
INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

VIOLA F. VALDEZ,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT,
DIVISION OF LABOR AND EMPLOYMENT,

Respondent.

The hearing was held on March 25, 1996, in Denver before Margot W. Jones, Administrative Law Judge (ALJ). Complainant was present at the hearing and represented by Daniel F. Lynch, Attorney at Law. Respondent appeared at hearing through Jeanette Walker Kornreich, Assistant Attorney General.

Complainant testified in her own behalf and called Glenda Barry as a witness at hearing. Complainant's exhibits A and B were admitted into evidence over Respondent's objection.

Respondent called the following employees of the Department of Labor and Employment (DOLE or department) to testify at hearing: John Donlon; Glenda Barry; and Teri Nakayama. Respondent did not offer exhibits into evidence at hearing.

PRELIMINARY MATTERS

1. Complainant's representative entered his appearance at hearing. He stated that he was retained by Complainant to represent her a week prior to hearing. Complainant requested a continuance of the hearing date in order to interview witnesses and subpoena them to appear at hearing. Respondent objected. Respondent contended that it was prepared to proceed at hearing and that it would be prejudiced if Complainant was granted a continuance.

As an alternative, Complainant asked that the hearing proceed on March 25, 1996. However, at the conclusion of the evidence, Complainant requested a continuance to call additional witnesses.

Complainant's request to continue the hearing was granted. The parties were directed to present the evidence available to them on March 25, 1996. Thereafter, Complainant was granted a brief

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continuance to provide Complainant with time to call witnesses.

At the conclusion of the evidence on March 25, 1996, Complainant advised the ALJ that she did not want to continue the hearing to present additional witnesses. Thus, the hearing concluded on March 25, 1996.

2. Respondent moved to dismiss the appeal on the grounds that the Board lacks jurisdiction to consider the case. Respondent contended that Complainant was a probationary status employee at the time of her resignation. Respondent argued that under State Personnel Board Rules, Complainant does not have the right to a hearing.

It appeared to be Respondent's further contention that the hearing should be held to consider the questions whether Complainant resigned her position and whether she should be terminated from her position with the department for poor job performance. Respondent argued that at the conclusion of the evidence if it is found that Complainant did not resign her position, then it should be found that she could have been terminated for poor job performance. Respondent contends that Complainant should not be returned to her position with DOLE.

Complainant objected to the motion. Complainant contended that she was entitled to a hearing to consider her claim that she was improperly separated from her position with DOLE when it was determined that she verbally resigned her position.

Respondent's motion to dismiss was denied. Complainant is entitled to a hearing to consider whether she verbally resigned her position with DOLE.

3. Complainant moved to limit the evidence presented at hearing to matters pertaining to the question whether Complainant resigned from her position.

Respondent objected to the motion in limine. Respondent argued that evidence should be considered whether Complainant resigned her position and whether Complainant should be terminated for poor job performance.

Complainant's request to limit the evidence was granted. The parties were directed to limit the evidence to matters related to the issue whether Complainant resigned her position with DOLE.

4. Complainant has the burden of proof in this matter under Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991). However, because of the unique nature of the claim raised, Respondent was directed to accept the burden of going forward at hearing.

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MATTER APPEALED

Complainant appeals Respondent's determination that she resigned her position with DOLE.

ISSUE

Whether Complainant resigned her position with DOLE.

FINDINGS OF FACT

1. Viola Valdez (Valdez), the Complainant, was employed by DOLE as an administrative assistant III in the documentary entry unit at the Division of Worker's Compensation. She worked under the supervision of Teri Nakayama (Nakayama). John Donlon (Donlon) is the executive director of the department. Valdez was a probationary status employee in January 1996.

2. Valdez' father was suffering from terminal cancer. Valdez frequently missed work in order to care for her father. In January 1996, Valdez exhausted all sick and annual leave. She applied for use of transferred leave in order to care for her ailing father. The use of transferred leave is a DOLE program that allows an employee to request that co-workers donate paid leave to her.

3. Nakayama approved Valdez' application for donated leave on January 25, 1996. Nakayama's signature on the application was intended to reflect that if leave was donated to Valdez, Nakayama would approve use of that leave. On January 26, 1996, Nakayama wrote to Donlon advising him that Valdez' application for donated leave should be denied. Thereafter, Valdez received notice that her request for donated paid leave was denied.

4. Valdez also applied for leave under the family medical leave act (FMLA). Though Valdez had not received a response to her request to use FMLA leave, her request probably would have been granted to take 16 hours of leave without pay.

5. On January 31, 1996, Valdez met with Donlon to request that he reconsider the decision not to allow her to take 16 hours of paid leave to care for her ailing father. Valdez felt strongly that it was unfair for DOLE to deny her request.

6. Donlon and Valdez met in Donlon's office. Donlon's manner was authoritarian and Valdez' manner was unyielding.

7. Valdez asked that she be permitted to take paid leave to care for her ailing parent. Donlon told Valdez that he would not grant her request to take paid leave.

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8. At the conclusion of the conversation, Valdez rose to leave Donlon's office. She asked Donlon how he could be so cold hearted. Valdez told Donlon that she felt sorry for him and that his soul hangs in the balance. Donlon considered these remarks to be insubordinate and belligerent.

9. Donlon replied that DOLE might not be the right department for Valdez and she should look for another place to work. Valdez replied that it is not the right place and she should look elsewhere. Donlon retorted, "You might as well make it today." Valdez proceeded to leave Donlon's office. Valdez believed that Donlon's remarks may have meant that he was terminating her employment. As she left the office, she asked if she could remain on the job for the day. Donlon replied that she could.

10. After Valdez departed Donlon's office, he arranged for Valdez to be escorted from the building immediately and to have her check given to her that day.

11. Valdez' personnel records reflected that she "verbally resigned" her position with DOLE.

12. On Monday, February 5, 1996, Valdez contacted Nakayama, the equal employment opportunity officer and Glenda Barry, the personnel director for the department to inquire whether she could return to her job. The personnel director indicated that it was within Donlon's discretion to allow Valdez to withdraw her resignation.

13. Donlon was advised that Valdez wanted to return to work. Donlon did not permit Valdez to return to work because he felt she was insubordinate. Donlon believed that he needed to set an example for the other employees in the department. Donlon thought that permitting Valdez to return to work would lead other department employees to conclude that Donlon could be addressed in an insubordinate manner without consequences.

DISCUSSION

Under Chapter 10, Article 4 and 5 of the Board rules, the Board clarifies its discretion to grant hearings. A probationary status employee is not entitled to a mandatory evidentiary hearing to review his disciplinary termination. Under R10-5-1(A)(1), a probationary status employee may appeal any action which adversely affects the employee's pay, status or tenure. And, under Board Policy 10-5, the Board shall hear and rule on all appeals of actions which adversely affect a probationary employee's pay, status or tenure, except for probationary employees terminated for unsatisfactory job performance.

Complainant's appeal alleges that Respondent acted improperly by

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deeming her to have verbally resigned her position. The appeal contains allegations which are within the Board's jurisdiction to consider at an evidentiary hearing.

The burden of proof to establish that Respondent acted arbitrarily, capriciously or contrary to rule or law was placed on Complainant. Renteria v. Colorado Department of Personnel, supra.

Complainant contends that she did not resign her position. She maintains that she did not intend to convey to Donlon during their conversation on January 31, 1996, that she resigned. She further contends that during the January 31 meeting she was emotional, not insubordinate or belligerent. She testified that after she left Donlon's office she went to the stairwell and cried.

Complainant testified that she was unsure what Donlon intended by his remarks. However, she feared that he might terminate her employment.

Respondent contends that Complainant resigned her position on January 31. Respondent maintains that a reasonable person could conclude that Complainant's remarks to Donlon during the meeting were intended to convey that she was resigning her position.

Respondent argues that the Nakayama's testimony further supports this conclusion. Nakayama testified that when she arrived at work on January 31 at 8:30 a.m., Complainant was in her work area and was upset about the denial of paid leave. When Complainant returned from her meeting with Donlon, Nakayama testified that she stated that she did not want to work for someone like Donlon. Nakayama testified that Complainant did not appear to believe at that time that she was terminated from her employment.

The ALJ concluded as a preliminary matter at hearing that the only issue raised by the appeal was whether Complainant resigned her position with the department on January 31, 1996. The answer to that question rest upon the testimony of the participants to that conversation, Complainant and Donlon.

There is some variance in Donlon and Complainant's description of the tenor of their conversation on January 31. Donlon says that Complainant was belligerent and insubordinate. Complainant describes Donlon as angry and authoritarian. Otherwise, their accounts of the words exchanged are in all important respects the same.

On rebuttal, Donlon was called for the announced purpose of rebutting testimony offered by Complainant. However, over Complainant's objection he was permitted to repeat testimony he offered during Respondent's case in chief. Donlon testified again about the conversation with Complainant on January 31. Donlon

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repeated earlier testimony about how he encouraged Complainant to look for another place to work. He testified that she replied that she would look elsewhere. He further testified that when Complainant indicated that she would look for work elsewhere, he replied, ok, let's do it today. Donlon testified that it was this exchange that lead him to conclude that Complainant was resigning her position with the department.

Complainant's testimony was similar. Complainant testified that Donlon said, if you don't like the way things are going do something about it. She testified that she replied, I will. Complainant testified that she believed that Donlon might fire her and she began walking from his office when Donlon stated that he would see about getting her check.

Neither account of the January 31 conversation can be found to be evidence that Complainant resigned her position with the department. The remarkable fact is that Complainant was embroiled in a dispute with Nakayama and Donlon about being paid for 16 hours of leave to care for her ailing parent. A person who is willing to beg and borrow 16 hours of paid leave is not an individual who would resign her position in the midst of this effort. In other words, if payment for 16 hours of leave was financially significant to Complainant, as it appears to have been, then Complainant would not have resigned her position, thus giving up her employment.

Many an employee growls to co-workers and supervisors alike about finding a better position. Most do not intend these remarks to be interpreted as an immediate verbal resignation.

Respondent contends that this is a high profile case in the department. Donlon testified that if he permitted Complainant to return to the job, employees in the department would be lead to believe that they could come into his office and address him in a disrespectful manner.

This case is important because it describes a set of facts under which an employee cannot be found to have verbally resigned a position. Complainant's remarks during the January 31 meeting cannot be found to constitute a verbal resignation. Under the facts presented at hearing, it appears that alternatives were at Donlon's disposal for clarifying Complainant's intention during the January 31 meeting. Complainant could have been asked directly whether she intended to resign her position with the department or she could have been offered the opportunity to sign a prepared resignation letter.

CONCLUSIONS OF LAW

Complainant sustained her burden of proof to establish that she

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did not resign her position with DOLE on January 31, 1996.

ORDER

1. Respondent is directed to rescind the personnel action from which this appeal arose in which Complainant was found to have verbally resigned her position with the department on January 31, 1996.

2. Respondent is directed to reinstate Complainant to her position with the department as an administrative assistant III with full back pay and benefits, less the appropriate offset required by law, from January 31, 1995 to the date of reinstatement.

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

Margot W. Jones
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 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

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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 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 this _____ day of April, 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:

Daniel F. Lynch
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and through interagency mail, addressed as follows:

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