

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 99B004

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

AUGUSTINE A. GARCIA,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Hearing was held before Administrative Law Judge Robert W. Thompson, Jr. on May 26, 1999. Respondent was represented by Assistant Attorney General Coleman M. Connolly. Complainant was represented by Robert C. Ozer, Attorney at Law.

Complainant bore the burden of proof. In addition to himself, he called as a witness Carl Meltzer, former Youth Counselor II, Department of Corrections. Respondent's sole witness was Regis Groff, formerly Director, Youth Offender System, Department of Corrections.

Complainant's Exhibits A, G, H and I and Respondent's Exhibits 1 through 9 were admitted into evidence by stipulation of the parties.

MATTER APPEALED

Complainant appeals the administrative termination of his

99B004

employment. For the reasons set forth below, respondent's action is rescinded.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether respondent's action was within the range of available alternatives.

PRELIMINARY MATTERS

Complainant withdrew the issue of whether he was discriminated against on the basis of having a disability.

FINDINGS OF FACT

1. Augustine A. Garcia, complainant, was employed as a Correctional Officer I with the Youth Offender System at the Denver Reception and Diagnostic Center (DRDC) of the Department of Corrections (DOC), respondent, from October 1, 1995 until he was administratively dismissed on June 24, 1998.
2. Complainant worked in the Intake, Diagnostic and Orientation Unit. His duties included supervising and counseling juvenile offenders, ages 14 to 18.
3. An essential function of the position of Correctional Officer is to be prepared and be able to use physical restraints against an inmate at all times. Complainant was called upon to use physical restraints approximately six times.

4. In May 1996, complainant injured his back while lifting weights at the DRDC gym. A medical diagnosis showed that he ruptured a disc.

5. In September 1997, complainant was involved in an automobile accident, which worsened his back condition. After being off the job for six weeks, he returned to work with work restrictions. He was assigned to office duty in order to limit his exposure to residents and lessen the potential for physical confrontation.

6. After a period of time, complainant resumed his normal duties without restrictions.

7. In January 1998, complainant injured his back while restraining a resident. He was placed on work restrictions and assigned office duties to limit his exposure to residents.

8. As a result of his back injuries, complainant used sick leave, annual leave and leave under the Family and Medical Leave Act (FMLA).

9. Per a DOC referral, complainant was treated at the Concentra Medical Center (Concentra) in Aurora, which referred him to Dr. Robert Kawasaki, a back specialist. His treating physician at Concentra was Dr. Hattem.

10. On May 27, 1998, Dr. Kawasaki reported that Garcia "may continue on work duty, but will need to avoid altercations and control/restraint situations." There were no other work restrictions. (Exhibit 2.)

11. By letter dated May 28, 1998, Director Regis Groff advised

complainant as follows:

On September 19, 1997 you were notified of your rights under the Family and Medical Leave Act. This benefit provides 520 hours of job protection for employees on extended leave running concurrent with other leave benefits. Your family and medical leave exhausted on March 31, 1998.

Each month since February 1998, you have exhausted any accrued sick and annual leave that you earned and have been granted intermittent leave without pay. As of this date you will not be granted any more leave without pay.

In the September 19, 1997 notice, you were also advised that if you had a permit for outside employment it was canceled. It has been brought to my attention that you are still employed at Elitches (sic). You must resign your position with Elitches (sic) at once.

Personnel Procedure 7-2-5(D) (3) (c) provides that when an employee has exhausted all accrued leave and is still unable to return to work, the appointing authority may terminate the employee.

A pre-separation meeting has been scheduled with you on June 2, 1998, at 10:00 a.m. in my office to discuss your leave status.

Exhibit 4 (underscoring in original).

12. On June 16, 1998, Dr. Kawasaki reported that the patient should: "Continue previous work restrictions." (Exhibit 2.)

13. Meanwhile, on or about June 3, 1998, complainant returned to full duty without restrictions, performing all of his normal duties. He performed the full job of a correctional officer satisfactorily and capably.

14. The basis for complainant's return to full duty was a printed status report from Concentra stating that complainant could return

to regular duty. There were no restrictions. The treating physician is shown as "Bill Lewis, MD," who was not further identified at hearing. (Exhibit G.)

15. Complainant testified that he gave the June 3 status report to his "employer." Carl Meltzer, the overall manager of the unit, understood that complainant was working without restrictions.

16. During June, according to Director Groff, complainant used 40 hours of leave without pay. The record does not reveal the circumstances of leave approval in view of the letter of May 28.

17. Complainant worked at Elitch's as the administrator of the off-duty program. He was the security supervisor but sometimes did the duties of a security officer.

18. On June 17, 1998, Meltzer was asked by the deputy director of the agency to telephone complainant at home and tell him to bring in either a letter of resignation from Elitch's or from DOC. Complainant complied with the directive with a letter of resignation from the amusement park.

19. The pre-separation meeting was eventually held on Monday, June 22, 1998. In attendance besides complainant were Director Groff, Madline Sabell and Debbie Perkins of the DOC personnel office, DOC Regional Director Mary West and Brad Rockwell, the EEO specialist. Groff, Sabell, Perkins, West and Rockwell were under the impression that complainant was working with restrictions. He did not present the June 3 status report releasing him from work restrictions. Complainant was advised of his rights under the personnel system upon the exhaustion of leave and a continued inability to return to work. Complainant suggested that he be

assigned to the graveyard shift, which he once worked and which would decrease the possibility of a physical confrontation because the residents were asleep for most of the shift. Rockwell advised him that he needed to fill out a written request for an accommodation to return to the graveyard shift.

20. Following the preseparation meeting, Debbie Perkins contacted someone at Concentra and was verbally advised that complainant was still on work restrictions.

21. Groff concluded that complainant was "still unable to return to work" because he was working under physical restrictions and could not perform the duties of a correctional officer as long as he was medically required to refrain from physical restraint situations. Groff's thinking was influenced by the fact that complainant had taken 40 hours of LWOP in June. He had seen no paperwork removing complainant from restrictions. He felt that complainant had spent an "exorbitant" amount of time away from the job.

22. Complainant was off work the day following the June 22 meeting. On Wednesday, June 24, he reported to work at noon for the start of his shift. He asked Meltzer if he still had a job, and Meltzer replied in the affirmative. Sometime during the afternoon, Meltzer received a phone call from an administrative assistant informing him that complainant had been terminated and should not be working. Later in the day, Meltzer was given a letter terminating complainant's employment and was instructed to deliver the letter and escort complainant off the premises. It was Meltzer's understanding that complainant was being dismissed for exhaustion of leave, not for being on work restrictions. He had heard no discussions regarding complainant's work restrictions.

Complainant was filling out a request form to return to the graveyard shift when Meltzer approached him.

23. The termination letter, which was dated June 25, 1998 and signed by Regis Groff, advised complainant in pertinent part:

Information from your physician at Concentra Medical Center was faxed to Debbie Perkins after our meeting stating that you have not been released to full duty and at the present time you cannot perform the essential functions of a Correctional Officer. As you know, you have exhausted all leave benefits.

Personnel Procedure 7-2-5 (D) (3) (c) provides that when an employee has exhausted all accrued leave and is still unable to return to work, the appointing authority may terminate the employee. Based upon the needs of the Department of Corrections, I feel I have no choice but to terminate you effective June 24, 1998.

Pursuant to the same procedure, certified employees who are terminated shall be placed on a departmental reemployment list upon recovery. Recovery must be within one year from the date of termination. The employee must not have worked for any other employer performing the same or comparable work during the recovery period. The employee must notify the agency within 90 days of recovery as verified by a physician's statement in order to be placed on a reemployment list.

Exhibits 6 and A.

24. The faxed document referenced by Groff in the termination letter was not introduced into evidence. Subsequent to his June 24 termination, complainant received in the mail a Concentra status report of June 30, 1998 instructing complainant to: "Avoid altercations and control restraint situations - bjr." (Exhibits 3 and H.) The status report was mailed to him by DOC. The initials "bjr" are not further identified. The treating physician is shown to be "Paul Springer, PA" (presumably physician's assistant).

Complainant had never been seen by someone named Paul Springer.

25. Complainant Augustine A. Garcia filed a timely appeal of his administrative termination on July 7, 1998. He did not exercise his right to be placed on a reemployment list. He does not believe that he was working under restrictions.

DISCUSSION

In an appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of going forward with the evidence and proving by a preponderance 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). See also *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. It is for the administrative law judge, as the fact finder, to 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).

Complainant asserts that, because he was dismissed under a written procedure that applies only to employees who are not at work, the sole determination to make is whether he was working, and if he was, then respondent's action should be overturned. Complainant argues that respondent created the fiction that he was unable to work in order to implement an administrative termination.

Respondent counters that a determination should be made as to whether complainant was on work restrictions, contending that he was unable to do the full job of a correctional officer as a result

of the restriction of avoiding physical restraint situations. Respondent contends that the June 3 status report releasing complainant from work restrictions (Exhibit G) is not reliable because it is inconsistent with all other documents in the case.

The record is unclear and incomplete in some respects, yet complainant proved by preponderant evidence that respondent's action was arbitrary, capricious or contrary to rule or law.

Director's Procedure 7-2-5(D)(3), 4 Code Colo. Reg. 801-2, in effect at the applicable time, provides:¹

(D) When an employee has exhausted all accrued sick leave and is still unable to return to work, the appointing authority:

(3) If the employee is unable to return to work after all accrued leave is used or after six months of continuous absence from work, whichever occurs first, and family/medical leave and/or short-term disability leave is inapplicable, the appointing authority may: (a) grant any remaining accrued leave; (b) grant leave without pay if all paid leave is exhausted; © or terminate the employee.

Director's Procedure P7-2-5(D)(3)(c) was an improper vehicle for the appointing authority to use in addressing his concerns about complainant's excessive use of leave. This was not a clear-cut case of an employee being "unable to return to work." Complainant was, in fact, performing the job when the termination decision was made and when he was so informed. Perhaps he should not have been working, as thought by Regis Groff. Nevertheless, if the

¹ The State Personnel Board Rules and Director's Procedures were repealed and replaced effective December 31, 1998.

appointing authority believed that complainant had returned to full duty in violation of a work restriction, the disciplinary process was the avenue to the truth. Or, if the concern was complainant's excessive use of leave or his outside employment, as suggested by the May 28 letter (Exhibit 4) and Groff's testimony, corrective action or discipline may have been appropriate. But as long as complainant was working he was accruing leave and did not come under the purview of an administrative procedure that contemplates a situation where an employee has no accrued leave and cannot work.

Exhausting all leave, or using leave as it is accrued, is not, by itself, a justifiable reason for immediate termination. Furthermore, there was no request for leave pending that mandated the appointing authority to make a decision to either grant leave without pay or terminate employment per P7-2-5(D)(3)(c).

Respondent asks: Why did the complainant not exercise his reemployment rights if he was truly fit for full duty? In answer to this question on cross-examination, complainant testified to the effect that he was unjustifiably fired and decided to use the appeal process. Nonetheless, the issue is not whether complainant should have exercised his right to have his name placed on the reemployment list. Nor is the issue whether or not complainant was working under restrictions, in any event a conclusion that cannot fairly be drawn on this record. Rather, the question in need of an answer is whether complainant was properly dismissed pursuant to a particular administrative procedure. The conclusion is reached that Procedure P7-2-5 was improperly implemented and the appointing authority abused his discretion in administratively terminating complainant's employment on June 24, 1998.

Neither party is entitled to an award of fees and costs under §24-50-125.5, C.R.S., of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious or contrary to rule or law.
2. Respondent's action was not within the range of available alternatives.

ORDER

Respondent's action is reversed. Complainant is reinstated to his former position with full back pay and benefits, less the appropriate offset for any income complainant would not have earned but for the termination.

DATED this _____ day of
June, 1999, at
Denver, Colorado.

Robert W. Thompson, Jr.
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), C.R.S. 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. 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).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may 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. 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.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). 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 is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3244.

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 the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

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 R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of June, 1999, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Robert C. Ozer
Attorney at Law
Ptarmigan Place, Suite 940W
3773 Cherry Creek Drive North
Denver, CO 80209

and in the interagency mail, addressed as follows:

Coleman M. Connolly
Assistant Attorney General
1525 Sherman Street, Fifth Floor
Denver, CO 80203
