

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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SPIRO KOINIS,

Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY,

Respondent.

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This matter was heard on December 11, 2001, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by John A. Lizza, Assistant Attorney General. Complainant appeared in-person and was represented by Barry D. Roseman, Attorney at Law.

**MATTER APPEALED**

Complainant appeals the effectiveness of his resignation, alleging that he was either constructively discharged or was forced or coerced to resign. For the reasons set forth below, complainant's appeal is dismissed with prejudice.

**ISSUES**

1. Whether complainant was constructively discharged;
2. Whether complainant was forced or coerced to resign pursuant to the state personnel rules;
3. Whether either party is entitled to an award of attorney fees and costs.

## FINDINGS OF FACT

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

1. The parties stipulated that just cause for discipline is not an issue in this case; the underlying reason for the discipline is irrelevant.
2. Complainant Spiro Koinis began his employment with the Division of Criminal Justice in the Colorado Department of Public Safety (DPS) in February 1998.
3. On Monday, February 5, 2001, Raymond Slaughter, Director of the Division of Criminal Justice, gave written notice to complainant of a predisciplinary meeting to be held on February 7.
4. Slaughter, complainant, and complainant's supervisor, Ed Camp, attended the R-6-10 meeting. Slaughter set a meeting for the upcoming Friday afternoon to discuss the result of the predisciplinary meeting.
5. It is a DPS policy to offer an employee the opportunity to resign under State Personnel Board Rule R-6-7 after the appointing authority has held a predisciplinary meeting with the employee and has made his final decision.
6. R-6-7 provides in pertinent part: "An appointing authority who has decided to discipline may also discuss alternatives with the employee in an attempt to reach a mutually acceptable resolution. If no resolution is reached, the employee retains the right to appeal. When

resigning in lieu of disciplinary action, the employee forfeits the right to file any appeal.”

7. This DPS policy of discussing alternatives with a to-be-dismissed employee began in the mid-1980s. To be offered an alternative to termination is not a right of the employee. The agency has found that some employees prefer to resign in lieu of termination so the incident can be brought to closure and they can get on with their lives. For the agency, it is more expedient to accept a resignation than to go through the termination and appeal process.
8. Slaughter consulted with Denise Wojahan, DPS Director of Human Resources, and DPS Deputy Director Pamela Sillars concerning the agency’s practices in implementing R-6-7. He was advised that he should prepare the disciplinary letter, that he should allow the employee an hour to one-and-one-half hours to decide between termination and resignation, and that the employee’s decision should be made by the end of the day. The employee should not be forced to resign. The employee’s decision to resign is separate from the agency’s decision to terminate. Once the appointing authority has decided to dismiss the employee, it is in the best interest of the agency to go forward with the disciplinary action rather than give the employee an extended period of time to decide whether he would prefer to resign. If the employee is unable to decide, the disciplinary action should be imposed.
9. On Friday, February 9, 2001 at 2:00 p.m., Slaughter met with complainant and informed him that his employment was terminated effective at 5:00 p.m. He then offered complainant the opportunity to resign in lieu of termination. He presented complainant with the termination letter and a letter of resignation and suggested that he read

them both. Complainant was indecisive. Slaughter telephoned Denise Wojahan to inquire as to the length of time complainant should be given to make up his mind. Wojahan suggested an hour or so but advised Slaughter that the matter needed to be resolved by the end of the day. Complainant was confused as to what he should do. Slaughter offered to take a break for complainant to consider his options and make some phone calls, and to meet again at 3:30. A break was taken for one hour and fifteen minutes.

10. When the parties got back together at 3:30, complainant was still indecisive. Slaughter reiterated that he was not required to give complainant an opportunity to resign, complainant was free to resign or not resign, and if he did not resign he would be fired. Complainant continued to be indecisive, saying that he wanted time to talk to an attorney. Slaughter then said that he would make the decision for him, and terminated complainant's employment effective at 5:00 p.m.
11. Complainant went to his office, which was located across the parking lot in a different building, and started cleaning out his desk while continuing to think about whether he should resign or be fired. He talked to his supervisor, Ed Camp. Camp telephoned Slaughter on complainant's behalf, said that complainant wanted to resign, and asked if he could still resign in lieu of termination. Slaughter responded in the affirmative and told Camp to send him back over.
12. At 4:15 p.m., complainant returned to Slaughter's office. They met with Slaughter's assistant in the assistant's office, where complainant signed a letter of resignation, which he read aloud: "By this letter I am submitting my resignation effective this date. I am aware that this is an irrevocable resignation in lieu of disciplinary action. It is my desire to pursue other career opportunities at this juncture in my life."

13. Complainant did not want to resign and did not want to be dismissed. He went back to Slaughter's office at 4:15 to tender his resignation because his employment had already been terminated.
14. On February 20, 2001, Spiro Koinis filed an appeal with the State Personnel Board from his "discharge or constructive discharge."
15. Complainant's ending salary with DPS was \$3,840 per month. He is now the Director of Williams Street Center, a community corrections facility, at a salary of \$55,000 per annum.
16. At a pre-hearing conference held before the Board on October 15, 2001, respondent's counsel took the position that discipline was anticipated but was not imposed. In an April 20, 2001 Motion to Dismiss, he indicated that the discipline of termination was imposed.

## **DISCUSSION**

### I. Arguments of the Parties

Complainant argues that Board Rule R-7-5, under the category of "Resignation" and providing that, "If the employee believes the resignation was coerced or forced, the employee has 10 days from the date of the resignation to appeal to the Board," serves as the basis for his appeal. Contending that he was either constructively discharged or forced or coerced to resign, complainant argues that his resignation is ineffective and he should be reinstated with back pay and the disciplinary process begun anew. He proffers his unclear and indecisive state of mind as evidence that his resignation should be ruled invalid. Although conceding actual notice, he asserts that respondent should be estopped from arguing otherwise because of respondent's counsel's earlier position that

discipline was not actually imposed, when the evidence showed that discipline was imposed.

Respondent, on the other hand, argues that R-6-7, under the category of “Corrective and Disciplinary Actions,” controls this situation because it applies specifically to a resignation in lieu of termination, and complainant does not have a right to any appeal. Respondent further argues that the applicable standard for determining the voluntariness of a resignation is that of a reasonable person, not the subjective state of mind of the employee.

## II. Constructive Discharge

When an employee relies upon the precepts of a constructive discharge to assert a wrongful discharge claim, the employee bears the burden of establishing that the resignation amounted to a discharge. *Harris v. State Bd. of Agriculture*, 968 P.2d 148, 151 (Colo. App. 1998). In order to prove a case of constructive discharge, complainant “must present sufficient evidence establishing deliberate action on the part of an employer which makes or allows an employee’s working conditions to become so difficult or intolerable that the employee has no other choice but to resign.” *Wilson v. Board of County Com’rs of Adams County, Colo.*, 703 P.2d 1257, 1259 (Colo. 1985). The *Wilson* court further ruled: “The determination of whether the actions of an employer amount to a constructive discharge depends upon whether a reasonable person under the same or similar circumstances would view the new working conditions as intolerable, and not upon the subjective view of the individual employee.” *Id.* at 1259-60.

The present case was not about working conditions; no evidence was presented to demonstrate that complainant’s working conditions had become so intolerable as to force him to resign his position. He resigned only in lieu of the termination of his employment, not because of poor working conditions. Consequently, he

failed to establish a minimal *prima facie* case of constructive discharge, as required by *Wilson, supra*.

Nor was complainant forced or coerced to resign. He was given an opportunity to resign rather than be dismissed. A state classified employee does not have a statutory or constitutional right to resign in lieu of termination. In this case, the agency afforded complainant the opportunity to resign pursuant to its own policy, but it was not required to do so. Due process was not implicated, since “the pertinent constitutional and statutory protections and procedures are applicable only to involuntary employment terminations; they are not implicated by a voluntary resignation.” *Harris, supra* at 151. While complainant was indecisive and confused, he undeniably returned to the appointing authority’s office for the sole purpose of offering his resignation on the condition that the appointing authority retract the termination. If the appointing authority had refused to retract the termination, then complainant would have been able to exercise his right of appeal to the Board, a right of which he was advised in the letter terminating his employment. It is unreasonable, if not irrational, for an employee to think that he would have the same right of appeal if he submitted his “irrevocable” resignation in lieu of termination as he would if he were dismissed. Still, his state of mind is not the issue; the subjective view of the employee is not the basis for determination under these circumstances. *Wilson, supra* at 1260. See *Christie v. San Miguel County School Dist. R-2(J)*, 759 P.2d 779 (Colo. App. 1988).

Complainant’s contention that respondent is estopped from arguing its position due to an October 15, 2001 statement by respondent’s counsel that discipline was not actually imposed is without merit. Complainant obviously knew at all pertinent times that discipline had, in fact, been imposed. The April 20, 2001 Motion to Dismiss, in which respondent pointed out that complainant was dismissed and was given a letter of termination, is further evidence that complainant knew all along what the evidence would show. There was no surprise. There was no harm.

### III. Rule R-6-7

Respondent seeks a specific ruling from this administrative law judge that R-6-7 means what it says, that is, “. . . the employee forfeits the right to file any appeal.” For sure, the employee forfeits the right to file an appeal contesting the merits of the dismissal. The employee does not have a right to file an appeal if he changes his mind. More proof is required than the mere fact that the employee did not make an independent decision to resign, but resigned as an option to dismissal. If an employee could appeal in either event, R-6-7 would serve no purpose, since the benefit to the agency is that it does not have to go through the appeal process with the possibility that it might not prevail on appeal. And there lies the rub against denying an employee the right to file any appeal on any grounds in any circumstances. For example, in the event that an employee were able to proffer sufficient evidence that the agency somehow forced him to resign in order to preclude the employee from exercising his right to appeal the termination of his employment, the employee should have a chance to prove his case, thereby establishing his right to appeal the merits of the dismissal. In a like manner, if an employee could appeal the terms of a settlement agreement, there would be no incentive for the agency to settle the case. Yet, if he were able to proffer a factual scenario to show that he was forced to settle the case in order to prevent him from exercising his right to a hearing on the merits of the disciplinary action, he should have the opportunity to attempt to set aside the agreement and go to hearing on the disciplinary action. The employee’s right to appeal an alleged constructive discharge also should not be taken away.

In the present matter, there was insufficient evidence of either a constructive discharge or a forced or coerced resignation.

#### IV. Attorney Fees

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose, or the defense thereof, "was instituted frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record does not support any of those findings. Accordingly, this is not a proper case for a fee award.

#### CONCLUSIONS OF LAW

1. Complainant was not constructively discharged.
2. Complainant was not forced or coerced to resign pursuant to the state personnel rules.
3. Neither party is entitled to an award of attorney fees and costs.

#### ORDER

Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_ day  
of January, 2002, at  
Denver, Colorado.

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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. 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 SERVICE**

This is to certify that on the \_\_\_\_ day of January, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Barry D. Roseman  
Attorney at Law  
899 Logan Street, Suite 203  
Denver, CO 80203

And by courier pick-up, to:

John A. Lizza  
Assistant Attorney General  
Criminal Justice Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, CO 80203