

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 2000B119

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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REBECCA DOANE,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

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This matter was heard on January 9, 2001, before Administrative Law Judge (ALJ) Robert W. Thompson, Jr. Respondent was represented by Cristina Valencia, Assistant Attorney General. Complainant appeared in person and was represented by Timothy Whitsitt, Attorney at Law.

The ALJ heard testimony from respondent's witnesses Gene Trujillo, Administrator; Mark Bachali, Patrol Supervisor; and Owen B. Leonard, Regional Transportation Director, Department of Transportation.

Complainant's evidence consisted of her own testimony and stipulated Exhibits A, B and C.

Respondent's Exhibits 1 through 6 were stipulated into evidence. Exhibits 7, 8 and 10 were admitted without objection. Exhibit 9 was admitted over complainant's objection.

## **MATTER APPEALED**

Complainant appeals the administrative termination of her employment under State Personnel Procedure P-5-10. For the reasons set forth herein, respondent's action is affirmed.

## **ISSUE**

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

## **STIPULATIONS OF FACT**

The parties stipulated to the following facts.

1. Complainant, Rebecca Doane, was employed by respondent, the Department of Transportation (DOT), on May 5, 1987 as an EEO Representative and assigned to the Glenwood Springs office. Her responsibilities included investigating allegations of discrimination.
2. In February 1999, complainant was responsible for conducting an investigation regarding a sexual harassment charge.
3. Complainant worked until March 16, 1999, at which time she went on annual leave. She never returned to work.
4. On August 10, 1999, complainant was issued the following permanent work restrictions:

She should not work for CDOT on the Western Slope as long as Mr. Patterson is on the Western Slope. If Mr. Patterson is transferred to another part of the state such as the Eastern Slope, Ms. Doane could then work for CDOT on

the Western Slope (she tells me that it would be unrealistic for her to move herself to another part of the state such as the Eastern Slope because she is divorced with young children and there are child custody issues). She should not, for the foreseeable future, work in any situation that would involve dealing with disgruntled employees.

5. On January 13, 2000, respondent made an attempt to accommodate complainant by offering her another position. Complainant declined the position.
6. On March 1, 2000, complainant was notified of her termination, having exhausted all available leave.

### **FINDINGS OF FACT**

The ALJ considered the exhibits and testimony, assessed the credibility of the witnesses and made the following findings of fact which were established by a preponderance of the evidence.

7. As the only Equal Employment Opportunity Representative in DOT Region 3, Rebecca Doane had the working title of Civil Rights Specialist and conducted two types of investigations, one ensuring compliance with state and federal mandates on highway construction projects (External EEO) and the other involving DOT employees and the agency's compliance with Title VII and other anti-discrimination laws (Internal EEO).
8. While Doane's office was located in Glenwood Springs, Regional Director Owen Leonard officed in Grand Junction. Leonard was Doane's immediate supervisor.

9. In February 1999, Doane was assigned to investigate a sexual harassment complaint against DOT employee John Patterson. In interviewing one female worker, Doane was told Patterson had said that he had been convicted of domestic violence and could not keep weapons at his home, that he enjoyed being in the Gulf War because he got to shoot at people, that he bragged about sexual encounters with his wife, and that he talked about wanting to kill his former wife. Doane reviewed Patterson's personnel file and found a corrective action for sexual harassment.
10. On February 23, Doane interviewed Mark Bachali, a co-worker of Patterson. She was scheduled to interview Patterson later in the day. Bachali related to Doane that Patterson had recently said that he had been instructed to take on the maintenance responsibilities of a rest area, and that he then made the statement: "Well, maybe tomorrow I'll take a gun to the potty patrol," referring to the rest stop.
11. Doane became upset and never talked to Patterson. She stopped coming to work on March 16 and filed for worker's compensation benefits. She was diagnosed with post-traumatic stress, stemming from the statement Patterson allegedly made.
12. Leonard found out that Doane claimed to have been threatened around mid-March when she filed for worker's compensation, and he received information that she claimed that Bachali had said that Patterson was thinking about bringing a gun to the meeting with her.
13. Leonard telephoned Bachali and then met with him in person. Bachali denied telling Doane that Patterson was thinking about bringing a gun to his meeting with her. Rather, Bachali said that he told Doane that Patterson had said he

might take a gun to work at a particular rest stop, referring to it as the “potty patrol.”

14. Leonard concluded that a threat had not been made by Patterson, but he accepted Doane’s claim that she suffered from work-related stress. (Ex. 10.) He did not contest Doane’s worker’s compensation claim. She was granted all types of leave.
15. The agency processed Doane’s claim under DOT Procedural Directive (PD) 86.1, “Disabled Employee Placement,” with the purpose, “To establish a consistent process for the administrative management of permanent employees of the Colorado Department of Transportation who have suffered permanent disabilities either on or away from the job which affect their ability to perform the essential functions of their job,” under the authority of the Americans with Disabilities Act (ADA) and State Personnel Rules and Procedures. (Ex. C.)
16. The procedures under PD 86.1 were implemented and overseen by Gene Trujillo, DOT’s Administrator of Internal EEO Programs. It was he who had the majority of the contact with Doane and who kept the appointing authority, Leonard, apprised of the ongoing process. Whether Doane’s situation came within the purview of the ADA or PD 86.1 was never disputed and always presumed.
17. Pursuant to Step 3 of PD 86.1, once an employee has reached Maximum Medical Improvement (MMI), a determination must be made whether the employee can return to work and perform the essential functions of the job with or without reasonable accommodation. The agency accepted the medical records and documentation of Doane’s worker’s compensation claim.

18. By letter dated August 11, 1999, Trujillo advised Doane that he had been notified that she had reached MMI and that the procedures of PD 86.1, reflective of the required processes of the ADA, would be implemented as soon as he was provided a list of her permanent work restrictions by her medical provider. (Ex. 6.)
19. On September 23, 1999, Trujillo received a list of Doane's medical work restrictions, which had been established for purposes of worker's compensation. These restrictions precluded Doane from working on the Western Slope as long as Patterson worked there. Glenwood Springs, the site of Doane's office, is on the Western Slope. Doane was also restricted from working in any situation that involved "dealing with disgruntled employees." (Ex. 8, Ex. 2.)
20. By a writing dated October 21, 1999, Doane limited her prospective work locations to Garfield County and Pitkin County, both on the Western Slope. She noted that she had changed her mind about being able to relocate to the front range. (Ex. 5.)
21. DOT's human resources office did a job search in an attempt to find a comparable position for Doane that did not involve working with disgruntled employees and was located in one of the two counties she had listed, even though each of those counties would violate her work restriction of not working on the Western Slope. (Ex. 4.) She had specifically stated that she was not available for a job on the front range, i.e., Denver. Admittedly, she could not perform the essential functions of her current position.
22. The only vacant position identified that Doane was qualified for was a one-half time Administrative Assistant III position located in Glenwood Springs. She was offered this position and turned it down because she did not type

and she could not work in the area as long as Patterson did also. It is not conclusive that typing was a requirement for this particular administrative assistant position, although it was for another one. In April 1999, she had turned down an offer from Leonard to work at her job in the Grand Junction Regional Office. (Ex. 9.)

23. Pursuant to Step 6 of PD 86.1, an Alternative Placement Conference was held on January 12, 2000, with Doane, Trujillo, and Leonard present, in an attempt to locate a position for Doane. The Administrative Assistant III position was offered and refused. Doane did not convey suggestions or make specific requests. There were no other vacant positions for which she was qualified in the geographic areas she had specified. (Ex. 3.)
24. Doane did not tell Trujillo or Leonard that she disagreed with the medical work restrictions set forth in Exhibit 8, the only work restrictions received by the agency.
25. Efforts to place the employee at the Alternative Placement Conference having failed, and Doane being unable to perform the essential functions of the job, Leonard advised Doane that her employment may have to be terminated because she had exhausted all available leave, including leave under the Family Medical and Leave Act, pursuant to Step 9, the final step of PD 86.1.
26. By letter dated March 1, 2000, the appointing authority terminated Doane's employment under Personnel Procedure P-5-10, which provides that an employee may be administratively discharged if she has exhausted all available leave and is unable to return to work, but that the employee has reinstatement privileges when she subsequently recovers. (Ex. 1.)
27. Doane has never requested reinstatement as provided for by P-5-10.

28. Patterson received a 30-day suspension for sexual harassment based upon the charge that Doane had been assigned to investigate in February. Through the gathering of information and a psychological evaluation, the appointing authority determined that Patterson was not a threat and had not threatened Doane, who did not file a grievance.
  
29. Doane's residence in Carbondale is ten miles from Glenwood Springs, 95 miles from Grand Junction, and 130 miles from Denver.

## **DISCUSSION**

This is an appeal of an administrative action. Unlike a disciplinary case, the burden of proof by a preponderance of the evidence rests with the complainant to show that respondent's action was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo. 1991). See *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); §24-50-103(6), C.R.S.

It is indisputable that complainant was unable to perform the essential functions of her position and that she had exhausted all available leave at the time of the decision to administratively terminate her employment. She argues that respondent's action was arbitrary, capricious or contrary to rule or law because the agency did not offer her adequate alternatives, without citing any supportive legal authority. Yet, she restricted her availability to two counties on the Western Slope, where her work restrictions precluded her from working. The agency offered her the only available position in the specified location for which she qualified, as identified by the human resources office. While she claimed that she was not qualified for the offered position because she did not type, it does not matter, since the result is simply that there were no available positions rather than one part-time position. Nothing was hidden from her; she was offered all that was turned up by the agency's human resources department. There is

no evidence that respondent was intentionally trying to prevent her from returning to work or did not offer her a suitable job that was available.

Complainant contends that the agency did not properly follow PD 86.1 because the Alternative Placement Conference should not have been held until the MMI report was final, and she had appealed her rating through the worker's compensation process. Though she testified at hearing to that effect, the agency was not so advised, and a second MMI rating was never produced. The agency used exactly what it was given, the only thing it had, a September 23, 1999 list of medical work restrictions based upon Doane having attained maximum medical improvement and precluding her from working on the Western Slope as long as John Patterson worked there, and from doing a job that involved dealing with "disgruntled" employees. (Ex. 8.) There is no documentary evidence that complainant appealed her MMI rating or that it was ever changed from the original one received by the agency in August 1999. Still, her testimony was that she was not at MMI until January. The Alternative Placement Conference was held on January 12. She was not dismissed from employment until March 1, 2000. There is no persuasive argument here.

Complainant makes a convoluted argument that the agency violated DOT PD 265.4, "Flexplace" (Ex. A), testifying at hearing that she would have been willing to work part-time in Denver but could not relocate there. The policy defined by PD 265.4 is a discretionary management tool and is not a right or benefit of the employee. There is no credible evidence demonstrating that this directive could have been applied to Doane's situation, should have been, was in any way violated by the agency, or that Doane suggested it at the Alternative Placement Conference.

The agency did not dispute that Doane suffered from work-related stress or that she was entitled to the protections of DOT's Procedural Directive 86.1, with its foundation in the ADA. The agency properly followed its own procedures and met the requirements of P-5-10 before terminating Doane's employment, after she had been away from the

job for almost a full year. She now seeks reinstatement, contending that she has recovered from her stress and is able to perform the essential functions of her former job, though providing no supporting medical documentation. In any event, that was not the case when the termination decision was made, and she has not argued otherwise. The personnel procedure under which she was discharged affords reinstatement privileges upon recovery, but she has not sought reinstatement that way. In order to gain reinstatement through this appeal, Doane must prove by preponderant evidence that respondent's action was arbitrary, capricious or contrary to rule or law, and she has not done so.

Complainant weakly argues that respondent did not enforce its policy against workplace violence, yet this would not warrant reinstatement even if it were proven true, which it was not. She does not suggest anything, just makes a general allegation. The appointing authority investigated Doane's allegation and reasonably concluded that Patterson had not threatened her, and that he was not a threat, but disciplined him on the original sexual harassment charge. (See Ex. 10.) Nevertheless, the agency treated Doane as a disabled person and fulfilled its consequent obligation to seek a reasonable accommodation.

## **CONCLUSIONS OF LAW**

Respondent's action 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 February, 2001, at  
Denver, Colorado.

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Robert W. Thompson, Jr.  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203

## 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. The notice of appeal must be received by the Board no later than the 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) 894-2136.

### 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 1/2 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 February, 2001, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Timothy E. Whitsitt  
Attorney at Law  
580 Main Street, Suite 210  
Carbondale, CO 81623

and in the interagency mail, addressed as follows:

Cristina Valencia  
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