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INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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MARVIN MILLER,

Complainant,

vs.

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

Respondent.

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The hearing in this matter was held on April 30, 1996, in Denver before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at hearing through Robin Rossenfeld, assistant attorney general. Complainant, Marvin Miller, was present at the hearing and represented by Howard Haenel, attorney at law.

Respondent called the complainant to testify at hearing and called the following employees of the Community College of Denver (CCD) to testify at hearing: Ken Price; Dr. Byron McClenney; Dr. Gregory Smith and Raymond Chambers. Complainant called Catherine Garcia, business representative for the Colorado Federation of Public Employees, to testify at hearing.

The parties admitted by stipulation respondent's exhibits 1 through 10, 12 and 13. Complainant's exhibit F was admitted into evidence without objection.

**MATTER APPEALED**

Complainant appeals the administrative termination of his employment under Board Rule, R9-1-4.

**ISSUES**

1. Whether complainant abandoned his position with CCD as a network analysis intern.
2. Whether respondent acted arbitrarily, capriciously or contrary to rule or law by deeming complainant to have resigned his position with CCD under Board Rule, R9-1-4.

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3. Whether the notice of the Board Rule, R8-3-3, meeting adequately advised complainant of the allegations being considered at that meeting.

4. Whether respondent is entitled to an award of attorney fees.

#### **FINDINGS OF FACT**

1. Complainant, Marvin Miller (Miller), was employed at CCD for approximately nine years. At the time relevant to this appeal, he was classified as a network analysis intern. In this capacity, he was responsible for the development and implementation of a multi user network working with staff and student hourly workers.

2. Dr. Gregory Smith, the vice president of resources and planning, was Miller's immediate supervisor until November 13, 1995, when Kenneth Price was appointed as Miller's immediate supervisor. Dr. Byron McClenney (McClenney) is the president of CCD and the appointing authority for Miller's position.

3. On August 7, 1995, Miller received a corrective action from McClenney. The corrective action directed Miller to improve his job performance in the following areas: communication; interpersonal relations; and teamwork. Specifically, Miller was directed to acknowledge receipt of written requests to perform work, to refrain from making negative personal comments about co-workers and to participate on projects at work as a part of a team.

4. On September 15, 1995, Miller received a second corrective action. This corrective action was imposed for "gross insubordination" for failure to comply with the directives of the August 7, 1995, corrective action.

5. The imposition of corrective actions put Miller into a tail spin in terms of his job performance and attitude. Miller believed that the incidents which gave rise to the corrective actions should have been discussed with him before imposition of the corrective actions. Miller further believed that the corrective actions were an attempt to railroad him out of CCD. Following imposition of the corrective actions, Miller was placed under closer supervision. The closer supervision caused problems for Miller since he was accustomed to working with greater autonomy.

6. On November 13, 1995, Kenneth Price (Price), the network analysis manager, met with subordinates to introduce himself as the new manager and to get to know his staff better. Miller was present at this meeting. Price assured Miller that he had a "clean slate" with him as far as the prior corrective actions were concerned.

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7. Price did not have contact again with Miller until November 20, 1995, when Price met with Miller to discuss CCD related business with him. That same day, Price sent Miller an E-mail message directing him to perform an assignment. Contrary to the directives of the August and September, 1995, corrective actions, Miller failed to acknowledge receipt of the assignment.

8. On November 20, 1995, when Price received no response to his E-mail message, he paged Miller. Miller responded to the page by advising Price that he intended to take sick leave on November 29, 1995. Over the week that followed the November 20 E-mail message, Price attempted to speak with Miller at his work site on several occasions. Miller was not able to speak to Price because Miller was busy or preparing to leave.

9. Price was concerned about Miller's unwillingness to work with him. Price consulted Dr. Greg Smith, Price's second level supervisor. Price decided to set up a meeting in his office with Miller on November 27, 1995. Price advised Miller of the meeting by leaving a voice mail message and by sending him an E-mail message. Miller never responded to these messages acknowledging receipt of the messages or indicating his intent to attend the meeting with Price.

10. On November 27, 1995, Miller failed to appear for the scheduled meeting with Price. On November 28, 1995, Price observed Miller working with a student hourly worker. Price asked the student hourly worker to give Miller the message to report to his office when their work was completed. When a half hour had passed and Miller did not report to Price's office, Price returned to Miller's work location and found him still working with the student hourly worker.

11. A short time later, Price observed Miller in the hallway of the office and he asked Miller to come to his office. Miller refused. Price made the request again. Miller yelled across the hall to Price, "No, I will not come to your office."

12. On November 28, 1995, Price reported the incident with Miller to Dr. Smith. Smith encountered Miller in the hallway. Smith told Miller that he would like to meet with him in Smith's office. Smith and Miller were standing approximately ten or fifteen feet apart at the time Smith made this request. Miller responded in a loud voice, "No, I will not go to your office. Let's have it out right here."

13. In response to Miller's remarks, Smith directed Miller to meet him in his office or leave the campus. Smith waited 15 to 30 minutes for Miller to report to his office, but Miller did not appear. Smith went to Miller's work site to see if he was still there. Miller was not in the work place.

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14. On November 28, 1995, Steve Hunter, the Vice President of Administrative Services and Smith's supervisor, prepared a memorandum to Miller advising him that his request to take sick leave on November 29, 1995, was granted. Hunter further advised Miller that it was determined to be in the best interest of the College for Miller to be placed on administrative leave on November 30 and December 1, 1995. Hunter directed Miller to report to work on December 4, 1995.

15. Smith left a voice mail message and an E-mail message advising Miller of the contents of Steve Hunter's November 28 memorandum. An attempt was made to send Miller the memorandum, but it was not possible to deliver the letter because Miller failed to keep CCD apprised of his home address. The letter was left at Miller's work station.

16. On November 28, 1995, Smith also left a message on Miller's home phone directing him to report for work on December 4, 1995. Miller did not report for work on December 4, 1995.

17. McClenney was advised of the events which had transpired. McClenney delegated appointing authority to Steve Hunter to act as appointing authority. Hunter did not want to exercise his authority since he had been Miller's supervisor and might not be viewed as unbiased.

18. McClenney therefore exercised appointing authority, advising Miller by letter dated December 4, 1995, that a Board Rule, R8-3-3 meeting would be held with him on December 6, 1995. This letter was sent to Miller by certified mail and was hand delivered to Miller by a courier at his home address on December 4, 1995.

19. On December 4, 1995, when Miller received the letter from McClenney advising him of the R8-3-3 meeting, he contacted his union representative, Catherine Garcia. Miller met with Garcia on December 5, 1995. Miller informed Garcia of the events which had transpired. Garcia advised Miller to return to work. Miller did not return to work or contact his supervisors.

20. Garcia was not available to appear with Miller at the R8-3-3 meeting on December 6, 1995. Garcia advised Miller that she would request a continuance of this meeting. Garcia attempted to reach McClenney by telephone on December 5 and 6, 1995. On December 5, 1995, Garcia faxed a letter to McClenney advising him of her unavailability to attend the R8-3-3 meeting and requesting an alternate date for the meeting. Garcia was not able to reach McClenney until December 7, 1995. McClenney advised Garcia that he would not reschedule the R8-3-3 meeting.

21. By letter dated December 9, 1995, McClenney terminated

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Miller's employment under Board Rule, R9-1-4. McClenney concluded that Miller had been absent without approved leave for five consecutive days. McClenney further concluded that since Miller did not appear for work and did not attempt to contact any of his supervisors during the five day period, he was deemed to have resigned his position.

#### DISCUSSION

The burden of proof in a non-disciplinary termination case is on the complainant. Renteria v. Colorado Department of Personnel, supra. Thus, complainant had the burden to establish that the termination of his employment was arbitrary, capricious or contrary to rule or law. 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 Veegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Complainant's employment was terminated under State Personnel Board Rule R9-1-4. This rule provides,

A full time employee who is absent without approved leave for a period of five or more consecutive days may, at the discretion of the appointing authority, be deemed to have resigned with prejudice.

Complainant argues that respondent's decision to deem him resigned from his position was arbitrary, capricious and contrary to rule and law. Complainant contends that the appointing authority failed to consider the surrounding circumstances. Complainant asserts that his contacts with the union representative should be considered as evidence that complainant did not intend to resign from his position.

Complainant further argues that respondent's notice of the R8-3-3 meeting dated December 4, 1995, denied him due process because it failed to provide sufficient information about the allegations to be considered by McClenney.

Respondent contends that McClenney's action was neither arbitrary, capricious or contrary to rule or law. Respondent argues that the evidence presented at hearing established that complainant was coaxed and cajoled to returned to work. He was sent voice mail messages, certified mail and E-mail messages. Respondent contends that it was not unreasonable to request that complainant return to work on December 4, 1995.

Respondent contends that under the circumstances of this case,

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when viewed in its totality, there is adequate evidence upon which to conclude that complainant intended to resign his position with CCD.

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). The evidentiary standard that applies in this administrative setting is "by a preponderance". This standard of proof has been explained as follows:

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. I at 491 (1985) (emphasis supplied).

The weight of the credible evidence in this case leads to a finding that complainant intended to abandon his position. The evidence presented is sufficient to sustain the conclusions reached by the appointing authority.

The application of R9-1-4 has been addressed in other cases. These cases lend support to the conclusion reached here.

In Ornelas v. Department of Institutions, 804 P.2d 235 (Colo. App. 1990), the Colorado Court of Appeals found that R9-1-4 is applicable "only to situations involving the abandonment of a job by an employee in which the appointing authority is aware of no apparent reason for the employee's absence."

In Hotchkiss v. Department of Corrections, Case No. 95B062, the analysis of a 1975 Board decision, with respect to the proper application of R9-1-4, was adopted. The 1975 case is quoted, as follows:

Rule 9-1-5 [now R9-1-4] was intended to be available to appointing authorities when all the facts and circumstances of a case indicate an abandonment of the job by the employee. This rule does not apply to those cases where the appointing authority has actual or constructive knowledge of the whereabouts of an absent employee, and the predisposing valid reason, medical or

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otherwise, that the employee has not appeared for duty.

The cited rule is not a substitute for disciplinary action for abuse of leave, in appropriate cases. Drury v. Colorado Division of Employment, Case No. 75-308 (Molnar, Initial Decision, Sept. 1975).

In another case, Costa v. Department of Regulatory Agencies, Case No. 94B036, the agency's determination that an employee resigned her position under R9-1-4 was again upheld. In Costa, Zagar v. Colorado Department of Revenue, 718 P.2d 546 (Colo. App. 1986), was relied upon to conclude that the termination of Costa's employment was proper where the employee not only failed to respond to a written communication to report to work on a date certain but also indicated to the personnel administrator that she did not intend to return to work.

In Lynn v. Department of Human Services, Case No. 94B161, an employee was deemed to have resigned his position under R9-1-4. In this case, the employee again failed to respond to written communications to return to work on a date certain and to provide documentation to support the employee's contention that he was absent from work due to illness. The employee remained off work from March 7 to May 23, 1994, when he was deemed to have resigned his position. The employee ultimately advised the agency managers that he did not intend to return to his position and wanted to transfer to another position.

Likewise, the facts found in this case justify application of R9-1-4. Complainant failed to appear for work on December 4, 1995, as instructed. The direction to complainant to return to work was communicated clearly and unequivocally. Complainant failed to follow this instruction and failed to contact his supervisors to advise them of his intention with regard to his position. Furthermore, complainant did not even heed the direction of his business representative, Catherine Garcia, who advised him that he should return to work.

The appointing authority here did not use R9-1-4 as a substitute for discipline. There was no basis for complainant to be cited for abuse of leave on December 8, 1995. Complainant was not granted any leave other than that to which he was entitled on November 29, 1995. By December 9, 1995, complainant's absence from work was for no apparent reason.

Complainant contends that the December 4, 1995, R8-3-3 notice letter was defective. Complainant's arguments have been considered and deemed to be without merit. While it might be concluded that the letter provided little information about the allegations to be considered at the meeting, the fact is that complainant was not separated from employment for disciplinary

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reasons. Complainant's separation from employment was due to the fact that he was deemed to have resigned his position. Therefore, a determination that the R8-3-3 notice letter was so vague as to deny due process does not have an impact on the outcome of this matter.

There was no evidence presented that respondent is entitled to an award of attorney fees.

#### CONCLUSIONS OF LAW

1. Complainant evidenced an intent to abandon his position in December, 1995, by failing to appear for work as directed and by failing to contact his supervisors to advise them of his intentions with regard to his position.

2. Respondent's actions, in deeming complainant to have resigned his position under R9-1-4, were neither arbitrary, capricious nor contrary to rule or law.

3. The issue whether the December 4, 1995, notice of a R8-3-3 meeting was so vague as to deny complainant due process is moot since complainant's separation from employment was not for disciplinary reasons.

4. The parties are not entitled to an award of attorney fees.

#### ORDER

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

Dated this \_\_\_\_\_ day  
of June, 1996, at  
Denver, Colorado.

\_\_\_\_\_  
Margot W. Jones  
Administrative Law Judge

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**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of June, 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:

Howard M. Haenel  
Pearlman & Dalton, P.C.  
The Equitable Building  
730 17th St., Suite 650  
Denver, CO 80202-3514

and in the interagency mail, addressed as follows:

Robin Rossenfeld  
Office of the Attorney General  
State Services Section  
1525 Sherman St., 5th Floor  
Denver, CO 80203

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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

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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 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.

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