

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DENISE MARTINEZ,
Complainant,

vs.

DEPARTMENT OF PERSONNEL AND ADMINISTRATION, EXECUTIVE OFFICE,
Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on October 16, 2003, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Complainant Denise Martinez ("Complainant" or "Martinez") appeared and represented herself. Assistant Attorney General Colleen O'Laughlin represented Respondent Department of Personnel and Administration ("Respondent" or "DPA").

MATTER APPEALED

Complainant appeals her administrative termination by Respondent and seeks reinstatement, back pay, and attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant was on trial service status at the time of her termination;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant commenced employment at DPA in April 2000. Within a few months of her hire date, she became an Accounting Technician II.
2. In May 2002, the payroll officer for DPA left the agency. Complainant volunteered to take on those duties, which were at an Accounting Technician III level.
3. Complainant's supervisor, DPA Controller Todd Olsen, approved of Complainant's request

to perform the payroll officer duties.

4. Complainant was trained in the payroll officer position from May 22 through 31, 2002.
5. From June 2002 forward, Complainant handled the duties of the payroll officer position for DPA.
6. In the summer of 2002, Complainant requested that Olsen submit a request for reallocation of her position to that of Accounting Technician III. In September or October 2002, Olsen did so.
7. On November 5, 2002, the agency director granted Olsen's reallocation request and Complainant's position was upgraded to Accounting Technician III.
8. On November 5, 2002, Complainant's six-month trial service period in the Accounting Technician III position commenced.
9. Complainant found the payroll duties to be very challenging. In October 2002 DPA hired another employee to assist her. In December, that employee was removed from the job of assisting Complainant. Complainant worked long days and enrolled in school to learn more about payroll. Of her many courses, she was able to complete only the course in payroll accounting, due to her family and work demands.
10. The stress of Complainant's work and personal situation caused her to become depressed in the fall of 2002. She often reported to work late and stayed late to complete her work.
11. At hearing, Complainant testified that her son has a serious health condition, Attention Deficit Disorder, for which she had to take sick leave in order to attend parent teacher conferences. She presented no evidence of how much leave she took leave for this purpose; or that she informed her supervisors of her son's condition at any time during her employment.
12. Complainant testified that she had a serious medical condition that made it "hard" for her to work one or two days during her menstrual cycle. However, she provided no evidence of how much leave and on what dates she took leave for this purpose; or that she informed her supervisors that she had this condition at any time during her employment.
13. On April 17, 2003, Olsen called Complainant into his office to address his concerns about her excessive absence from the office and use of sick leave. She informed him she could bring in a doctor's note justifying her recent absences and stated that she had a serious medical condition. She did not identify the nature of her serious health condition.
14. On April 29, 2003, Respondent gave Complainant her performance evaluation for the period April 1, 2002 through March 31, 2003. She received a "Needs Improvement" rating, based

on several areas of her job duties in which she was not performing satisfactorily.

15. On May 1, 2003, as a result of the Needs Improvement evaluation and Complainant's unsatisfactory job performance, Respondent hand delivered to Complainant a letter revoking her trial service status in the Accounting Technician III position, reverting her back to the Accounting Technician II position, and informing her that because no vacant or occupied positions in her previously certified classes existed, pursuant to Board Rule R-4-11, she was being administratively separated.
16. Complainant did not provide any information on her serious medical condition to her supervisor prior to her termination.
17. Complainant timely appealed her administrative separation.

DISCUSSION

In this *de novo* proceeding, Complainant bears the burden of proving that Respondent's decision to administratively separate her from state employment was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

Trial Service.

Board Rule R-4-11 states as follows:

"Trial Service applies when a certified employee promotes or reappoints. The trial service period must not exceed six working months, except as provided in the 'Time off' chapter or when there is a selection appeal pending.

A. An employee who fails to perform satisfactorily during trial service shall revert to an existing vacancy in the previously certified class in the current department with no right to a hearing or, if there is no existing vacancy in the previously certified class, may be administratively separated. The appointing authority has discretion to administer corrective or disciplinary action instead of reversion or administrative separation."

Complainant argues that her trial service began in June 2002, when she assumed the duties of Accounting Technician III. She contends that since trial service began in June, it ended in December 2002, and therefore her termination occurred after the expiration of trial service. Complainant's argument is essentially one of fairness: because she took on the more challenging duties of payroll officer in June 2002, she should be given credit for time served in that position in determining when her trial service period began.

Director's Procedure P-2-2 states in part, "No allocation or appointment may be made to a proposed class until it is approved as final on a date determined by the director." Under this rule,

Complainant's position was not allocated to Accounting Technician III until November 5, 2003, the date on which the director approved Olsen's reallocation request. Therefore, her trial service did not commence until November 5, 2002, and ended on May 5, 2003, after her termination.

While Complainant's argument in favor of "credit for time served" appears to promote fairness, a delay in the commencement of the trial service period also affords employees some extra time to become competent in the new, more challenging position.

Family Medical Leave Act.

Having concluded that Complainant was terminated within the trial service period, the next question is whether Respondent's action was nevertheless arbitrary, capricious, or contrary to rule or law. Complainant argues that Respondent violated the Family Medical Leave Act in terminating her.

The Family Medical Leave Act permits eligible employees of covered employers to take up to 12 weeks of unpaid leave in a 12-month period. Leave is available to employees who are unable to perform the functions of their position due to a serious health condition, or to care for a child with a serious health condition. 29 USC Section 2612(a)(1)(C) and (D).

Colorado Director of Personnel Director's Procedure P-12-26 defines "serious health condition" as follows:

"an illness, injury, impairment, physical or mental condition that requires inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. Continuing treatment is a period of incapacity of more than three calendar days, pregnancy, a chronic serious health condition, or permanent long-term condition for which there is no treatment but the patient is under supervision, or multiple treatments without which a period of incapacity would result."

Complainant argues that her son's ADHD constitutes a serious health condition under the FMLA. However, she presented no evidence of actually having taken leave for that purpose, that she informed her employer of his condition, or that she ever requested leave for the purpose of attending to his condition. Complainant also argued that she has a serious health condition that makes it hard for her to work one or two days per month during her menstrual cycle. However, again, Complainant never made her employer aware of this condition during her employment, and she presented no evidence that she actually took sick leave for this purpose (with the exception of surgery in June 2002).

Complainant fails to state a claim under the FMLA.

Agency Discretion Under Rule R-4-11.

Arbitrary or capricious exercise of discretion can arise in three ways, namely: (a) by neglecting

or refusing 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; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising 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 (Colo. 2001).

The application of Rule R-4-11 in this case is troubling. Complainant demonstrated just the type of initiative agencies seek of their classified employees by offering to take on the payroll officer duties in May of 2002. After it became clear that she was not working out in that position, instead of being provided the opportunity to improve her performance, she was administratively terminated. This appears a remarkably harsh result; yet it was squarely within the agency's discretion under R-4-11 to do so.

Notwithstanding the above, Complainant did not meet her burden of proving that DPA acted in an arbitrary and capricious manner. She did not contest the substance of the Needs Improvement evaluation at hearing. The agency gave Complainant a full year to master the duties of the payroll officer position. DPA ultimately determined, in its discretion, that it was not in the agency's best interest to give her the chance to improve through corrective or disciplinary action.

CONCLUSIONS OF LAW

1. Complainant was a trial service employee at the time of her termination.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. Attorney's fees and costs are not warranted.

ORDER

Respondent's action is **affirmed**.

Dated this ____ day
of **November 2003**, at

Mary S. McClatchey

Denver, Colorado

Administrative Law Judge
1120 Lincoln St., Suite 1400
Denver, CO 80203

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 mailed to the parties. Section 24-4-105(15), C.R.S. 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 mailed to the parties. 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. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made 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.

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 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ___ day of **November 2003**, I served true copies of the foregoing

INITIAL DECISION AND NOTICE OF APPEAL RIGHTS by placing same in the United States mail, postage prepaid, addressed as follows:

Denise Martinez
2920 Eliot Circle, Apt #4
Westminster, Colorado 80030

And interagency mail to:

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