

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 98 B 140

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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SUSAN J. JOHN,

Complainant,

v.

DEPARTMENT OF HIGHER EDUCATION,  
STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION,  
FRONT RANGE COMMUNITY COLLEGE,

Respondent.

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THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on June 4, 1998 at 1525 Sherman Street, B-65, Denver, Colorado. Respondent was represented by Assistant Attorney General Robin Rossenfeld. Complainant appeared *pro se*.

**MATTER APPEALED**

Complainant appeals an administrative termination. For the reasons set forth below, Respondent's actions are reversed.

**PRELIMINARY MATTERS**

**1. Prehearing Motions**

Respondent, by written motion, requested that Dr. Thomas Gonzales, President of Front Range Community College, appear and offer his testimony by telephone. Complainant did not object and such motion was granted.

**2. Exhibits**

a. Judicial Notice was taken of State Personnel Board Rules, in particular Rule P7-7-1 (F), (G) (1) and (G) (2) and Rule P7-2-5 (D) (3). Judicial Notice was also taken of the required contents of an Employer Notification form as per Rule P7-7-1 (F).

b. Respondent's Exhibits 1 through 16 were accepted into evidence without objection.

c. Complainant's Exhibits A through F and H were accepted into evidence without objection.

d. Complainant's Exhibit G was rejected as an incomplete copy. However the complete document was accepted, without objection, as Respondent's Exhibit 5.

e. Complainant's Exhibit I, a written narrative of facts and Complainant's arguments, was not accepted into evidence because it was simply another version of Complainant's testimony and therefore duplicitous.

f. Complainant's Exhibit J, a sample Employer Notice of Rights and Responsibilities under the Family Medical Leave Act (FMLA), was not accepted into evidence because it was not the form available to Respondent and therefore was irrelevant.

### **3. Witnesses**

a. Respondent called the following witnesses: Dr. Thomas Gonzales, President of Front Range Community College and the appointing authority in this matter; Ms. Shirley L. Krug, Manager of the Front Range Community College Bookstore; Ms. Carol Taylor (formerly Carol Martin), Human Resources Specialist I at Front Range Community College; Mr. Searl Brier, Director of Human Resources, Front Range Community College.

b. Complainant testified on her own behalf.

### **ISSUES**

1. Whether Respondent accurately applied Complainant's Family Medical Leave Act (FMLA) leave.
2. Whether Respondent gave written notice to Complainant of her rights and responsibilities under FMLA.
3. Whether Respondent's actions were arbitrary or capricious;
4. Whether Respondent's actions were contrary to rule or law, including State Personnel Board Rule P7-7-1 (F), (G) (1) and (G) (2)

## FACTS

1. Complainant worked for nearly thirteen (13) years, half (½) time, four (4) hours per day at the Front Range Community College Bookstore performing clerical and administrative duties.
2. Complainant's husband died in an accident on September 3, 1997.
3. Complainant was granted five (5) days funeral leave, September 3 through 9, 1997. (Complainant's Exhibit C.)
4. Complainant's supervisor, Ms. Shirley Krug, was aware that Complainant had a significant amount of both accrued sick leave and accrued annual leave. Ms. Krug told Complainant "take all the time you need" but Ms. Krug did not believe that Complainant would use all her accrued leave.
5. Complainant requested use of her accrued sick leave and was granted sick leave for September 9 through December 1, 1997. (Complainant's Exhibit C.)
6. Complainant was diagnosed and treated, by her medical doctor and a psychiatrist, for Post Traumatic Stress Syndrome (PTSS) and depression due to her husband's accidental death.
7. After her husband's death Complainant lived with one or the other of her sons but did not return to the home she had shared with her husband. She received her mail at a Post Office Box.
8. Complainant advised her supervisor of the telephone numbers of her sons.
9. In October 1997 Complainant began receiving telephone calls about "straightening out" Complainant's leave. Complainant spoke with Ms. Carol Martin by telephone. Ms. Martin requested completion of a medical release form.
10. Ms. Martin sent the blank medical form to Complainant and Complainant forwarded it to her doctor.
11. In late October or early November Respondent received the completed Treatment Verification and Diagnosis form (dated October 27, 1998), determined that the "start date" was illegible and, by letter to Complainant dated November 3, 1997, requested correction by Complainant's physician. Enclosed in the letter was a copy of the completed Treatment Verification and Diagnosis form, a blank Medical Certification Form, Definitions for Medical Certification, a completed Position Identification form, Categories for ADA Essential Functions and a completed Primary Job Duties and Responsibilities form. (Respondent's Exhibit 11.)

12. In November 1997, aware that her sick leave was about to run out but that she had accrued annual leave available and that she was not yet ready to return to work, Complainant went to the State Personnel Office, requested a leave form and was given a State of Colorado Leave/Absence Request and Authorization form.

13. Complainant filled out the top part of the State of Colorado Leave/Absence Request and Authorization form, i.e. "Name", "Soc. Sec. No.", "Department" and "Division", signed her name on the "Employee Signature" line, left the date blank and turned in the form to Ms. Carol Martin. (Complainant's Exhibit D/Respondent's Exhibit 16.)

14. The date on the State of Colorado Leave/Absence Request and Authorization form, signed by Complainant, was later filled in by Ms. Martin. Complainant's supervisor, Ms. Krug, approved the leave as of the date filled in by Ms. Martin, "1/21/98" (January 21, 1998). (Complainant's Exhibit D/Respondent's Exhibit 16.)

15. Complainant was unaware that the form she submitted could be considered as an application for FMLA leave.

16. In November 1997, after submitting the blank medical forms to her doctor for his completion and a new leave request form (paragraphs 12. through 14. above), Complainant went to stay with her son in Phoenix, Arizona. As was her practice, she called her work site and left a telephone number where she could be reached.

17. Complainant stayed with her son in Phoenix into December 1997.

18. In late November 1997 Respondent sent a letter to Complainant stating they had not received "the information we have requested in order to determine your status for sick leave use and your rights under Family Medical Leave." The letter also indicated that Complainant's annual leave had been exhausted as of November 11, 1997; therefore, she was placed on leave without pay. Enclosed with the letter were copies of State Personnel Board Rules pertaining to "absence without approved leave" and copies of two (2) letters previously sent to Complainant. (Respondent's Exhibit 9.)

19. On December 15, 1997 Respondent sent another letter to Complainant stating that they had not yet received the corrected "medical release form". Enclosed with the letter was a "short term disability packet/claim form" and "a brochure regarding PERA disability". (Respondent's Exhibit 7.)

20. Complainant continued to be treated for depression throughout the time she was on leave from work, including and up to the date of hearing in this matter.

21. In December 1997, after Complainant returned from Phoenix, Complainant was scheduled to meet with Ms. Carol Martin at Front Range Community College to discuss her leave options. However, although she mentally prepared for the meeting, dressed and warmed-up the car,

Complainant found that for emotional reasons she could not go to a meeting on the Front Range campus. She canceled the meeting. (Respondent's Exhibit 6.)

22. Complainant stated that for emotional reasons she could not even drive past the campus.

23. Complainant submitted the corrected Treatment Verification and Diagnosis form. The dates were legible but the new version contained an addition, i.e. there was a question mark in response to "May resume work/school on \_\_\_\_\_". (Respondent's Exhibit 6.)

24. Complainant's Medical Certification Form (dated December 8, 1997) indicated that the "Probable duration of the condition" was January 15, 1998. (Complainant's Exhibit A/Respondent's Exhibit 6.)

25. In January 1998 Complainant received a letter from Respondent indicating that Respondent had recently received the documentation necessary to "adjust your leave accordingly" and stating that her sick leave ran through part of the day, December 8, 1997; her annual leave began December 8, 1997 and would continue through February 13, 1998; and that her rights to FMLA leave ended December 10, 1997. Attached to the letter were a claim form for Short Term Disability and a blank Medical Certification form referenced in the letter. (Respondent's Exhibit 5.)

26. Designation of Complainant's leave time as family/medical leave was made on or about January 21, 1998.

27. FMLA leave was applied retroactively to the first date of her leave, excluding funeral leave.

28. At the time of designation and up to the date of hearing, a form which was a notice of rights and responsibilities under FMLA, pursuant to State Personnel Board Rule P7-7-1 (F), was available to Respondent..

29. Respondent never sent, nor did Complainant receive, any notice of her rights and responsibilities under FMLA as required by Board Rule P7-7-1 (F).

30. Complainant responded by letter dated February 10, 1998 questioning the leave calculations, FMLA procedures and stating that she had not received FMLA notification. (Respondent's Exhibit 4.)

31. Respondent responded to Complainant by letter dated February 20, 1998 requesting an additional Medical Certification Form. Enclosed in the letter was a copy of a brochure entitled "You and Family/Medical Leave". (Respondent's Exhibit 3.)

32. In early April 1998 Complainant received a letter from Respondent stating that she had exhausted all paid leave; there was no remaining accrued leave; FMLA leave ended December 10, 1997; short-term disability ended March 9, 1998 and, as per State Personnel Board Rule P7-2-5 (D)

(3) and P7-7-4 (B), Complainant's employment would be terminated effective March 31, 1998. Attached to the letter were copies of the State Personnel Board Rules referenced in the letter. (Complainant's Exhibit H / Respondent's Exhibit 2.)

33. After the termination of her employment, Complainant submitted an additional Medical Certification Form, as per Respondent's February 20, 1998 request. (Complainant's Exhibit F.)

34. Complainant was prompt in returning telephone calls to Respondent but slow in producing requested documentation. Complainant's slowness in producing requested documentation is a symptom of her depression.

35. Mr. Brier relied on the documentation provided to him by Complainant, through Ms. Carol Martin, to make his calculations for sick leave and annual leave. He relied on those same documents and on his understanding of FMLA procedures in applying FMLA leave time to Complainant's situation.

36. Dr. Gonzales relied on Mr. Brier's calculations in deciding to terminate Complainant, i.e. he did not calculate the leave time himself and he did not apply FMLA leave to Complainant's situation. Even the termination letter (Respondent's Exhibit 2.) was drafted by Mr. Brier for Dr. Gonzales' signature.

37. Complainant continues to be treated for depression. Her most recent doctor's visit, prior to hearing, was April 21, 1998. The duration of Complainant's continuing emotional disability was "unknown" at that time. (Complainant's Exhibit F.)

38. Family/medical leave may be applied concurrently with other leave. If it is *not* applied concurrently with paid leave, it is unpaid leave, e.g. family/medical leave alone is unpaid leave.

## **DISCUSSION**

### **1. Administrative action of Respondent.**

This is an appeal of an administrative action. Therefore, the Complainant bears the burden of proof, by a preponderance of the evidence, that Respondent acted arbitrarily, capriciously or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo.1991); *Department of Institutions v. Kinchen*, 886 v. P.2d 700 (Colo.1994). The State Personnel Board may reverse the Respondent only where its actions are found to be arbitrary, capricious or contrary to rule or law, Section 24-50-103 (6), C.R.S.

### **2. Employer Notification form.**

State Personnel Board Rule P7-7-1 (F) requires the employer to provide to an employee, who has applied for leave that may qualify as Family/Medical Leave<sup>1</sup>, a written notice of the employee's rights and responsibilities under FMLA. If the employer does not use a State of Colorado Employer Notification form, then the contents of such other notice "shall be the exact equivalent of the State of Colorado Employer Notification form."

Mr. Brier, under questioning by Complainant, stated that Front Range Community College (FRCC) has an Employer Notification form which they regularly use to provide notice to employees who may qualify for FMLA. Further, Mr. Brier admitted that the Employer Notification form FRCC regularly uses was not sent or given to Complainant. Instead, Mr. Brier argues Complainant's second leave slip submitted in November 1997, when considered together with the brochure entitled "You and Family/Medical Leave" enclosed with a February 1998 letter sent to Complainant, are notice as required by Rule P7-7-1 (F). However, a review of the two documents does not reveal information that is "the exact equivalent of the State of Colorado Employer Notification form" (Rule P7-7-1 (F).) Even if the documents, *when considered together*, did contain the exact equivalent of the information contained in the State of Colorado Employer Notification form, the documents were presented two (2) months apart, and as such cannot be considered to be notice to Complainant.

Given the number of letters sent to Complainant from Respondent (eight) and therefore the same number of opportunities to include an FMLA Employer Notification form *and* given that such a form existed and was regularly used by Respondent, Respondent's failure to give the required notice of rights and responsibilities under FMLA can be nothing less than arbitrary and capricious. Also, because State Personnel Board Rule P7-7-1 (F) requires such notice, Respondent's failure to give the required notice of rights and responsibilities under FMLA is contrary to rule.

### **3. Retroactive application of family/medical leave.**

State Personnel Board Rule P7-7-1 (G) (1) states in pertinent part: "When the appointing authority is aware of the reason for family/medical leave ... and fails to designate the leave in a timely manner, the appointing authority shall not designate any leave used prior to the notice of designation as family/medical leave. The employee receives all of the protections of family/medical leave but the absence preceding the designation may not be counted against the family/medical leave entitlement." Rule P7-7-1 (G) (2) indicates that family/medical leave cannot be designated

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<sup>1</sup> State Personnel Board rule P7-7-1 (G) indicates that it is the responsibility of the employer to determine whether applied for leave may be designated family/medical leave, i.e. the employer, not the employee, designates leave as family/medical leave.

retroactively unless the appointing authority was not aware of the reason for the leave or the leave was conditionally designated as family/medical leave pending required confirmation or certification.

In this case, Respondent failed to designate FMLA leave in a timely manner. Up to Respondent's January 21, 1998 letter to Complainant (Respondent's Exhibit 5.), all written or verbal communication from Respondent indicated that they were still trying to figure out how to apply Complainant's accrued leave. The only mention of FMLA, prior to the January 21st letter, was in Respondent's November 3rd and November 21st letters to Complainant (Respondent's Exhibits 9 and 11.) in which Respondent indicates that they had not yet determined Complainant's rights under FMLA. Additionally, Respondent, through Ms. Martin, dated Complainant's second leave request as approved on January 21, 1998. (Complainant's Exhibit D/Respondent's Exhibit 16.) The weight of the evidence indicates that designation of Complainant's leave as family/medical leave occurred on January 21, 1998.

The January 21, 1998 letter (Respondent's Exhibit 5.) is, at best, a vague notification of FMLA designation. Perhaps of more significance, however, is that the letter states "we have gone back and adjusted your leave accordingly". Contrary to Rule P7-7-1 (G) (2) Respondent *retroactively* applied Complainant's FMLA leave to begin September 9, 1998 and run through December 10, 1997. Neither of the two exceptions allowing retroactive application of family/medical leave apply in this case: Mr. Brier was aware, from the beginning, of the reason for Complainant's leave and Mr. Brier's testimony that the leave had been "conditionally designated as family/medical leave pending required confirmation or certification" (Rule P7-7-1 (G) (2)) was unsubstantiated by documentary evidence<sup>2</sup> or other testimony. Therefore, the retroactive application of FMLA by Respondent is contrary to State Personnel Board Rule P7-7-1 (G) (2).

Respondent argues that even if Complainant's family/medical leave is calculated from January 21, 1998, such leave would have ended in April, 1998 and therefore, Complainant is not entitled to reinstatement unless the decision to terminate was arbitrary or capricious. Such argument would be well taken if Respondent had complied with State Personnel Rule P7-7-1 (F) and given Complainant notice of her rights and responsibilities under FMLA. However, notice to Complainant of her rights under FMLA is a prerequisite to the application of family/medical leave. Therefore, Complainant's family/medical leave, designated on January 21, 1998, cannot be applied until Complainant receives notice of her rights and responsibilities under FMLA.

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<sup>2</sup> State Personnel Board Rule P7-7-1 (G) states in pertinent part: "The appointing authority may provide a verbal designation but must confirm it in writing within one week." If the conditional designation was made prior January 21, 1998, there should have been written confirmation of such conditional designation. None was presented at hearing.

#### **4. Termination.**

State Personnel Board Rule P7-2-5 (D) (3) states: “If the employee is unable to return to work after all accrued leave is used or after six months of continuous absence from work, whichever occurs first, and family/medical leave and or short-term disability leave is inapplicable, the appointing authority may: a) grant any remaining accrued leave; b) grant leave without pay if all paid leave is exhausted; c) or terminate the employee.”

Complainant argues that Respondent’s actions in terminating her employment were arbitrary and capricious. Respondent argues that termination is an available and reasonable option as per Rule P7-2-5 (D) (3).

However, in order to allow Respondent opportunity to notify Complainant of her rights and responsibilities under FMLA as required by State Personnel Board Rule P7-7-1 (F), Complainant must be reinstated. Only after such notice is given can family/medical leave be applied. In this case it cannot be applied retroactively. Therefore, the question of termination under Rule P7-2-5 (D) (3) is a moot issue.

If Respondent, in the future, again decides to terminate Complainant’s employment for the same reasons; then the Board may grant an evidentiary hearing on that issue. However, neither the Board nor this administrative law judge may speculate as to what might happen after reinstatement. There are a number of alternate resolutions possible. Therefore, the issue of whether this administrative termination was arbitrary, capricious or contrary to rule or law is moot. The issue of whether administrative termination in this case *would be* arbitrary, capricious or contrary to rule or law, in the uncertain future, is not ripe for consideration.

### **CONCLUSIONS OF LAW**

1. The combination of Complainant’s State of Colorado Leave/Absence Request and Authorization form and a copy of the brochure entitled “You and Family/Medical Leave” does not qualify as Notice of Rights and Responsibilities under FMLA because, considered separately or together, they do not contain “the exact equivalent of the State of Colorado Employer Notification form” as required by State personnel Board Rule P7-7-1 (F).
2. Respondent’s actions were arbitrary, capricious and contrary to rule in their failure to properly notify Complainant of her rights and responsibilities under FMLA.
3. Respondent’s actions in applying FMLA leave retroactively were contrary to State Personnel Board Rule P7-7-1 (G) (1).

### **ORDER**

1. The administrative termination by **Respondent is reversed.**
2. Respondent is directed to reinstate Complainant to her former position, on leave without pay, if she is unable to work for any reason.
3. Respondent is directed to give Complainant the Employer Notification of rights and responsibilities under the Family/Medical Leave Act (FMLA) as required by State Personnel Board Rule P7-7-1 (F).
4. Respondent is directed to apply the full amount of Complainant's family/medical leave *forward* from the date Complainant receives the Employer Notification form or its equivalent.

Dated this 26th  
day of June 1998  
at Denver, CO

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Michael Gallegos  
Administrative Law Judge

### **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), 10A C.R.S. (1993 Cum. Supp.). 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), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board 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).

### **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 should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

### **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 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

### **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 R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ must 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, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. 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.

### **CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of June, 1998, I placed true copies of the foregoing **INITIAL**

**DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Ms. Susan J. John  
P.O. Box 280782  
Lakewood, CO 80228-0782

and to the respondent's representative in the interagency mail, addressed as follows:

Ms. Robin Rossenfeld  
Assistant Attorney General  
1525 Sherman St., 5th Floor  
Denver, CO 80203

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