

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94B179

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROXANNA HARRIS,

Complainant,

vs.

STATE BOARD OF AGRICULTURE,
FORT LEWIS COLLEGE,

Respondent.

Hearing commenced on September 11, 1996 and concluded on January 9, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Robert Dolphin and was represented by William Thro, Assistant Attorney General. Complainant appeared and was represented by Vonda Hall, Attorney at Law.

Complainant testified on her own behalf and called as her sole other witness Julie Crawford, Administrative Assistant II at Fort Lewis College, who testified by telephone.

Respondent's witnesses were: Robert Dolphin, Jr., Vice-President for Business and Financial Affairs, Fort Lewis College; Vicki Caskey, Director of Human Services, Fort Lewis College; and Betty Perry, Vice-President of Student Affairs, Fort Lewis College.

Complainant's Exhibits B, C, D, F and G were stipulated into evidence. Exhibit I was admitted

without objection. Exhibit H was not admitted. Exhibits J and K were marked for identification only and will be carried with the record per the agreement of the parties but will not be considered as evidence.

Respondent's Exhibits 1, 4, 5, 6 and 7 were stipulated into evidence. Exhibit 2 was admitted without objection. Exhibit 3 was admitted over objection. Pages 2, 4 and 5 of Exhibit 8 were offered but not admitted.

MATTER APPEALED

Complainant alleges that she was forced to resign her position as Administrative Assistant III and appeals respondent's decision to not accept a withdrawal of her resignation.

ISSUES

1. Whether complainant was forced to resign;
2. Whether respondent's action in not allowing complainant to withdraw her resignation was arbitrary, capricious or contrary to rule or law.

PROCEDURAL HISTORY

Complainant's appeal was received by the State Personnel Board on June 28, 1994. Summary judgment was entered in favor of respondent on September 12, 1994. Complainant appealed the order of summary judgment to the Board, which affirmed the order, and to the Court of Appeals, which remanded the case for hearing. *See Roxanna Harris v. State Board of Agriculture, Fort Lewis College and State Personnel Board*, Court of Appeals Case No. 95CA0579 (June 6, 1996) (NSOP).

PRELIMINARY MATTERS

Upon Complainant's motion, a witness sequestration order was entered excluding witnesses from the hearing room unless testifying. Excepted from this order were the complainant and Robert Dolphin, respondent's advisory witness.

The burden of proof was placed on complainant because this case involves an administrative decision as opposed to a disciplinary action. Complainant objected to carrying the burden of going forward and the burden of persuasion on grounds that the case is one of constructive discharge and the respondent should consequently bear the burden. The parties agreed that whether there was just cause for a termination was not an issue.

Respondent objected to hearing the issue of whether respondent's refusal to allow complainant to withdraw her resignation was arbitrary, capricious or contrary to rule or law on grounds that the Court of Appeals declined to address that issue. The administrative law judge took the view that, since the Court of Appeals reversed the entire summary judgment order, the original issues remained and complainant was entitled to a hearing on all issues.

Complainant withdrew the issue of whether she was treated differently from similarly situated employees, raised for the first time in her amended prehearing statement.

FINDINGS OF FACT

1. Complainant, Roxanna Harris, was employed by respondent, Fort Lewis College (FLC), for thirteen years. For the most recent five years of her employment she served as Administrative Assistant III in the security office of the college. She performed clerical duties and had contact with local law enforcement agencies as a dispatcher.
2. On May 26, 1994, Harris was at the scene of a drug bust. On May 31 she was arrested for possession of a controlled substance.
3. On the day of her arrest, Harris telephoned FLC Human Resources Director Vicki Caskey.

Without informing her of the particulars, Harris, who was upset, told Caskey that she was in trouble and asked if she should resign. Answering in the negative, Caskey stated that she would try to find out what was happening and advised Harris to talk to her supervisor.

4. Caskey found out about the arrest the next day, June 1, 1994, by speaking with Harris's supervisor. She then talked to Robert Dolphin, the appointing authority for all positions at FLC, who asked her to draft for his signature a letter notifying Harris of a Rule R8-3-3 meeting set for 1:00 p.m. on the following day. By that letter, Harris was also placed on administrative suspension with pay. (Exhibits 1 and B.)

5. In the interests of time and expediency, Caskey hand-delivered the letter on the date it was written to Harris at home. Reminding Harris of her earlier question of whether she should resign, Caskey said words to the effect of, "Maybe you should think about it."

6. The R8-3-3 meeting was held on June 2, 1994 at 1:00 p.m. In attendance were Harris, Dolphin, Caskey and Betty Perry, who was asked by Dolphin to attend the meeting because she was in charge of the security department.

7. At the outset of the meeting, Dolphin explained to Harris that her arrest had come to his attention and that the purpose of the meeting was for her to tell her side of the story and to present mitigating circumstances regarding her ability to continue to perform the duties assigned to her as an employee of the college. Upset and crying at times, Harris read from a prepared statement in which she admitted to being at the scene of a drug bust, being arrested and to having drug residue in her purse. Reading from her written statement, she went on to say that she knew she could not continue working in the security department and wanted to transfer to another position on campus. She offered to resign if a reassignment were not possible.

8. Harris, herself, brought up the subject of resignation. Dolphin was surprised at this because he thought it was premature. No one said to Harris that her only choice was to resign or be terminated.

9. There were no equivalent positions which could be filled by Harris.

10. Dolphin asked Harris to step out of the room while he and the others discussed the matter. He did not advise her of the right to a hearing because they never got to that point. The first order of business became to decide whether to accept the offer of resignation if no other positions were available, and there were not. Together, Dolphin and Perry decided that the resignation should be accepted. Dolphin testified that, but for the offer of resignation, he would have taken the matter under advisement and later would have issued a written decision, the standard practice at FLC.

11. When Harris returned to the meeting, Dolphin advised her that her resignation would be accepted, and she resigned. She asked that the process be facilitated so she could receive her final paycheck and her PERA contributions refund as soon as possible because she needed the money. Dolphin asked her if she wanted assistance in preparing the resignation letter, to which she replied, "Yes." Dolphin asked Caskey to prepare the letter. Perry then left the meeting.

12. Caskey went to her office and typed the resignation letter for Harris's signature. (Exhibits 4 and C.) She made the resignation effective immediately because Harris had asked that the PERA contributions refund request be expedited. Harris did not suggest or ask for a different effective date.

13. Harris read and signed the resignation letter without comment. She and Caskey arranged a time for her to recover personal items from the security office because she wanted to do this when no one else was there.

14. Dolphin accepted the resignation in writing. (Exhibits 5 and D.) Harris's resignation thus became effective on June 2, 1994.

15. On June 4, Harris met Caskey at the security office and collected her personal belongings. Harris asked that the PERA refund request form be completed as soon as it was received by the human resources office and stated that she would have someone pick it up because she needed the money right away.

16. The PERA refund request form was received in the human resources office on June 7. A representative of Harris returned the form and picked up her final paycheck on June 8, 1994.

17. On the day following receipt of her final paycheck, June 9, Harris talked to Julie Crawford, an administrative assistant at FLC, telling Crawford that she had a certain amount of time to rescind her resignation and asking Crawford to type and deliver a letter withdrawing her resignation. Crawford testified that she typed and delivered the letter to Dolphin's office the same day. (Exhibits 6 and F.) The evidence is unclear as to how this was accomplished, i.e., when and where Harris signed the letter typed by Crawford.

18. The withdrawal letter was received and date-stamped in the human resources office on June 13, 1994, the day Dolphin saw it for the first time. The normal procedure for mail coming to Dolphin's office is for the mail to be date-stamped and placed in his basket, and, since no such action was taken, Dolphin has no knowledge that the letter was actually delivered directly to him.

19. In the resignation withdrawal letter, Harris advanced two reasons for withdrawing her resignation: she was forced to resign; she had not been convicted of anything and under the law was considered innocent until proven otherwise.

20. Dolphin conferred with Vicky Caskey regarding the personnel rules governing resignations. He did not accept the withdrawal of the resignation because Harris was not forced to resign. In his view, the resignation was voluntary; there was no coercion. He had no reaction to the second reason for the tendered withdrawal because he had not assumed Harris's guilt and had not told her that he thought she was guilty of anything.

21. By letter dated June 14, 1994, the appointing authority advised complainant that her resignation was final. (Exhibits 7 and F.)

DISCUSSION

In this appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the

burden of proving by preponderant evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo. 1991); *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse respondent's action only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S.

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). As the fact finder, the judge is entitled to accept parts of a witness's testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). He can believe all, part, or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995). This judge is guided by the factors set out in Colorado Jury Instruction 3:16, which include: the witnesses' means of knowledge, strength of memory and opportunities for observation, the reasonableness or unreasonableness of their testimony, their motives, whether their testimony has been contradicted, any bias, prejudice or interest, and their manner or demeanor upon the witness stand.

It is complainant's position that she was constructively discharged because she believed her job was at an end before she submitted her resignation. Asserting that her resignation was premised on the termination of her employment, complainant argues that this is a case of termination without due process. She contends further that the rules of the State Personnel Board permit a withdrawal of a resignation under the circumstances presented here and that it was arbitrary and capricious for respondent to decline to accept the tendered withdrawal. Complainant requests reinstatement, back pay and benefits.

In overturning the order of summary judgment, the Court of Appeals ruled that an issue of fact was created by complainant's affidavit, in which she alleged that her resignation was requested by the employer and that she was told to resign or be terminated. *Harris v. State Board of Agriculture*, *supra*. The credible evidence presented at hearing, however, sustains a conclusion that complainant's resignation was offered, not requested, and that she was not confronted by the sole

choice between resignation and termination. Although she may have personally believed this to be her only option at the time, her belief was not the doing of the appointing authority. Moreover, in preparing a written statement, which she read at the R8-3-3 meeting, she obviously gave thought to the possibility of resignation. Her resignation was not the result of a spontaneous, emotional outburst. Even though she was understandably upset at the meeting, being upset alone does not excuse an individual from responsibility for her own actions. It is specifically found that complainant voluntarily introduced the subject of her resignation and was not prodded into resignation by the appointing authority by being given the coercive choice of immediate resignation or termination. The meeting scenario was not such that a reasonable person would conclude that she had been terminated.

Complainant was not threatened. She knew what she was doing and later changed her mind. It appears from the testimonies of the meeting participants that the effective date was not actually discussed, but rather, from the context of the conversation all four presumed that the resignation would be made effective immediately, if it were done at all.

In view of the above-noted credibility guidelines, Robert Dolphin, Vicki Caskey and Betty Perry are found highly credible. Their respective testimonies were internally and externally consistent, reasonable and logical and are consequently accorded substantial weight. Complainant's contrary testimony was incomplete, self-serving and against the weight of the evidence.

Turning to respondent's decision declining to accept complainant's resignation withdrawal, Rule R9-1-1, 4 Code Colo. Reg. 801-1, provides in pertinent part:

Resignation Procedure. In order to resign an employee shall submit a written resignation to the appointing authority. The following procedures shall govern the process:

- (A) An employee may resign by submitting a written resignation to the appointing authority at least 10 working days prior to the date the resignation is to be effective.
- (B) Less written notice may be accepted if the employee and appointing authority

mutually agree.

In the present case, the employee provided less than ten working days notice of her resignation, yet, pursuant to R9-1-1(B), the resignation was nonetheless proper since the employee and the appointing authority agreed, at least by implication, to less written notice.

Next, Rule R9-1-2, 4 Code Colo. Reg. 801-1, provides:

Withdrawal of Resignation. An employee shall have the right to withdraw his/her resignation at any time prior to 7 full working days before the set resignation date. After that time, a resignation may be withdrawn only if the employee and the appointing authority mutually agree.

Rule R9-1-2 contemplates that the employee has not left the job. The requirement of seven full working days *before* the set resignation date infers that the employee gave at least the ten working days notice referenced in R9-1-1(A), which would have established a *set* resignation date. For example, if the employee gave ten working days notice, she would then have three working days from the date she submitted her resignation to withdraw the resignation without the mutual agreement of the appointing authority. The apparent purpose of this rule is to enable the appointing authority to get on with the business of running the agency, i.e., personnel management, without being unnecessarily held back by an indecisive employee. The rights and obligations of both parties are thereby enforced.

It can now be seen that R9-1-2 does not have application to a resignation made immediately effective since it is impossible to give notice of a withdrawal seven working days prior to the set effective date. Therefore, under the current system, an immediate resignation cannot be withdrawn except by the mutual agreement of the parties. Here, the appointing authority, in the exercise of his discretion, did not consent to complainant's resignation withdrawal, rendering the resignation final. Whether an appointing authority even has the discretion to accept the withdrawal of a resignation where the employee has already received her final paycheck is not addressed by the rules. As with litigation, at some point there must be a means to ensure the finality of the action. Other procedures

vis-a-vis reemployment may have to be brought into effect at that juncture. Neither party has suggested or inferred that anything was considered in this case beyond the issue of the validity and acceptance of complainant's attempt to withdraw her resignation.

Both parties attach some significance to whether complainant's resignation withdrawal letter was submitted on June 9 or June 13. Complainant urges that, in either event, the withdrawal was timely because it was submitted within seven working days of the resignation effective date. This is an incorrect reading of R9-1-2 in that it substitutes the word "after" for the word "before," providing, of course, an entirely different meaning than was intended by the rule. Consequently, whether the letter was submitted on the 9th or the 13th is irrelevant.

Rule R9-1-3, 4 Code Colo. Reg. 801-1, is applicable because complainant was under suspension at the time she tendered her resignation. R9-1-3 provides:

Resignation in Lieu of Disciplinary Action. An employee who resigns in lieu of disciplinary action or while under suspension or while awaiting disciplinary action shall forfeit his/her right to a hearing on the disciplinary action or suspension unless s/he withdraws his/her resignation as prescribed in R9-1-2.

Complainant proffers as evidence of coercion the fact that she was not advised that her resignation would result in a forfeiture of her right to a hearing on the disciplinary action, if any, or on her suspension with pay, which was the only action taken by the appointing authority up to that point. No such requirement is written into the rule. It would be improper to now do so and apply the newly added requirement *ex post facto*. The appointing authority testified that he did not advise complainant of a hearing right because they never reached the stage where an advisement was necessary and would not have reached that stage except by a written document at some point in time subsequent to the meeting. A reasonable and competent person should understand that a resignation means that the job is over with, and an appeal of any potential but speculative disciplinary action is not going to take place. The State Personnel Board may wish to consider adding a notice requirement to R9-1-3. The Board may also wish to consider the enactment of a rule pertaining to

resignations that have an immediate effect. Nevertheless, that is not what the administrative law judge is faced with today.

CONCLUSIONS OF LAW

1. Complainant was not forced to resign.
2. Respondent's action in not allowing complainant to withdraw her resignation was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
February, 1997, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of February, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall
Attorney at Law

1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

William E. Thro
Assistant Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, CO 80203
