

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B156

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LOUISE RESENDEZ,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF COLORADO AT BOULDER,
DEPARTMENT OF FACILITIES MANAGEMENT,

Respondent.

The hearing in this matter was held on January 29, 1996, in Denver before Margot W. Jones, Administrative Law Judge (ALJ). Complainant, Louise Resendez, was present at the hearing and represented by Ruth Irvin, attorney at law. Respondent appeared at hearing through Louise Romero, Associate University Counsel.

Complainant testified in her own behalf and called no other witnesses. Complainant did not offer exhibits into evidence at hearing.

Respondent did not call witnesses to testify at hearing and did not offer exhibits into evidence.

On her own motion, the ALJ admitted respondent's exhibits 5 and 6 into evidence.

PRELIMINARY MATTERS

1. Complainant has the burden of proof and the burden of going forward in this matter. *Renteria v. Colorado Department of Personnel*, 811 P.2d 797 (Colo. 1991).

2. Complainant's request to sequester the witnesses from the hearing room was granted.

3. On January 24, 1996, respondent moved to amend the prehearing statement to add a witness to testify at hearing. The motion was considered as a preliminary matter at hearing.

Respondent maintained that it should be permitted to call Dollie Madrid as a witness at hearing despite the late endorsement.

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Respondent contended that complainant would not be prejudiced as a result of the late endorsement of the witness.

Complainant objected to the witness being called to testify since the witness was not timely endorsed. Complainant maintained that she would be prejudiced by the witness' testimony, since complainant's counsel was not informed of the nature of the testimony to be offered and was not prepared to cross examine the witness.

Since complainant has the burden of proof, the ALJ ruled that an order related to respondent's motion would be held in abeyance until complainant presented her case in chief.

4. At the conclusion of complainant's case, respondent moved for summary judgment. Respondent contended that, viewing the evidence in the light most favorable to complainant, there was no disputed issues of fact between the parties and judgment should be entered for respondent as a matter of law. Respondent contended that complainant failed to sustain her burden to establish that respondent's decision to terminate her employment under Director's Procedure, P7-2-5, was arbitrary, capricious, or contrary to rule or law.

MATTER APPEALED

Complainant appeals the termination of her employment under Director's Procedure, P7-2-5.

ISSUE

Whether complainant established that the decision to terminate her employment under Director's Procedure, P7-2-5, was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant, Louise Resendez (Resendez), was employed by the University of Colorado at Boulder (University) as a custodian. She was first employed by the University in 1982. On May 2, 1995, Resendez was given notice that under Director's Procedure, P7-2-5, her employment was terminated.

2. From 1990 to 1995, Resendez suffered at least four on the job injuries. These were injuries to Resendez' right and left thumb and left knee. Resendez filed worker's compensation claims for these injuries and the University admitted liability. Resendez suffered another injury, to her right knee, which she alleged occurred on the job on June 26, 1992. She filed a worker's compensation claim in connection with this injury. This claim was contested, and the case is now pending for a determination of

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compensability.

3. Following the June 26, 1992, injury Resendez was required by her physician to remain off work until September, 1992. During this period Resendez was required to take sick and annual leave.

4. In addition to Resendez' on the job injuries which caused her to miss work and utilize sick and annual leave, she had a brother who was terminally ill. Resendez provided care for her brother. In June, 1994, Resendez exhausted all accrued leave and needed additional time off from work to care for her brother. From July 1, 1994 to late September, 1994, Resendez was permitted to take family medical leave without pay to care for her brother. Ultimately, Resendez received payment for this leave time when she was permitted to borrow leave from the University's "leave bank" to cover this period.

5. During Resendez' employment, she was repeatedly counselled, reprimanded and disciplined for absenteeism. Because of Resendez' attendance record, she was directed in January, 1995, to provide her supervisor with a doctor's statement following each absence from work due to illness.

6. As a result of Resendez' repeated absences, in February, 1995, she had a negative leave balance of 19.21 hours. By April, 1995, Resendez' negative leave balance increased to 29.89 hours.

7. On March 21, 1995, Resendez applied for short term disability. The physician's statement which accompanied her request for short term disability indicated that Resendez was diagnosed with "Sinusitis/OM/Bronchitis". The physician's diagnosis further indicated a secondary diagnosis, related to Resendez' disability, of migraine headaches. The physician recommended that Resendez stop work. (Exhibit 6.)

8. On April 13, 1995, Resendez applied for use of "leave bank" benefits. Her application reflected that she was requesting this leave to care for herself and a family member. She did not specify the family member for whom she provided care. She described the nature of her illness to be "[s]evere migraine headaches, sinusitis, possible symptoms of pneumonia. See Dr.'s statement previously submitted."

9. On April 21, 1995, Resendez suffered another on the job injury, this time the injury occurred to her left knee. John Madsen, Resendez' supervisor, directed her to see a doctor for the knee injury on April 24, 1995, and to bring a doctor's statement upon her return to work.

10. Resendez met with Madsen on April 25, 1995, to review her attendance and discuss her ability to return to work. The doctor

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Resendez saw on April 24, 1995, placed restrictions on her ability to return to work and recommended surgery to correct the injury to her knee.

11. Following the April 25, 1995, meeting, since Resendez exhausted all leave and was not able to return to work due to her injuries, Paul Talbolt, the director of facilities management and the appointing authority, decided to terminate Resendez' employment under Director's Procedure, P7-2-5.

DISCUSSION

Complainant had the burden of proof and the burden of going forward in this matter. Renteria v. Department of Personnel, supra. Complainant's burden was to establish that the decision to terminate her employment under Director's Procedure, P7-2-5 was arbitrary, capricious or contrary to rule or law.

Director's Procedure, P7-2-5(C) (4) (a) and (b) provides, the following:

- (C) When an employee has exhausted all accrued sick leave and is still unable to return to work, the appointing authority:
- (4) If the employee is unable to return to work after all accrued leave is used and family/medical leave is inapplicable, the appointing authority may:
 - (a) grant the employee leave without pay in accordance with P7-4-7; or
 - (b) request resignation of or terminate the employee. . . .

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent moved for summary judgment at the conclusion of complainant's case. Respondent contended that complainant failed to sustain her burden of proof to establish arbitrary and capricious action. Respondent argued that there were no disputed issues of fact between the parties and judgment should be entered for respondent as a matter of law.

While complainant's testimony was halting and sometimes difficult

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to understand, at the conclusion of complainant's case, counsel argued in opposition to the motion for summary judgment clearly and coherently. On the basis of that argument, it appears to be complainant's position that she would have leave available but for the 1992 use of accrued sick and annual leave. Complainant argues that in 1992 she was improperly required to use this leave following an alleged on the job injury. Complainant filed a worker's compensation claim in 1992. She contends that, had the University admitted liability in 1992, in April, 1995, she would have accrued sick and annual leave available. Complainant further contends that liability for the 1992 injury continues to be litigated before an ALJ for the Industrial Claims Commission and she should not be terminated under P7-2-5 while the worker's compensation case is pending.

Complainant testified at hearing that during her employment the University worked with her to allow her to use leave to address her injuries and care for her brother. She took accrued sick and annual leave and was permitted to use FMLA leave, leave without pay and leave borrowed from the "leave bank". Complainant further testified that during her brother's illness, she was encouraged by her supervisor to keep him apprised of her concerns with regard to leave usage so that the agency could support her. Based on complainant's testimony, it can be concluded that the University's decision to terminate complainant did not appear to be a decision made in haste or without the exertion of significant effort to work with complainant.

The question whether complainant should have been terminated prior to the determination of compensability of her worker's compensation claim has been before the Board in prior cases. Clark v. University of Colorado, 812-O-23 and 823-B-10. The Board's decision in the Clark case has been relied upon by hearing officers in cases entitled, Dillard v. Colorado State Patrol, 878-B-93 and Richard Sulentic v. Fort Logan Mental Health Center, 867-B-20.

In Clark, the Board ruled that an appointing authority may terminate an employee upon the exhaustion of all sick and annual leave even though a worker's compensation case is pending which could result in the determination of compensability.

Although the above cited cases do not provide binding precedent, they offer guidance as to the Board's interpretation of the language of its own rule. These cases were decided under Board Rules, R6-2-5 and R7-2-4, which preceded the current Director's procedure, P7-2-5. The wording of these rules has remained substantially the same.

Based on the evidence presented at hearing, and the interpretation of the Director's Procedure, there is no disputed issues of fact

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and judgment should be entered for respondent as a matter of law.
Complainant failed to present any evidence that the University's decision to terminate her employment was arbitrary, capricious or contrary to rule or law.

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CONCLUSIONS OF LAW

1. Respondent's motion for summary judgment is granted.
2. Complainant failed to establish that respondent's decision to terminate complainant's employment was arbitrary, capricious or contrary to rule or law.

ORDER

The action of the respondent is affirmed. The appeal is dismissed with prejudice.

DATED this _____ day of
March, 1996, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on this _____ day of March, 1996, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Ruth K. Irvin
IRVIN AND IRVIN
5353 Manhattan Circle, Suite 101
Boulder, CO 80303

and in the interagency mail, addressed as follows:

L. Louise Romero
Office of the University Counsel
University of Colorado at Boulder
203 Regent Administration Center
Campus Box 13
Boulder, CO 80309-0013

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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 estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. 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

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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 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.