotely full time." The HR Division's List of suggested "Medical & Religious Reasonable Accommodations" that agencies are "strongly encouraged" to explore includes changing an employee's job or providing equipment that allows an employee to work from home or at another site, restructuring an employee's job to reduce interactions with others, or reassigning tasks or job duties. Neither Compliance Officer Mooney nor Officer Redmond consulted Complainant's supervisors to determine whether restructuring Complainant's work assignments would constitute "undue hardship."

The preponderance of the evidence establishes that Respondent failed to "demonstrate

that an undue hardship would result from each available alternative method of accommodation." Therefore, Respondent's termination of Complainant's employment was contrary to Rule 50.1(B) of the Civil Rights Commission's Code of Colorado Regulations, 3 CCR 708-1. As a result, Respondent's decision to terminate Complainant's employment should be reversed, pursuant to § 24-50-103(6), C.R.S.

E. RESPONDENT'S FAILURE TO ATTEMPT TO ACCOMMODATE COMPLAINANT'S RELIGIOUS BELIEFS CONSTITUTED DISCRIMINATION IN VIOLATION OF CADA.

CADA prohibits discrimination "in matters of … terms, conditions or privileges of employment against any person otherwise qualified" due to, *inter alia*, that person's religion. §24-34-402(1)(a), C.R.S. Board Rule 9-3 provides, in pertinent part: "Discrimination and/or harassment against any person is prohibited because of … religion … This applies to all employment decisions."

Complainant argues that Respondent failed to accommodate her religious beliefs. The Tenth Circuit Court of Appeals has held that an employer's failure to make reasonable accommodation, short of undue hardship, for its employees' religious practices constitutes an unlawful employment practice under Title VII. *Toledo,* 892 F.2d at 1487-88 (10th Cir. 1989), quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

To establish a *prima facie* case of failure to accommodate, Complainant must establish: (1) Complainant had a *bona fide* religious belief that conflicted with an employment requirement, (2) Complainant informed Respondent of this belief, and (3) Respondent terminated Complainant's employment for failure to comply with the conflicting employment requirement. *Thomas v. Nat'l Ass'n Letter Carriers*, 225 F.3d 1149, 1155-56 (10th Cir. 2000).

Complainant has established all three elements of a *prima facie* failure to accommodate claim. First, as a practicing Muslim, Complainant has established that she has a *bona fide* religious belief that conflicts with Respondent's serial testing requirement. Respondent acknowledged this fact in its first step grievance response, when Compliance Officer Mooney "accepted" that Complainant had "sincerely held religious beliefs that conflict with the testing requirements." The preponderance of the evidence establishes that Complainant's belief that serial testing violated the precepts and practices of her religion was sincere and *bona fide*. No evidence to the contrary was presented during the evidentiary hearing.

Second, beginning on September 21, 2021, Complainant repeatedly informed Respondent that she had a *bona fide* religious belief that conflicted with Respondent's serial testing requirement. Therefore, Complainant has established the second element of a *prima facie* failure to accommodate case.

Finally, Appointing Authority Lineberger's notice of termination states that she terminated Complainant's employment for failure to comply with Respondent's serial testing requirement. Therefore, Complainant has established the third element of a *prima facie* failure to accommodate case.

Once Complainant establishes a *prima facie* case of failure to accommodate her religious beliefs, the burden shifts to Respondent to: (1) conclusively rebut one or more elements of Complainant's *prima facie* case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable reasonably to accommodate the employee's religious needs without undue hardship. *Thomas*, 225 F.3d at 1156. Respondent did not attempt to rebut any element of

Complainant's *prima facie* case and did not allege that it offered a reasonable accommodation. Instead, Respondent argued that it was unable to accommodate Complainant's religious beliefs without undue hardship.

It is the employer's burden to establish that it cannot offer a reasonable accommodation without undue hardship. *Tabura v. Kellogg*, 880 F.3d 544, 558 (10th Cir. 2018). To prove undue hardship, an employer must demonstrate how much cost or disruption proposed accommodations would involve. *Trans World Airlines, Inc*., 432 U.S. at 84. In responding to Complainant's suggestion during the first step grievance that she be allowed to work from home full time, Compliance Officer Mooney simply responded: "[A]n accommodation allowing an unvaccinated employee to refrain from testing would place an undue hardship on CDSP." Compliance Officer Mooney did not specifically respond to Complainant's request to work from home full time and did not consult with any of Complainant's supervisors to see whether such an accommodation would be possible. Rather, Compliance Officer Mooney simply concluded that no unvaccinated employees who asked to be excused from testing could be accommodated.

If no accommodation was offered to an employee, an employer must demonstrate that no accommodation could have been made without undue hardship. The Tenth Circuit cautioned: "Although conceivable, such situations will also be rare." *Toledo*, 892 F.3d at 1490. The Tenth Circuit explained that "deciding the issue of undue hardship without some background of attempted or proposed accommodation is best resolved by examining the specific hardships imposed by specific accommodation proposals." *Id.*

The only evidence of undue hardship offered by Respondent was provided by Chief Brunette during his testimony. Chief Brunette testified that Respondent needed to have its Administrative Assistants in the office to process incoming mail, and to assist any employees or customers who might appear in person. To meet these needs, Chief Brunette required Respondent's two Administrative Assistants to take turns coming into the office three days a week every other week. Chief Brunette testified that allowing Complainant to continue to come into the office without being vaccinated or submitting to serial testing might expose other employees or potential customers who might enter the office to COVID-19. However, Chief Brunette did not address any other potential accommodations, such as restructuring the Administrative Assistants' work assignments to allow Complainant to handle online work from home while the other Administrative Assistant (who was vaccinated) or another employee handled any necessary work in the office.

No evidence was presented as to whether restructuring of Complainant's work would constitute an undue hardship. Although Complainant specifically asked Compliance Officer Mooney and Officer Redmond about this alternative, they made no effort to consult with Complainant's supervisors to determine whether it could be a reasonable accommodation. An employer cannot rely on potential or hypothetical hardship, particularly speculation based on co-workers' reactions, to establish undue hardship. *See Brown v. General Motors Corp.,* 601 F.2d 956, 961 (8th Cir. 1979).

The preponderance of the evidence fails to establish that Respondent was unable reasonably to accommodate the employee's religious needs without undue hardship. *Thomas*, 225 F.3d at 1156. Absent a showing that no accommodation could have been made without undue hardship, "failure to attempt some reasonable accommodation would breach the employer's duty to initiate accommodation of religious practices." *Toledo*, 892 F.3d at 1490.

Respondent's denial of Complainant's request for accommodation of her religious beliefs without a specific demonstration of undue hardship constituted discrimination in violation of CADA. Therefore, Respondent's decision to terminate Complainant's employment should be reversed, pursuant to § 24-50-103(6), C.R.S.

F. REMEDY

As discussed above, Respondent's denial of Complainant's request for accommodation of her religious beliefs, and resulting termination of her employment, constituted discrimination in violation of CADA. Board Rule 9-6 provides:

> If the Board finds that discrimination or harassment has occurred, it may order affirmative relief that the Board determines to be appropriate, including reinstatement or rehiring or employees, with or without back pay, front pay, and any other relief authorized by the statutes governing the Board.

In addition to discriminating against Complainant on the basis of religion, Respondent's termination of Complainant's employment was arbitrary and capricious, as well as contrary to rule and law. Therefore, Complainant is entitled to be reinstated to her former position as an Administrative Assistant III 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.")

Complainant testified that, prior to the termination of her employment, she was earning $3,921 per month. Since the termination of her employment, Complainant has not received any unemployment benefits and has been unsuccessful in obtaining other employment.

CONCLUSIONS OF LAW

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

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

3. Respondent's decision to terminate Complainant's employment was contrary to rule and law.

4. Respondent discriminated against Complainant on the basis of religion.

5. The appropriate remedy is reversal of Respondent's decision to terminate Complainant's employment.

ORDER

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

Respondent shall **reinstate** Complainant to her former position of Administrative Assistant III.

Respondent shall **reimburse** Complainant for lost wages in the amount of $3,921 per month for each month from January 20, 2022 until the date of her reinstatement. This amount is subject to the employer's PERA contribution, as well as interest of 8% per annum to the date of reinstatement. Complainant shall also **restore** all lost benefits denied Complainant due to the termination of her employment.

If Respondent has a current policy requiring employees to be vaccinated for COVID-19 or to submit to serial testing, once Complainant is reinstated, Respondent shall engage in a good-faith interactive dialogue with Complainant to determine whether her sincere religious beliefs may be accommodated without undue hardship by considering "each available alternative method of accommodation," as required by Rule 50.1 of the Civil Rights Commission's Code of Colorado Regulations, 3 CCR 708-1.

Dated this 6th day
of June, 2023, at
Denver, Colorado.

/s/ [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 6th day of June**,** 2023, 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:

Joy Fernandez
[redacted]

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[redacted]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits A, B, C, D, E, H, I, K, M, N, P, Q, R, S, T, W, X, AA, AB, AC, AD, AE, AH, AK, AN, AR. The following additional exhibit was admitted into evidence without objection: Exhibit AI.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45.

WITNESSES

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

Christopher Brunette, Fire & Life Safety Section Chief
William Bischof, Supervisor
Susan Redmond, Chief Human Resources Officer
Melissa Lineberger, former Chief of Staff and Complainant's Appointing Authority
Dee Shane Stevens, former Plans Examiner
Barbara Jean Davis, Grants Manager, DPS
Joy Fernandez, 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).