

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001B085(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PAULA J. EVANS,

Complainant,

vs.

DEPARTMENT OF REVENUE,
MOTOR VEHICLE SERVICES,

Respondent.

This matter was heard on May 14 and July 16, 2001, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Carol M. Caesar, Assistant Attorney General. Complainant appeared and represented herself.

Complainant, carrying the burden to go forward with the evidence and the burden of proof, testified in her own behalf.

Respondent called the following witnesses: James H. Roach, Jr., Safety Inspector; Rebecca Sue Rae, Port Officer; Dave Fuggett, Program Safety Director; Danny Ryan Wells, District Supervisor; Linda Elliott-Traylor, Risk Management Specialist; Vern Eggert, Regional Supervisor; and Jerry L. Pierce, Chief of Port of Entry, Department of Revenue, Port of Entry Section.

Complainant's Exhibits B, J, K and L were stipulated into evidence. Exhibit H was admitted without objection. Exhibit M was admitted over objection. Exhibits C, E, N, O, P and Z were excluded.

Respondent's Exhibit's 1 through 8, 15, 18, 19, 20, 22, 24, 27, 30, 33, 35, 36, 37 and 38 were admitted without objection. Exhibits 11, 16 and 17 were admitted over objection.

MATTER APPEALED

Complainant appeals the administrative termination of her employment and the denial of her grievance of a corrective action. For the reasons set forth below, respondent's actions are affirmed.

ISSUES

1. Whether respondent's actions were arbitrary, capricious or contrary to rule or law;
2. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Respondent's motion to take the telephone testimony of certain witnesses was granted without objection.¹ An order sequestering the witnesses was entered, with the exceptions of complainant and respondent's advisory witness, Jerry Pierce, the appointing authority for this action.

FINDINGS OF FACT

The ALJ 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 witnesses ultimately testified in-person.

1. Complainant, Paula J. Evans, worked as a Port Officer for the Port of Entry section of the Department of Revenue (DOR), Motor Vehicle Services, from August 1986 until her administrative termination on February 2, 2001. As a port officer, she enforced the size and weight laws of Colorado for commercial vehicles. Her duties included weighing trucks and entering information into the computer and writing penalty assessments for violations. It was sometimes necessary to measure the length and height of vehicles. Her workstation was at the Monument port, 20 miles north of Colorado Springs. She lived in Monument.
2. In August 1999, Evans began experiencing pain and numbness in both hands. In September, she filed a worker's compensation claim and was diagnosed as having Carpal Tunnel Syndrome. (See Exh. 26.) Complainant would come to believe that her injury was tendonitis, but the worker's compensation diagnosis did not change,
3. For purposes of a worker's compensation claim, an employee must be treated at Concentra Medical Centers (Concentra) rather than by a personal physician. The agency relies on the medical information it receives from Concentra.
4. Complainant requested an ergonomic evaluation of her workstation, and one was conducted by Concentra on November 9, 1999. (Exh. B.) All recommendations and suggestions emanating from this evaluation were advisory only. The evaluator recommended that the computer keyboard be lowered and that complainant use a more suitable chair.
5. Linda Traylor, Risk Management Specialist for the agency, visited the Monument port and looked for ways to make it easier for complainant to perform her job duties. Traylor moved the Prepass monitor, which

needs to be seen by all officers on duty, closer to complainant's workstation so she would not have to turn around to look at it.

6. The countertop was cut to lower the keyboard. A new chair was ordered for complainant's use.
7. Complainant felt that these changes should have been made sooner than they were, and believes that this circumstance delayed her recovery.
8. Concentra placed a work restriction of ten-minute breaks every hour in order for complainant to stand up and stretch. Normally, port officers do not get regular breaks. Complainant's supervisor, Dan Wells, complied with this work restriction. Concentra did not recommend time off.
9. On August 15, 2000, complainant telephoned Port Officer Rebecca Rae at the Dumont port on a business matter. In the course of that conversation, complainant began complaining about her hands and that her new chair did not seem to help her. She said that her supervisor, Dan Wells, played Christian music all day long and that Wells was always on the phone talking to his wife, who was probably checking on him to make sure that he was not out molesting children. In addition, complainant said that Wells' adopted daughter was probably his because she looked so much like one of his other children.
10. This conversation resulted in Rae feeling very uncomfortable, especially at the allegation that Wells was a child molester. Jim Roach, a safety inspector who was at the Dumont port and overheard Rae on the telephone, noticed that Rae was clearly upset over what

she had heard. Upon his inquiry, Rae told him the things Evans had said about Wells. He agreed with Rae that the comments were inappropriate and suggested that she write an incident report.

11. Rae reported the conversation to her supervisor, Viki Skeers, who asked her to write a report, which she did. (Exh. 19.) Skeers, in turn, reported the incident to her supervisor, Jeff Anderson. (Exh. 18.) Anderson then informed Dave Fuggett, Regional Supervisor and delegated appointing authority for corrective and disciplinary actions.
12. After discussing the matter with Jerry Pierce, Director of Motor Carrier Services, Fuggett decided that the matter was serious enough to be investigated. He interviewed Rae, Wells, and Skeers, who confirmed that Rae was upset over the conversation.
13. Fuggett noticed a predisciplinary meeting with complainant. (Exh. 1.)
14. At the R-6-10 meeting, Evans was unable to convince Fuggett that the alleged statements had not been made. Fuggett later interviewed Jim Roach, who corroborated Rae's side of the conversation and the fact that it had bothered her. Fuggett found both Rae and Roach credible. He concluded that, on August 15, Evans made disparaging and untrue remarks about her supervisor.
15. On September 26, 2000, Fuggett issued a corrective action to complainant admonishing her to refrain from making derogatory remarks about her supervisor and transferring her to the port of entry in Limon, 90 miles from Monument, effective October 10, 2000, "for the betterment of the Division." (Exh. 2.)

16. Fuggett thought that the transfer was necessary because complainant's statements had created an atmosphere of alienation between her and her supervisor that jeopardized Wells' ability to objectively supervise and evaluate her. (Exh. 2.) He chose Limon because it was the closest port to Monument. He knew she had carpal tunnel but believed that this could be accommodated at any port. The agency had no information to the effect that complainant's ability to drive was impaired.
17. Evans was informed on her date-of-hire that she could be transferred to another port whenever it was determined to be "for the betterment of the Division." (Exh. 6.)
18. On October 6, 2000, Evans grieved the corrective action, denying the alleged statements and asking that the corrective action, including her transfer to Limon, be dismissed. She did not say anything about not being able to work in Limon. (Exh. 3.)
19. A final-step grievance meeting between complainant and Jerry Pierce was held on October 12. Pierce upheld the corrective action on October 17, changing the effective date of complainant's transfer to Limon from October 10 to November 1, 2000. (Exh. 4.)
20. Having reached Maximum Medical Improvement (MMI) in March 2000 according to the Concentra physicians, and disagreeing with their diagnosis, complainant began seeing her personal physician and undergoing massage therapy. She was granted annual leave, sick leave, and leave under the Family and Medical Leave Act. She exhausted all leave on December 20, 2000, and was so advised in writing. (Exh. 9.) (See Exhs. H, J, L, 26, 27, 33, 34, 35, 36.)

21. During this time, Evans should have been seeing Concentra physicians, the agency's designated providers, rather than her personal physician because her treatment was for a work-related injury.
22. Complainant did not report to work from October 31, 2000, forward, due to her medical condition. Beginning December 20, she was in LWOP status.
23. Complainant's attorneys had requested an Independent Medical Evaluation (IME), which is dated August 3, 2000. (Exh. H). It is unclear when the IME report was received by the agency. The report indicated that Evans had said that she could tolerate driving for 5-10 minutes. In November, Linda Traylor, as Risk Management Specialist, sent the IME report to Concentra asking if Evans could tolerate driving for more than 5-10 minutes. A Concentra doctor responded in a couple of days that there were no driving restrictions, and confirmed it in writing in February 2001. (Exh. 37.)
24. By letter dated January 8, 2001, Pierce advised complainant that she must do two things before January 16, 2001: a) submit a State of Colorado Certification Form signed by a Concentra physician justifying her continued absence; b) report to work at the Limon Port of Entry, where any necessary medical accommodations would be made. (Exh. 8.)
25. Complainant responded to Pierce's letter via a January 19, 2001 writing in which she stated that her doctor felt that her time off was called for, possibly until her therapy was completed, and that she had difficulty opening jars, holding items in her hands, and driving for any length of time without substantial breaks. (Exh. 24.)

26. By letter dated February 2, 2001, Pierce administratively terminated complainant's employment pursuant to Procedure P-5-10, which provides that an individual who has exhausted all sick leave and annual leave and is unable to return to work may be administratively discharged. The letter informed Evans that she may be eligible for reinstatement to a state position upon her recovery and the submission of a medical release to return to work. (Exh. 7.)
27. Complainant did not raise an issue of disability discrimination, and has not exercised her reinstatement rights.
28. In her written appeal to the State Personnel Board, complainant stated that she was scheduled for a medical re-evaluation on March 6 and hoped to know if she would have a chance to return to work.

DISCUSSION

In an appeal of an administrative action, in this case termination of employment for exhaustion of leave and the denial of a grievance of a corrective action, 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) (explaining role of state personnel system in employee discipline actions). 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. In determining whether the agency's decision was arbitrary or capricious, it must be determined whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion; if not, the agency did not

abuse its discretion. *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P. 2d 654 (Colo. App. 1999).

If there is conflicting testimony, the credibility of witnesses, as well as the weight to be given their testimony, is within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). See *Barrett v. University of Colorado*, 851 P. 2d 258, 261 (Colo. App. 1993). It is for the ALJ to resolve conflicts in the testimony. See *Mellow Yellow Taxi Co. v. Public Utilities Commission*, 644 P.2d 18 (Colo. 1982). It is for the ALJ, as the finder of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Complainant contends that she could not report to Limon because she was incapable of driving 90 miles to get there, or if she moved there she would not be able to drive 90 miles to Colorado Springs for therapy. She feels that she could probably handle the computer but probably could not write tickets. She blames the agency for her repetitive motion injury and faults the agency for her injury not getting better more quickly. With respect to the corrective action, she argues that Director Pierce acted arbitrarily and capriciously when he gave weight to the statements of Rae and Roach over her own.

Respondent first argues that the power to transfer an employee is within the discretion of the appointing authority, there was no medical documentation that complainant should not be transferred, and the corrective action was appropriate. Respondent then argues that, pursuant to Procedure P-5-6, the appointing authority could not have accepted complainant back at work without a completed State of Colorado Medical Certificate or, pursuant to Procedure P-5-9 a fitness-to-return certification, which he requested but did not receive. Accordingly, the appointing authority acted properly when complainant had exhausted all leave

and could not return to work and he administratively discharged her under Procedure P-5-10.

Director's Procedure P-5-10, 4 Code Colo. Reg. 801, provides in full:

If an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication. The notice must inform the employee of appeal rights and the need to contact PERA on eligibility for retirement. No employee may be administratively discharged if FML and/or short-term disability leave (includes the 30-day waiting period) apply and/or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship. When an employee has been terminated under this procedure and subsequently recovers, a certified employee has reinstatement privileges.

The evidence sustains a conclusion that complainant at least believed that she could not return to work because of her medical condition. Her doctor released her from work, period, not just from working at Limon. There is no credible documentation that would lead to a finding that an inability to drive prevented her from reporting to the Limon port. She did not grieve the corrective action on the ground that she could not drive, but rather on the basis of Fuggett believing Rae instead of her. She had not reported to work for three months and had exhausted all of her accrued leave. Under these circumstances, the appointing authority appropriately exercised his discretion under P-5-10.

The personnel procedure under which she was discharged affords complainant reinstatement privileges upon recovery, but she has not sought reinstatement that way. In order to gain reinstatement through this appeal, she must prove by preponderant evidence that respondent's action was arbitrary, capricious or contrary to rule or law, but she has not done so.

The corrective action was issued only after due investigation and consideration. It was a thoughtful decision. Transfers are within the discretion of the appointing authority, and the employee is deemed to have resigned if she refuses it. P-4-5, 4 Code Colo. Reg. 801.

An abuse of discretion by an administrative agency “means that the decision under review is not reasonably supported by any competent evidence in the record.” *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1999). There was no agency abuse of discretion here.

Respondent’s request for an award of attorney fees and costs is denied pursuant to C.R.S. §24-50-125.5 and Board Rule R-8-38, which require certain findings that cannot be made in this case. To read C.R.S. §24-50-125.5 as a prevailing-party statute would unduly inhibit state employees from exercising a constitutional right. *Sena v. Department of Institutions*, Case No. 93B029, Order of the State Personnel Board, May 20, 1994. Additionally, C.R.S. §13-17-102(6) provides: “No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious;....”

CONCLUSIONS OF LAW

1. Respondent’s actions were not arbitrary, capricious or contrary to rule or law;
2. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's actions are affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day
of August, 2001, 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. 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 August, 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:

Paula J. Evans
P.O. Box 87
Monument, CO 80132

And through interagency mail:

Carol M. Caesar
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
