

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. **2023B052**

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**ANDREW RATH,**  
Complainant,

v.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL, CRIMINAL INVESTIGATIONS BRANCH,**  
Respondent.

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Administrative Law Judge (“ALJ”) K. McCabe held the evidentiary hearing on October 16 and 17, 2023 at 1525 Sherman Street, 4<sup>th</sup> Floor, Courtroom 6 in Denver, Colorado. The record closed on October 24, 2023.

Andrew Rath (“Complainant”) appeared for the hearing with counsel. Complainant appeared onsite on October 16, 2023. Complainant appeared remotely on October 17, 2023. Paul Sukenik, Esq., represented Complainant.

Vincent Morscher, Esq., and Kerry Ferrell, Esq., represented Department of Public Safety, Colorado State Patrol, Criminal Investigations Branch (“CSP” or “Respondent”). Major Mark Mason, Complainant’s Appointing Authority, participated as Respondent’s advisory witness.

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

**MATTERS APPEALED**

On March 23, 2023, Respondent disciplinarily terminated Complainant’s employment. On March 31, 2023, Complainant filed an appeal seeking review of the disciplinary termination with the State Personnel Board (“Board”). Complainant alleges Respondent discriminated against him in violation of the Colorado Anti-Discrimination Act (“CADA”) on the basis of disability.

For the reasons discussed below, Respondent’s termination of Complainant’s employment is **AFFIRMED**.

**ISSUES**

1. Did Complainant commit the acts for which he was disciplined?
2. Was Respondent’s decision to terminate Complainant arbitrary, capricious, or contrary to rule or law?
3. Did Respondent discriminate against Complainant on the basis of disability?

## **FINDINGS OF FACT**

### **Background**

1. Complainant was hired by CSP on March 16, 2015, and was appointed to the Cadet Class of 2015. (Stipulated).
2. Complainant promoted to Trooper from Cadet effective November 20, 2015. (Stipulated).
3. On July 11, 2018, Complainant was selected for the Smuggling, Trafficking, and Interdiction Section ("STIS") K-9 position in CSP District 2. (Stipulated).
4. Complainant was assigned a canine to assist him with perform[ing] his duties. (Stipulated).
5. Complainant's last canine partner was Lexi.<sup>1</sup>
6. Complainant's job duties required him to handle large sums of money, narcotics, and weapons.
7. Complainant's job duties required him to testify in criminal proceedings.
8. Integrity is paramount to a trooper's job functions.
9. Complainant received satisfactory performance evaluations during the course of his employment.
10. On January 1, 2021, Sergeant Thomas Taylor took over the managing the District 2 STIS team and became Complainant's supervisor. (Stipulated).
11. Sgt. Taylor was Complainant's immediate supervisor from January 1, 2021 until the time of Complainant's termination from employment.
12. Captain William Barkley was Complainant's second line supervisor. Cpt. Barkley had the authority to administer Corrective Actions to Complainant.
13. Major Mark Mason was Complainant's Appointing Authority. Major Mason had the authority to discipline Complainant.
14. Major Mason has conducted approximately 24 Board Rule 6-10 Meetings during his tenure with Respondent. Of those Board Rule 6-10 Meetings, approximately 5 have resulted in termination of an employee's employment. The conduct in each of the 5 Board Rule 6-10 Meetings that resulted in termination involved some form of dishonesty.
15. Respondent has a Code of Ethics, Core Values, and General Orders.

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<sup>1</sup> The parties stipulated to the following fact: At the time of separation, the canine partner Complainant worked with was named Lexi. (Stipulated). Lexi, however, appears to have retired shortly before Complainant's termination from employment.

16. The Code of Ethics requires members of the Colorado State Patrol to be “[h]onest in thought and deed.” The Code of Ethics states, “I recognize the badge of the Colorado State Patrol as a symbol of public faith.”

17. The Core Values of the Colorado State Patrol are Honor, Duty, and Respect. The Core Values provides, “**Honor** is the essence of a person’s veritable integrity based on the representation of moral character and ethical actions.” (Bold and italics in original.)

18. The General Orders include:

- Members will be truthful and complete in their accounts and reports.
- Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately.
- Members will avoid any conduct that may bring discredit upon, or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.
- Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.

#### Complainant’s Medical Conditions

19. Complainant has multiple medical conditions.

20. In June 2021, Complainant informed Sgt. Taylor about diagnosed medical conditions.

21. In March 2022, Complainant disclosed diagnosis of additional medical conditions to Sgt. Taylor. After the disclosure, Sgt. Taylor asked Complainant what they needed to do now. Complainant told Sgt. Taylor that Sgt. Taylor did not to do anything and that Complainant was not seeking any accommodations.

22. Sgt. Taylor provided Complainant a list of resources that may be useful for addressing the medical conditions. Complainant utilized the list of resources.

23. Cpt. Barkley became aware of Complainant’s medical conditions, and had conversations with Complainant about those medical conditions. Cpt. Barkley also shared his own personal medical conditions that were similar to Complainant’s. Cpt. Barkley discussed state and other resources that were available for medical conditions, including possible financial assistance with receiving treatment. Complainant did not ask for any accommodations for his medical conditions. With his chain of command, Cpt. Barkley discussed what, if anything, Respondent could do to assist Complainant.

#### Ongoing Issues with Performance of Administrative Duties

24. Complainant had ongoing issues with completing reports on time. Complainant also had other issues with reports, including issues with grammar.

25. Complainant had ongoing issues with other administrative duties, including timekeeping.

26. Timely and accurate completion of administrative duties is an important part of Complainant's duties.

27. Sgt. Taylor created Complainant a "cheat sheet" to help Complainant stay on top of certain tasks.

#### June 2021 Incident

28. On June 23, 2021, Complainant was assisting Trooper Stephen Wall with an interdiction stop that involved the deployment of Lexi on the vehicle ("June 2021 Incident"). (Stipulated).

29. Lexi searched the vehicle and alerted Complainant to the presence of narcotics.

30. Complainant improperly interpreted Lexi's actions and informed the other troopers on scene that Lexi did not alert.

31. The other officers located narcotics at the spot Lexi alerted.

32. Complainant then informed the officers Lexi alerted.

33. On approximately June 24, 2021, Trooper Wall notified Sgt. Taylor about the June 2021 Incident.

34. On approximately June 27, 2021, Sgt. Taylor addressed the June 2021 Incident with Complainant.

#### June 2022 Incident

35. On June 8, 2022, Complainant had a conversation with Sgt. Taylor at the firearms range about a supplemental narrative. (Stipulated).

36. Complainant told Sgt. Taylor the supplemental narrative was done. Sgt. Taylor instructed Complainant to send him the supplemental narrative while they were still at the firearms range.

37. Complainant did not send the supplemental narrative to Sgt. Taylor while they were at the firearms range.

38. The supplemental narrative was not done.

39. Complainant turned in the report a couple of days later and stated he needed time to finish the supplemental narrative.

40. Sgt. Taylor reported the June 2022 Incident to Cpt. Barkley on November 7, 2022.

#### September 2022 Incident

41. On September 16, 2022, Complainant was involved in a pursuit in which he was the senior trooper ("September 2022 Incident"). (Stipulated).

42. Complainant attempted to stop a vehicle with a flashlight without wearing a reflective vest.

43. Complainant misused stop sticks, resulting in two uninvolved vehicles getting flat tires. An officer on scene was struck by something during the use of the stop sticks.

44. Complainant approached a person from the vehicle not yet in custody in an unsafe manner.

45. During the September 2022 Incident, Complainant's actions caused serious safety concerns.

#### October 2022 Incident

46. On October 14, 2022, Complainant lost his CSP issued flat badge<sup>2</sup> while attending training ("October Badge Incident"). (Stipulated). Complainant reported the loss of the badge to Sgt. Taylor on October 16, 2022. (Stipulated).

47. A lost badge presents a safety concern, because someone could use the badge to impersonate a police officer. A lost badge needs to be promptly reported.

#### November 2022 Incident

48. On November 5, 2022, Complainant had a conversation ("November 2022 Incident") with Sgt. Taylor about a wall stop the prior day. (Stipulated). The conversation addressed issues related to a vehicle search. (Stipulated).

49. A wall stop is a stop done on a vehicle that is part of/under an investigation by another agency. Troopers must have their own probable cause to stop the vehicle.

50. Sgt. Taylor asked Complainant questions about the search of different areas of the vehicle. Sgt. Taylor was asking the questions to see if Complainant had missed searching any areas of the vehicle, so Complainant could remember to search those areas in the future. Asking these types of questions is a common practice.

51. During the conversation, Sgt. Taylor asked Complainant if he had gotten underneath the truck to see if Complainant had looked at the bolts holding the bed of the truck on and about the straps of the gas tank. Indications of recent movement to the bolts and straps might indicate a recent accessing of the gas tank. Sgt. Taylor did not ask Complainant if he had scoped<sup>3</sup> the gas tank. Complainant told Sgt. Taylor he scoped the gas tank of the vehicle.

52. Complainant had not scoped the gas tank of the vehicle.

53. Sgt. Taylor subsequently reviewed the video of the stop. In reviewing video of the vehicle search, Sgt. Taylor learned Complainant had not scoped the gas tank of the vehicle.

54. Sgt. Taylor informed Cpt. Barkley about this incident on November 7, 2022.

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<sup>2</sup> The badge number was included in the stipulated fact. It has been excluded in this Initial Decision. The number is not necessary for this Initial Decision.

<sup>3</sup>Scoping is using a device to look inside the gas tank for hidden items.

#### November 2022 Meeting<sup>4</sup>

55. On November 7, 2022, Cpt. Barkley and Sgt. Taylor met with Complainant to discuss Complainant's recent performance issues and integrity concerns. (Stipulated).

56. Cpt. Barkley recorded the meeting. The meeting lasted approximately 2 hours and 40 minutes.

57. At the beginning of the meeting, Cpt. Barkley asked Complainant if he knew what the meeting was about. Complainant noted the ongoing issues with the performance of Complainant's administrative duties, the September 2022 Incident, and the October Badge Incident.

58. Near the beginning of the meeting, Cpt. Barkley informed Complainant it was an investigatory meeting.

59. During the meeting, Complainant discussed his personal issues and medical conditions that were impacting his performance and the help he was seeking to address those issues.

60. Complainant described his administrative performance as "chaotic at best," "disorganized," and "inconsistent." Complainant acknowledged he had several meetings with Sgt. Taylor regarding his administrative performance (estimated between 5 and 15 meetings). Per Complainant, topics discussed in the meetings included timekeeping and timely submitting reports. Complainant acknowledged that Sgt. Taylor made a list for him to help keep track of deadlines.

61. Complainant said, "So, I've been given the opportunities to succeed and just...things have just been tough, sir."

62. Complainant acknowledged his ongoing issues with performance of administrative duties violated Respondent's policies.

63. After being asked, Complainant acknowledged that at a minimum he should receive a Corrective Action for Complainant's ongoing issues with the performance of administrative duties. Cpt. Barkley agreed that a Corrective Action would be appropriate. Cpt. Barkley told Complainant he would be put on a Corrective Action as a result of Complainant's ongoing issues with performance of administrative duties.<sup>5</sup>

64. During the meeting, Complainant admitted losing his flat badge. After being asked, Complainant explained he waited to report the lost flat badge because he believed he could find it. After being asked, Complainant acknowledged that a Corrective Action would be appropriate for the October Badge Incident. Cpt. Barkley agreed and later indicated he would issue a Corrective Action as a result of the October Badge Incident.

65. Complainant described one of his actions during the September 2022 Incident as "beyond stupid" and admitted making multiple mistakes during the incident. Cpt. Barkley told Complainant there would be a Corrective Action as a result of the September 2022 Incident.

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<sup>4</sup> The parties provided an audio recording of the November 2022 Meeting without a transcription.

<sup>5</sup> Cpt. Barkley never issued any Corrective Actions.

66. Approximately 1.5 hours into the meeting and approximately 30 minutes after a short break, Cpt. Barkley began to discuss integrity issues with Complainant.

67. As to integrity issues, Cpt. Barkley began by discussing the June 2021 Incident. Complainant denied this was an integrity issue, and said he did not see the alert behavior and that he was not reading his dog.

68. Cpt. Barkley asked, "Do you agree that Sgt. Taylor and I have been very lenient with you?" Complainant responded, "Unquestionably sir, you guys have both been very caring, compassionate, very understanding...It has been a very difficult time for me...he's obviously bent over backwards to try to find ways to help..."

69. Cpt. Barkley then asked about the June 2022 Incident and asked about Complainant telling Sgt. Taylor that the supplemental narrative was done and then later telling Sgt. Taylor that Complainant needed more time to finish the supplemental narrative. Complainant explained that during the incident he was looking at Sgt. Taylor as the "villain" and "out to get" Complainant. Complainant then stated, "You know, kind of painted back into a corner realizing I hadn't done this. So rather than just saying no I haven't done it...and I had started but it wasn't done... just trying in my own way to not pile more nonsense, I guess, on my pile of nonsense...". Complainant asserted that he did not mean to lie.

70. Cpt. Barkley then asked about the November 2022 Incident. Cpt. Barkley read Sgt. Taylor's narrative about his discussion with Complainant about the search of the truck, and reached the part where Complainant told Sgt. Taylor he had scoped the gas tank of the truck. Complainant interrupted and volunteered that Complainant had not scoped the gas tank of the truck, and was not sure why he said that he had. "I remember looking at the gas tank...I'm not sure why I said that I had I scoped it. I did say that. I didn't scope it. So obviously this is a lie. I certainly was not trying to hide anything. Cold and tired, but that's not an excuse and I'm not sure sir."

71. Cpt. Barkley informed Complainant he would have to speak to Major Mason about the integrity issues. Complainant asked if he still had a job. Cpt. Barkley said that if he was the Major he would not fire Complainant.

72. At the end of the meeting, Sgt. Taylor stated internal resources for Complainant to seek help. Sgt. Taylor stated, "I, and I know the Captain will do the same thing, help you find whatever avenue you need to make yourself better...if you need help, you gotta get it."

73. After the November 2022 Meeting, Cpt. Barkley relayed concerns about the integrity issue to Major Mason. Major Mason asked Cpt. Barkley to provide a written recap.

74. On December 1, 2022, Cpt. Barkley sent a memo to Major Mason. The memo recommended discipline of Complainant. Based upon his review of the memo, due to the integrity issues, Major Mason determined there was a need to initiate the Board Rule 6-10 Process.

75. Major Mason did not review the audio of the November 2022 Meeting in advance of the Board Rule 6-10 Meeting.

#### Board Rule 6-10 Process

76. On December 8, 2022, Major Mason notified Complainant of a Board Rule 6-10 Meeting.

77. Major Mason provided Complainant documents to review in advance of the Board Rule 6-10 Meeting.

78. On December 19, 2022, Complainant and his attorney, Don Sisson, met with Major Mason and Major Darce Weil for a Board Rule 6-10 Meeting. (Stipulated).<sup>6</sup>

79. At the meeting, Complainant provided Major Mason a packet of documents for review.

80. During the meeting, Complainant told Major Mason he was very honest with Sgt. Taylor about what Complainant was dealing with. Complainant stated, "I am not asking for accommodations."

81. During the Board Rule 6-10 Meeting, Major Mason discussed with Complainant Complainant's ongoing issues with performance of administrative duties, the June 2021 Incident, the June 2022 Incident, the September 2022 Incident, the October Badge Incident, and the November 2022 Incident.

82. During the meeting, Major Mason said, "So, from what I'm hearing...it sounds like Sgt. Taylor's kind of gone out of his way to try to help you along." Complainant responded, "He has been very patient. He has asked what he can do to help me...I can't give him an answer...I don't know how to fix it...for a long time I didn't know what the problem was."

83. In discussion of the June 2022 Incident, Complainant explained, "It was done sir. It was that I didn't turn it in for two more days. So, I had had it completed. It wasn't that I was lying to him about the report, it was that I didn't follow instructions and I didn't turn it in when I was supposed to." Complainant attempted to explain his statements during the November 2022 Meeting by providing that there were still probably things that he could have worked on in the supplemental narrative, but emphasizing that the supplemental narrative was done.

84. In discussion of the November 2022 Incident, Complainant explained he was not "paying attention or listening," he was "zoning out from being attacked," and was in essence saying "yes" to each of Sgt. Taylor's questions. Complainant stated there was no benefit to him to lie about scoping the gas tank.

85. Major Mason asked Complainant if Complaint lied or was dishonest during the June 2021 Incident, the June 2022 Incident, or the November 2022 Incident. Complainant denied dishonesty and lying in the three incidents. Complainant went on to discuss poor communication and dealing with stress and emotions.

86. On December 26, 2022, Complainant provided Major Mason additional documents. The documents included information from a medical provider.

87. Following the Board Rule 6-10 Meeting, Major Mason reviewed documents provided by Sgt. Taylor and Cpt. Barkley, the audio of the November 2022 Meeting, all of the documentation provided by Complainant, Complainant's performance evaluations, and other documentation.

88. Major Mason "greatly" considered Complainant's medical information. Major Mason understood Complainant's medical conditions impacted his ability to perform, particularly as to Complainant's ongoing issues with performance of administrative duties, the September 2022

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<sup>6</sup> The parties provided an audio recording of the Board Rule 6-10 Meeting without a transcription.



Incident, and the October Badge Incident. Major Mason believed Respondent could work with Complainant to correct these issues. However, Major Mason did not believe Complainant's integrity issues could be corrected.

#### Disciplinary Action

89. On March 23, 2023, Major Mason issued a Disciplinary Action terminating Complainant's employment effective March 23, 2023. (Stipulated).

90. Major Mason addressed the Complainant's ongoing issues with performance of administrative duties, the September 2022 Incident, and the October Badge Incident in the Disciplinary Action. Major Mason did not terminate Complainant's employment as a result of these incidents.

91. As to the June 2021 Incident, Major Mason found:

Regarding the K9 search you conducted on 06/23/2021 where you initially stated your K9 did not alert and later stated that she did, you stated that you were not trying to hide anything or willfully have an integrity issue. However, you acknowledged that this brings into question your reliability, integrity, validity and that of your K9, the unit, and the agency.

92. As to the June 2022 Incident, Major Mason found, "You admitted you lied regarding the incident on 06/08/2022 where you claimed the report was done when it wasn't."

93. As to the November 2022 Incident, Major Mason found, "You admitted you lied regarding the conversation you had with Taylor on 11/05/2022, where you claimed you scoped the gas tank when you did not."

94. Major Mason also found that, "You later changed these admissions of lying to a statement that you communicated poorly."

95. In addition to other policy violations, Major Mason found Complainant violated Respondent's Code of Ethics, Core Values, and General Orders.

96. Major Mason terminated Complainant's employment as a result of the three integrity issues.

97. Major Mason concluded in the Disciplinary Action, "As a result of your continued issues with truthfulness, I have decided to take disciplinary action to terminate your employment with the Colorado State Patrol effective March 23, 2023."

98. The Disciplinary Action letter addressed each of the factors set forth in Board Rule 6-11. Major Mason considered each of the factors set forth in Board Rule 6-11 in reaching his disciplinary decision.

99. In the Disciplinary Action letter, Major Mason explained:

Ultimately, after carefully weighing these factors, I arrived at my decision to terminate your employment because of the overall seriousness of your continued lack of integrity. You made statements that were not true on three separate

occasions. In the law enforcement profession, your credibility and integrity mean everything. Without them, you are unable to serve the citizens of the state because your truthfulness and credibility are so tarnished that it would not be possible to use you as a witness in any prosecution because a jury would have issues with your credibility. No condition or excuse justifies making false statements. Your performance evaluations have reflected successful performance on other work matters, but those evaluations are outweighed by the serious nature of your compromised integrity. Your actions have brought discredit upon you and the Colorado State Patrol. Accordingly, I determined that your employment with the Colorado State Patrol should be terminated.

100. On March 23, 2023, Respondent notified District Attorneys in Respondent's Southern Region that Major Mason had issued a letter that could impact Complainant's credibility. This is required reporting ("Brady Reporting"). An officer's sustained acts of untruthfulness must be reported as exculpatory evidence by the District Attorney to the defense in criminal cases.

101. As a result of Complainant's integrity issues, Complainant became a Brady Officer and could not effectively fulfill a major duty of his position: providing testimony in court.

102. Complainant timely appealed the termination decision to the Board and asserted disability discrimination. (Stipulated).

## **ANALYSIS**

### **A. BURDEN OF PROOF.**

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

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

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

Colo. Const. Art. XII, § 13(8).

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

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

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

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

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

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

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

## **B. CREDIBILITY**

Complainant’s testimony, particularly about the integrity issues leading to his termination from employment, is not credible. Regarding the June 2022 Incident, Complainant made statements as follows:

- June 2022 Incident - Complainant told Sgt. Taylor the supplemental narrative was done.
- November 2022 Meeting - “You know, kind of painted back into a corner realizing I hadn’t done this. So rather than just saying no I haven’t done it...and I had started but it wasn’t done... just trying in my own way to not pile more nonsense, I guess, on my pile of nonsense...”
- Board Rule 6-10 Meeting - “It was done sir. It was that I didn’t turn it in for two more days.”
- Complainant testified at hearing the supplemental narrative was done.

The statements in the November 2022 Meeting directly contradict Complainant’s later statements that the supplemental narrative was done. Complainant made a false statement either in the

November 2022 Meeting or during the June 2022 Incident, the Board Rule 6-10 Meeting, and at the evidentiary hearing. No amount of explanation or interpretation makes “I had started but it wasn’t done...” and “It was done sir” both true. Complainant was also dishonest about scoping the gas tank during the November 2022 Incident. Therefore, Complainant’s testimony is not credible.

**C. COMPLAINANT COMMITTED THE ACTS FOR WHICH RESPONDENT DISCIPLINED COMPLAINANT.**

Respondent terminated Complainant’s employment as a result of Complainant’s integrity issues, specifically a failure to be truthful on three separate occasions.<sup>7</sup>

During the June 2021 Incident, Complainant incorrectly stated Lexi had not alerted, when Lexi had alerted. Complainant then stated something untrue during the June 2021 Incident. Complainant failed to properly read a signal from his dog and reported the dog’s behavior incorrectly while in the midst of a vehicle search. While Complainant stated something untrue, Complainant did not intentionally lie during the June 2021 Incident. Although Complainant did not intentionally lie and this does not appear to be an actual integrity issue, there still may be a perceived integrity issue as a result of Complainant’s actions. Further, as found by Major Mason, Complainant’s actions during the June 2021 Incident call into question reliability and the validity of Complainant’s K9 unit. Therefore, Complainant committed the misconduct for which he was disciplined pertaining to the June 2021 Incident.

Complainant exhibited dishonesty during the June 2022 Incident and the November 2022 Incident. Complainant was intentionally dishonest during the June 2022 Incident and the November 2022 Incident. In both incidents, Complainant reported something was done that was not done. Complainant committed the misconduct for which he was disciplined pertaining to the June 2022 Incident and the November 2022 Incident.

Complainant’s conduct in the June 2022 Incident and the November 2022 Incident was willful misconduct. Complainant made false statements in both incidents. Complainant also violated Respondent’s Code of Ethics, Core Values, and General Orders. Complainant’s dishonesty caused him to violate provisions of these policies requiring Complainant to be truthful and honest. Dishonesty also compromised Complainant’s integrity and potentially could diminish public trust in Complainant and CSP, thus violating these policies.

**D. RESPONDENT’S DECISION TO TERMINATE COMPLAINANT FROM EMPLOYMENT WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.**

After determining a person has committed the act for which they were disciplined, the second question to be determined is whether the decision to terminate Complainant’s employment was arbitrary, capricious, or contrary to rule or law. In determining whether an agency’s decision is arbitrary or capricious, the ALJ must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by

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<sup>7</sup> While Complainant’s ongoing issues with the performance of administrative duties, the September 2022 Incident, and the October Badge Incident were included in the Disciplinary Action letter, the preponderance of the evidence demonstrates Respondent would not have terminated Complainant solely as a result of those incidents. Respondent proved by a preponderance of the evidence Complainant committed each of those acts.

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).

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

As to the first *Lawley* prong, Respondent established that Major Mason used reasonable diligence and care to procure evidence. After learning of Complainant's performance and integrity issues, Major Mason set a Board Rule 6-10 Meeting as required. Major Mason conducted the Board Rule 6-10 Meeting. Following the meeting, Major Mason reviewed the information provided by Complainant, performance reviews, the audio of the November 2022 Meeting, information provided by Sgt. Taylor and Cpt. Barkley, and other documents. The preponderance of the evidence establishes that Major Mason used reasonable diligence and care to procure evidence.

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

As to the second *Lawley* prong, Respondent established Major Mason gave candid and honest consideration to the evidence. "This prong is satisfied if the appointing authority considered, in good faith, the relevant evidence..." including the factors set forth in Board Rule.<sup>8</sup> *Stiles* 477 P.3d at 719. Board Rule 6-11(A)(1-6) lists the following factors to be considered by the appointing authority:

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

The Disciplinary Action demonstrates Major Mason considered each of the factors set forth in Board Rule 6-11. It is evident from Major Mason's testimony, as well as the analysis and discussion in the Disciplinary Action, that Major Mason considered the evidence before him and the factors set forth in Board Rule 6-11 in good faith.

It was not Complainant's ongoing issues with performance of administrative duties, the September 2022 Incident, or the October Badge Incident that resulted in the termination of Complainant's employment. Major Mason concluded, "Ultimately, after carefully weighing these factors, I arrived at my decision to terminate your employment because of the overall seriousness of your continued lack of integrity." It was Complainant's dishonesty that resulted in Major Mason's decision to terminate Complainant's employment. Major Mason appropriately gave significant weight to the seriousness of dishonesty. The evidence in the record demonstrates

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<sup>8</sup> *Stiles* references Board Rule 6-9, which was amended. Language similar to the old Board Rule 6-9 is now included in Board Rule 6-11.

Complainant, a Trooper in the STIS, demonstrated integrity issues by twice lying to Sgt. Taylor. In good faith, Major determined that Complainant's lies were serious offenses. Dishonesty can cause a variety of issues for a trooper in the performance of their duties. Importantly, because of Brady Reporting, it compromises a trooper's ability to present credible testimony in criminal proceedings and is serious misconduct.

It is not in dispute that Complainant had a distinguished military career, served successfully for several years with the CSP, and had medical conditions that may have impacted performance during the period of time he exhibited performance issues. Major Mason was aware of, and gave consideration to, these factors. These factors do not mitigate the problems caused by a finding of dishonesty for a person in Complainant's position. As determined by Major Mason, "No condition or excuse justifies making false statements."

Complainant argued that there was a delay in addressing the integrity issues, and asserted the delay undermines the seriousness of the integrity issues. It is concerning that two of the integrity issues were not promptly brought to the attention of the appointing authority. Respondent failed to take prompt action to address the June 2021 Incident and the June 2022 Incident. However, that failure to act promptly does not diminish the seriousness of the integrity issues. Moreover, Respondent acted promptly as to the November 2022 Incident. It was appropriate for Major Mason to initiate the Board Rule 6-10 Process and take action following the November 2022 Incident and the integrity issues discussed during the November 2022 Meeting.

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

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

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

Complainant lied to Sgt. Taylor twice. Termination of a person who must be able to testify credibly in order to perform their job duties is a reasonable disciplinary action after fair and honest consideration of the evidence.

The standard set forth under the third prong of *Lawley* is that a different conclusion *must* be reached after fair and honest consideration of the evidence. The delays in addressing June 2021 Incident and the June 2022 Incident do not indicate that a different conclusion must be reached. First, as discussed above, the November 2022 Incident was promptly addressed. Second, Major Mason fairly and honestly considered the evidence and decided termination was an appropriate action. Review of the evidence does not demonstrate that reasonable persons, fairly and honestly considering the evidence, *must* reach a contrary conclusion.

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

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

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

Respondent had cause to discipline Complainant under Colo. Const. Art. XII, § 13(8) and Board Rule 6-12. Dishonesty and lying is willful misconduct. Willful misconduct is enumerated cause for discipline. Colo. Const. Art. XII, § 13(8). False statements are also enumerated cause for discipline. Board Rule 6-12(B)(6). Complainant intentionally made false statements twice. Therefore, Major Mason had cause to discipline Complainant.

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

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

Major Mason did not violate Board Rule 6-2 when he disciplined Complainant. Although Board Rule 6-2 encourages corrective action before discipline, it does not require it. Complainant's integrity issues were just cause for discipline under Board Rule 6-12 and significantly serious to warrant discipline without prior corrective action, because of the consequence of a finding of dishonesty on Complainant's ability to perform his job duties. As discussed above, the delay in addressing the first two integrity issues does not undermine the seriousness of an act of dishonesty by a person in Complainant's position.

As discussed below, the evidence in the record does not demonstrate Respondent violated CADA in its termination of Complainant's employment. Ultimately, Respondent had a legitimate reason for disciplining Complainant, and the evidence in the record does not demonstrate that this legitimate business reason was pretext for discrimination.

The preponderance of the evidence establishes that Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law.

## **E. DISCRIMINATION**

Complainant has the burden to prove by a preponderance of the evidence that Respondent discriminated against Complainant on the basis of disability. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400-01 (Colo. 1997). Complainant claims Respondent discriminated against him in violation of CADA. Disability is a class protected by CADA. § 24-34-402(1)(a), C.R.S.

The Colorado Civil Rights Commission ("CCRC") has promulgated rules to implement CADA. The rules state CADA, as related to disability, "...is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act, as amended, and the Fair Housing Act concerning disability." 3 CCR 708-1-60.1(A). Interpretations of CADA, "...shall follow the interpretations and guidance established in State and Federal law, regulations, and guidelines; and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." 3 CCR 708-1-10.14(C).

To establish a *prima facie* case of discrimination in employment on the basis of one of the protected classes, Complainant must demonstrate:

First, an employee must show that he belongs to a protected class. Second, the employee must prove that he was qualified for the job at issue. Third, the employee must show that he suffered an adverse employment decision despite his qualifications. Finally, the employee must establish that all the evidence in the record supports or permits an inference of unlawful discrimination.

*Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 297 (Colo. 2000).

Complainant established the first and third elements of a *prima facie* case of discrimination. As to the first element, Complainant is disabled within the meaning of the law based upon his medical conditions. As to the third element, Complainant experienced the adverse employment action of termination of employment. Therefore, Complainant established the first and third elements of a *prima facie* case of discrimination.

As to the second element of a *prima facie* case, Complainant did not establish that he could perform the essential functions of his position, with or without reasonable accommodations. A person with a disability, "...is 'otherwise qualified' if, with reasonable accommodations, he can perform the reasonable, legitimate, and necessary functions of his job." *AT&T Techs., Inc. v. Royston*, 772 P.2d 1182, 1185 (Colo. App. 1989). While Complainant's performance evaluations and other evidence presented at the hearing demonstrate Complainant was at times able to satisfactorily perform his job duties, Complainant did not demonstrate at the time of his separation he was able to perform the essential functions of his position. It seems at the time of his separation from employment Complainant had ongoing issues with his ability to perform the administrative duties of his position, and attributed the integrity issues to communication issues caused by his medical conditions. If Complainant's medical condition caused him to have communication issues that resulted Complainant making untrue statements, he could not perform the essential functions of his position. There is simply not enough evidence in the record to establish Complainant could perform the essential functions of his job, with or without reasonable accommodations, at the time of his separation. Therefore, Complainant failed to establish the second element of a *prima facie* case of discrimination.

To establish the fourth and final element of a *prima facie* case, Complainant must proffer evidence that supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297. Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. See *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). The Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi*, 995 P.2d at 296. "[E]mployees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis." *Id.* Complainant may rely on, "existing conditions from which a fair inference of such discrimination could legitimately be drawn." *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Complainant did not present direct or indirect evidence of disability discrimination. There was no evidence presented that indicated anyone made derogatory statements related to Complainant's disabilities. To the contrary, the evidence supports Sgt. Taylor and Cpt. Barkley went to great lengths to work with Complainant after learning of his medical conditions.

As to indirect evidence of discrimination, Complainant asserted Sgt. Taylor began treating him adversely after Complainant disclosed his medical conditions. First, Complainant did not prove by a preponderance of the evidence that Sgt. Taylor singled Complainant out for review or feedback as a result of Complainant's disclosed medical conditions.



Second, the preponderance of the evidence demonstrates Complainant's performance was in decline in that time-period after the disclosure of Complainant's medical conditions. The preponderance of the evidence establishes that Sgt. Taylor was working diligently with Complainant to correct those performance issues. There is no evidence Sgt. Taylor treated Complainant adversely because of the disclosed medical conditions. Instead, the evidence indicates Sgt. Taylor was working with Complainant to correct Complainant's performance.

Third, Complainant's statements during the November 2022 Meeting and the Board Rule 6-10 Meeting contradict the assertion that Sgt. Taylor and Cpt. Barkley treated him discriminatorily or adversely as a result of Complainant's medical conditions. Complainant stated Sgt. Taylor bent over backwards to try and help him. Complainant described Sgt. Taylor and Cpt. Barkley as compassionate and understanding. The preponderance of the evidence does not demonstrate Sgt. Taylor or Cpt. Barkley created a hostile work environment as a result of Complainant's disabilities. Therefore, Complainant failed to establish the fourth element of a *prima facie* case of discrimination.

Even if Complainant had established a *prima facie* case of disability discrimination, Respondent articulated legitimate, nondiscriminatory reasons for terminating Complainant's employment. Complainant did not demonstrate that those reasons were pretextual. "When the plaintiff has proved a *prima facie* case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Texas Dept. of Comty. Affairs v. Burdine*, 450 US 248, 260 (1981). Once an employer meets its burden of proffering a legitimate, non-discriminatory reason for an adverse employment decision, Complainant must "demonstrate by competent evidence" that this articulated reason is "a pretext for discrimination." *Big O Tires*, 940 P.2d at 400-01. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.' (citation omitted)." *Morgan v. Hilti, Inc.*, 108 F. 3d 1319, 1323 (10<sup>th</sup> Cir. 1997).

Respondent presented a legitimate, non-discriminatory reason for terminating Complainant's employment - dishonesty. Complainant did not demonstrate Respondent's legitimate non-discriminatory reason for termination was pretext for discrimination. Therefore, the preponderance of the evidence establishes that Respondent's reason for terminating Complainant's employment did not constitute pretext for discrimination.

Complainant also asserts Respondent failed to accommodate his disabilities and take action to help Complainant. "To establish a *prima facie* failure-to-accommodate claim, Plaintiff had to show: (1) he was disabled; (2) he was otherwise qualified; (3) he requested a plausibly reasonable accommodation; and (4) Defendant refused to accommodate his disability." *Dansie v. Union Pacific Railroad Co.*, 42 F. 4th 1184, 1192-93 (10<sup>th</sup> Cir. 2022).

As discussed above, Complainant failed to establish he was otherwise qualified for his position. Further, the preponderance of the evidence establishes that Complainant never requested an accommodation and Respondent did not refuse to provide an accommodation. In fact, it appears Sgt. Taylor and Cpt. Barkley attempted to work with Complainant to correct his performance issues. Therefore, Complainant cannot establish the third element of a *prima facie* failure-to-accommodate claim.

Finally, even if Respondent should have accommodated Complainant and gone through an interactive process, Complainant would still have the burden to show that reasonable

accommodation was possible. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999). Here, there is no evidence in the record that reasonable accommodation was possible. No evidence was presented of any accommodation that could have been made for Complainant, let alone an accommodation for lying. The Administrative Law Judge is unaware of any legal authority that mandates an accommodation for dishonesty. Therefore, Complainant has failed to establish a *prima facie* case of a failure to accommodate.

### **CONCLUSIONS OF LAW**

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

### **ORDER**

Respondent's decision to disciplinary terminate Complainant's employment is **AFFIRMED**. Complainant's appeal is dismissed from the State Personnel Board with prejudice.

Dated this 14th day, of  
November, 2023, at  
Denver, Colorado.

/s/

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

### **CERTIFICATE OF SERVICE**

This is to certify that on the 14th day of **November, 2023**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Elkus & Sisson, P.C.  
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## **APPENDIX**

### **EXHIBITS**

#### **COMPLAINANT'S EXHIBITS ADMITTED:**

The following exhibits were stipulated and admitted into evidence:

I, J, and L.

#### **RESPONDENT'S EXHIBITS ADMITTED:**

The following exhibits were stipulated to and admitted into evidence:

1 - 5, 6.1, 6.2, 7 - 8, 9.1, 9.2, 10 - 11, 12.3, and 13 - 27.

### **WITNESSES**

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

Cpt. William Barkley

Major Mark Mason

Andrew Rath

Sgt. Thomas Taylor

## NOTICE OF APPEAL RIGHTS

### **EACH PARTY HAS THE FOLLOWING RIGHTS:**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. *Vendetti v. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.
4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

### **RECORD ON APPEAL**

The cost to prepare the electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. Board Rule 8-53(C). That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at [dpa\\_state.personnelboard@state.co.us](mailto:dpa_state.personnelboard@state.co.us).

### **BRIEFS ON APPEAL**

When the Certificate of Record of Hearing Proceedings is served to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-54.

### **ORAL ARGUMENT ON APPEAL TO THE BOARD**

In general, no oral argument is permitted. Board Rule 8-55(C).

### **MOTION FOR RECONSIDERATION**

Motions for reconsideration are discouraged. See Board Rule 8-47(K).