

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 98B153

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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DEBBIE L. SWOPE,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,  
COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Respondent.  
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THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on September 21, 1998. Respondent was represented by Beverly Fulton, Assistant Attorney General. Complainant represented herself.

Respondent's sole witness was Gregory M. Trautt, Division Director of the Child and Adolescent Treatment Center, Colorado Mental Health Institute at Pueblo (by telephone from Pueblo).

Complainant testified in her own behalf. She proffered her daughter as a witness. Respondent objected on grounds of relevancy and lack of notice, the daughter not having been previously endorsed as a witness. The objection was sustained.

Respondent's Exhibit 1, a copy of complainant's leave request, was stipulated into evidence. Complainant proffered Exhibit A, purported to be a written statement from her daughter's doctor. Respondent objected on grounds of lack of endorsement, hearsay and questionable authenticity. The objection was sustained.

**MATTER APPEALED**

Complainant appeals the denial of paid leave on April 27, 1998. For the reasons set forth below, respondent's personnel action is upheld.

**ISSUE**

Whether respondent's action was arbitrary, capricious or contrary to rule or law.

**STIPULATION OF FACT**

Complainant is requesting a total sum of \$92.49 to compensate her for six hours of unpaid leave.

**FINDINGS OF FACT**

1. Complainant Debbie Swope is a certified administrative assistant with the Child and Adolescent Center of respondent Colorado Mental Health Institute at Pueblo (CMHIP).
2. Greg Trautt is the division director and the appointing authority with respect to complainant's position.
3. On Monday, April 27, 1998, Swope telephoned the office shortly before 8:00 a.m. Because he was the only person there, Trautt answered the phone. Swope asked for the day off. Trautt advised her that he would have to check on the administrative coverage for the day and asked Swope to call back in ten minutes.

4. The policy of the office is that only one administrative assistant at a time is granted leave. On this day, two administrative assistants were absent, one on annual leave and one on sick leave.

5. Assistant Marci Guardamondo received Swope's second call and informed her that Troutt had denied the leave request because of insufficient administrative coverage. Swope asked to speak to Troutt directly, and the call was transferred. Troutt confirmed that the leave request was denied because of inadequate coverage.

6. Office policy provides that an employee does not have to request sick leave, but merely has to call in.

7. Swope did not report for work on April 27. She was not disciplined or corrected for her absence.

8. On May 1, 1998, Swope submitted a leave request for April 27, stating as a reason: "Family Sick-Daughter." Her immediate supervisor denied the request pursuant to the decision of the appointing authority. (Exhibit 1.) She resubmitted the request on May 4 with an attached note purportedly signed by the daughter's doctor stating that her daughter was sick on April 27. The request was denied once again.

9. The daughter to whom Swope referred is a married adult and is not a member of Swope's household.

10. Troutt had twice approved sick leave for Swope when a family member was sick.

11. Swope was docked six hours of paid time on her monthly paycheck for not working on April 27. She did not determine the

exact basis of the calculation.

12. Swope's normal working hours are from 7:30 a.m. to 5:00 p.m., with a one-half hour lunch, for four and five days, respectively, during alternating weeks. It is her usual practice to work through the lunch break. The week of April 27 was a five-day work week for her.

13. Swope believes that she should be compensated for the time that she worked through her lunch break for the four days she worked during the week of April 27 in order to compensate for being absent on April 27. She did not make such an arrangement with either her supervisor or the appointing authority and did not seek prior approval for compensatory time.

14. On May 15, 1998, complainant filed a timely appeal of the denial of her sick leave request, alleging a "denial of family sick leave."

#### **DISCUSSION**

This appeal is brought under Board Policy 10-5, 4 Code Colo. Reg. 801-1, which provides in pertinent part: "The board shall also hear and rule on all appeals in which an appointing authority's denial of the use of paid leave results in a certified or probationary employee being placed on leave without pay during that pay period."

The complainant thus does not need to petition for a discretionary hearing; a hearing is mandatory.

Complainant was not disciplined. This is not a disciplinary action as such, yet complainant was denied a constitutional property interest in her employment. See *Department of Institutions v.*

*Kinchen*, 886 P.2d 700 (Colo. 1994). Nor is it an administrative action in the sense of a layoff or a dismissal for exhaustion of leave. The burden of proof by preponderant evidence is logically placed on the respondent under Policy 10-5 to show just cause for the denial of the property right.<sup>1</sup>

The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S. In determining whether an administrative agency's decision is arbitrary or capricious, the administrative law judge must determine whether a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. *Ramseyer v. Colorado Department of Social Services*, 895 P.2d 506 (Colo. App. 1992).

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 fact finder 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). The fact finder 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).

It is for the administrative law judge, as the trier of fact, to

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<sup>1</sup>Respondent filed a motion for summary judgment alleging that Policy 10-5 contemplates a discretionary hearing for which complainant must petition based upon having filed a grievance. The motion was denied.

determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. V. Gussert*, 914 P.2d 411 (Colo. App. 1995). The preponderance of the evidence standard, as used in this administrative proceeding, requires the fact finder to be convinced that the factual conclusion he chooses is more likely than not. *Koch*, Administrative Law and Practice, Vol. I at 491 (1985).

Complainant testified that, on April 27 as she was ready to leave for work, she received a telephone call from her daughter in which the daughter said that she was sick and needed assistance. The daughter's husband had just begun a new job in Colorado Springs and she did not know how to reach him. According to complainant, she then telephoned the appointing authority to request sick leave because her daughter was ill. The appointing authority steadfastly denied that complainant said anything more than she wanted the day off, which is why he asked her to call back in ten minutes to give him a chance to determine whether the office would be sufficiently covered administratively.

It is undisputed that an employee in that office is not required to justify sick leave, regardless of staff coverage. The appointing authority testified credibly that the level of coverage was significant to his decision in this case because the request was for a vacation day, and the established office procedure was that only one administrative assistant at a time could be gone. Complainant admits that she did not mention her sick daughter when she called back and talked to an administrative assistant and then to the appointing authority again. It would have been reasonable for complainant to insist again that she needed the day off to care for her daughter, in view of office policy and procedure, but she admits that she did not. The inference is drawn that the

appointing authority is correct in saying that Swope did not begin the conversation by telling him that she needed time off to take care of her sick daughter, and that complainant is mistaken.

Complainant testified that Trautt's final words were for her to do what she felt she needed to do, which meant to her that she was not being told to come to work because she felt that she had to take the day off. Trautt denied saying that. But even if he did say it, which is not found, it is strange reasoning to interpret a statement like that as giving permission after the request was unequivocally denied. She asked for the day off. He said no. She argued a bit and the answer did not change. It is illogical and irrational to construe from that scenario that permission to take leave had been granted. When the leave request was denied, complainant's obligation to report to work was unchanged.

Complainant argues that she should be compensated for lost pay because the Family Medical Leave Act (FMLA) does not specify that a family member needs to be a member of the household. That is the extent of her legal argument.

Under the FMLA, being a member of the household is not the determining factor. The following definitions apply:

(c) Son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, *who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability."*

(1) "Incapable of self-care" means that the individual requires active assistance or supervision to provide

daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating.

Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

29 CFR 825.113 (emphasis supplied).

There is no evidence of the daughter's age. It is presumed that she is 18 or older. There is no evidence what she is mentally or physically disabled. Rather, complainant testified that her daughter was very sick on April 27 and needed to go to the doctor.

The daughter suffered from a temporary illness, not a disability.

Complainant has failed to show that she is entitled to relief under the FMLA.

Respondent has shown just cause for its action. The appointing authority did not abuse his discretion. His act was that of a reasonable and prudent administrator under the circumstances.

This is not a proper case for the award of fees and costs under §24-50-125.5 of the State Personnel System Act.

#### **CONCLUSIONS OF LAW**

The action of the respondent 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 \_\_\_\_\_  
October, 1998, at Administrative Law Judge  
Denver, Colorado.

**CERTIFICATE OF MAILING**

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

Debbie L. Swope  
291 Kipling Drive  
Pueblo West, CO 81007

and in the interdepartmental mail, addressed as follows:

Beverly Fulton  
Assistant Attorney General  
Department of Law  
1525 Sherman Street, 5th Floor

Denver, CO 80203