

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EARL HOCKETT,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Administrative Law Judge Robert W. Thompson, Jr. heard this matter on September 17-18, 2002. Danielle Moore, Assistant Attorney General, represented respondent. Complainant represented himself.

MATTER APPEALED

Complainant appeals his administrative termination of employment. For the reasons set forth below, the administrative action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether complainant was discriminated against on the basis of disability;
3. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

On September 9, 2002, Respondent filed a motion for summary judgment. Complainant filed a response on September 16, and the motion was argued at hearing on September 17. Respondent's motion was denied on the grounds that there were genuine issues of material fact, and respondent was not entitled to judgment as a matter of law.

STIPULATIONS OF FACT

1. Mr. Hockett worked as a Transportation Maintenance II for CDOT.
2. Mr. Hockett was administratively discharged for exhaustion of leave on February 14, 2002.
3. Dr. Roberts is Mr. Hockett's family physician.
4. Dr. Burnbaum is a neurologist.
5. CDOT went through the ADA process with Mr. Hockett.

FINDINGS OF FACT

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

1. In 1995, complainant Earl K. Hockett was promoted from the position of Transportation Maintenance I (TM I) to Transportation Maintenance II (TM II) at the Highway Maintenance Patrol at Maybell for respondent Colorado Department of Transportation (CDOT). As a TM II, Hockett was a lead worker and supervised a crew of four, inclusive of himself and three TM Is.

2. The Maybell Patrol maintains Highway 40 and Highway 318 in Northwestern Colorado, covering a total of 85 miles of two-lane highway. The lead worker oversees the operation, but he must also perform all of the duties of a TM I. TM duties include mostly driving trucks and operating heavy equipment. It is classified as a safety-sensitive position.
3. The members of the patrol work together as a group to accomplish such tasks as plowing, grading, delineation, and flagging (stopping traffic). More than half the time is spent plowing snow. Safety is of utmost importance.
4. In November 1995, Hockett was driving a CDOT one-ton truck with Dan Tibbs as a passenger when he momentarily let go of the steering wheel and slumped against the door with a blank stare. When Tibbs tried talking to him, Hockett mumbled, "Leave me alone, leave me alone, I'll be all right." Tibbs asked Hockett to stop the truck and let him drive, but Hockett refused. Tibbs had witnessed three similar episodes in the previous ten months, in which Hockett spoke in a high-pitched voice and sometimes lifted his arms over his head. In a To-Whom-It-May-Concern letter sent to the safety officer in Craig, Tibbs wrote: "I want to go on record that I object to being forced to work under these unsafe conditions."
5. In 1997, Wayne Quick, Senior Highway Foreman, asked Tibbs if he had seen any more of these types of episodes, and Tibbs answered, "Yes, and they were serious." All told, Tibbs saw Hockett undergo about a dozen such episodes.
6. In February 1996, at a CDOT safety meeting at the city hall in Craig, Hockett had an episode in which he raised his hands over his head,

wobbled backwards, and sat on the ground leaning against a pick-up truck, mumbling, "Leave me alone, leave me alone, I'm fine." Four maintenance workers who witnessed this event reported it in writing.

7. In spring/early summer 1998, Ed Beason, TM I, was having coffee in the patrol office when Hockett said in a high-pitched voice, "Please, please, please," and knelt down on one knee. Hockett did not respond when Beason asked if he was okay. When Hockett recovered after several seconds, Beason again asked him if he was okay, and Hockett answered, "No, I have these all the time." Hockett then asked Beason not to tell anyone what he had seen.
8. Another time Beason and Hockett were going to Rifle in a one-ton truck, Beason driving. Hockett suddenly slumped down in his seat on the passenger's side. After perhaps 30 seconds, Hockett said he was fine.
9. Beason was having lunch in the patrol office once when Hockett began staring at him and saying, "Please, please, please." Hockett could not remember this happening. Beason became worried about his safety on the job.
10. Beason drove Hockett around every day for six weeks and witnessed five or six such episodes, including one where Hockett slumped down in his seat and the paperwork he was holding in his lap fell to the floor.
11. Around December 2000, Dan Boone was talking to Hockett in the patrol office when Hockett, who was his supervisor, started speaking in a high-pitched voice and grabbed his abdomen. Hockett did not respond to Boone's inquiry of whether he was all right. Roughly thirty

seconds later, Hockett recovered and asked Boone not to tell anyone what had happened.

12. Christy Beckerman is Office Manager for the Craig Maintenance Patrol. In mid-July 2000, Hockett was in her office talking to her when he started speaking in a high-pitched voice and pleaded, "Please, please, please." He knelt down on one knee, and then recovered. The incident lasted five to eight seconds. Shocked at what she had observed, Beckerman telephoned Les Anderson to relate the incident as soon as Hockett left her office.
13. On September 6, 2000, Wayne Quick wrote a memo to his superintendent, Bernie Lay, in which he described three similar episodes he had observed Hockett experiencing, the first occurring in 1998 when Hockett knelt down, wrapped his arms around his stomach, and said in a loud, high-pitched voice, "Wayne, please help me ... I'll be all right, I'll be all right, just leave me alone." Another episode happened in early 2000 when Hockett grabbed his stomach and shouted, "Please, please, please help me, Wayne ... Just leave me alone, I'll be all right." Quick reported in his memo that, shortly after Hockett transferred to Maybell in 1995, members of Hockett's patrol and neighboring patrols began noticing these episodes and were concerned that if it happened while Hockett was driving or operating heavy equipment someone could get killed or hurt.
14. On September 8, 2000, Les Anderson wrote a memo to Bernie Lay in which he stated that he had talked to several TMs in the Maybell area who had observed Hockett experiencing these episodes. The episodes were commonly described as lasting for a few seconds and Hockett grabbing his stomach, bending over and saying in a high-

pitched voice, “Help me, help me...”, and then acting like nothing had happened.

15. In July 2000, Owen Leonard, the appointing authority and CDOT Region 3 Regional Director, became aware of the issue of whether Hockett could perform his duties in view of his episodic experiences, based on reports from Craig Maintenance Superintendent Bernard Lay. He interviewed individual members of the work crew. Hockett was placed on modified duty. Thus began an eighteen-month effort to determine whether Hockett could perform the essential functions of his position.
16. Gregory Roberts, M.D., of Craig, has been Hockett’s primary physician since 1997. He has seen Hockett many times regarding the episodes. His file indicates that Hockett has been evaluated by multiple doctors, including Craig Stagg, an occupational medical specialist in Grand Junction; David Spencer, a psychologist in Craig; William Austin, a psychologist in Steamboat Springs; Elaine Mitchell, a psychiatrist in Denver; Barbara Phillips of the CNI Epilepsy Center in Denver; Elias Dickerman of Denver; and Mitchell Burnbaum, a neurologist in Grand Junction.
17. Dr. Roberts referred Hockett to Dr. Stagg because Stagg is an occupational medical specialist. On December 7, 2001, Stagg removed Hockett from the operation of heavy equipment or driving of commercial vehicles. Roberts deferred to Dr. Stagg regarding whether Hockett was able to perform his regular job duties.
18. In June 2001, Dr. Stagg referred Hockett to Dr. Burnbaum, a neurologist, for evaluation, findings, and recommendations. Payment was authorized by CDOT. Dr. Burnbaum became the doctor to be

relied upon by CDOT with respect to Hockett's ability to perform the essential functions of his position, namely operating heavy equipment and driving trucks.

19. Operating heavy equipment and driving trucks are essential functions of Hockett's position.
20. Hockett was medically removed from the performance of his duties pending medical approval to return to the job. He was allowed to return to work at various times but would be removed again upon the happening of an episode. A lot of time was consumed referring Hockett to medical appointments, such as for an EEG evaluation, and waiting on reports from doctors.
21. Hockett would eventually exhaust his sick leave, annual leave, short-term disability leave, and leave under the Family and Medical Leave Act (FMLA).
22. Dr. Burnbaum conducted his first neurological consultation with Hockett on June 13, 2001. At that time, Hockett had not been at work since January 2001, having been removed from his job duties by Dr. Skagg.
23. Dr. Burnbaum diagnosed Hockett with "complex partial seizures," accompanied by some memory loss.
24. Patrick Gomez, CDOT Region III EEO Officer and ADA Coordinator, beginning in July 2000, monitored Hockett's situation closely. Gomez followed through on agency procedures, specifically Procedural Directive 86.1, in determining whether Hockett could perform the essential functions of his position and in full compliance with the

Americans with Disabilities Act (ADA). Through the interactive process, he determined that there were no reasonable accommodations that could be made so that Hockett could perform the essential functions of his position while experiencing periodic episodes of the kind he had been having. There were no transfer opportunities available in Craig or Maybell, which were the only two locations in which Hockett was willing to work.

25. In December 2001, Hockett was medically released by Dr. Burnbaum to work, with no restrictions, on the basis of not having had an episode for a period of five months.
26. Hockett's position had been held open. The Maybell Patrol had been operating as a three-man, rather than a four-man patrol.
27. Hockett returned to work in early January 2002.
28. On January 10, 2002, Dennis Sanchez, a maintenance foreman who had witnessed several of Hockett's episodes, and Hockett went to Craig to attend a computer class. Afterwards they went to Les Anderson's office, where Hockett had an episode in which he suddenly clutched his mid-section and yelled in a high-pitched voice, "My God, My God." He was incapacitated for approximately one and one-half minutes. He did not appear to be aware of his actions, since he did not respond to Sanchez talking to him, but rather stared at the wall. When he recovered, Hockett's only memory was that he "belched." He did not understand why everybody was making such a big deal over a "belch." Superintendent Lay, who was also present, telephoned Owen Leonard. Because of safety issues, and Hockett's ongoing history of these episodes, Leonard instructed Lay to release Hockett from duty and send him back to a doctor.

29. The next day, Sanchez and Anderson drove down to Grand Junction to talk to Leonard about Hockett's latest episode. They were very concerned about Hockett's safety as well as their own while on the job.
30. Because Hockett was removed from all safety-sensitive functions, including driving, flagging in traffic, and the use of all equipment, he was placed on paid administrative leave for the rest of the week.
31. On Monday, January 14, Hockett was placed on leave without pay (LWOP) pending certification from Dr. Burnbaum of his fitness to return to duty.
32. Dr. Burnbaum re-evaluated Hockett on February 11, 2002. He wrote in his report that he continued to believe that the patient suffered from partial complex seizures with a loss of awareness. He precluded Hockett from operating heavy equipment or driving a motor vehicle as part of his job. Burnbaum considered Hockett "incapacitated."
33. Leonard relied on the opinion of Dr. Burnbaum rather than that of Dr. Roberts because Roberts had referred the patient to Skagg, and Skagg in turn referred the patient to Burnbaum. Roberts had specifically deferred the decision of whether Hockett was fit to return to duty to Skagg and Burnbaum.
34. On February 14, 2002, contemplating administrative termination of Hockett's employment because Hockett had exhausted all of his leave and could not work, Leonard conducted a pre-termination conference with Hockett on February 14, 2002. Also present were EEO Representative Patrick Gomez and Maintenance Superintendent Bernard Lay.

35. On February 15, 2002, the appointing authority administratively discharged Earl Hockett pursuant to State Personnel Procedure P-5-10, which provides:

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 be reasonably accommodated without undue hardship. When an employee has been terminated under this procedure and subsequently recovers, a certified employee has reinstatement privileges.

DISCUSSION

I. Arbitrary or Capricious

In an appeal of an administrative action, in this case termination of employment for exhaustion of leave and the inability to return to work, 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. § 24-50-103(6), C.R.S.; *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).

Complainant argues that he had received good performance evaluations, and that it has not been positively determined that he suffers from a seizure disorder. He contends that, if this was a proper termination, his discharge should be called

a medical termination instead of an administrative termination, without explaining a difference in effect.

Complainant's job performance is not at issue. His job was not terminated for disciplinary reasons. He was administratively discharged for his exhaustion of leave and his inability to return to work. The agency held his job open for a year-and-a-half while he underwent numerous medical evaluations. The level of his job performance was never questioned and is irrelevant when considering whether he could physically perform his job.

After Hockett was returned to duty by Dr. Burnbaum and experienced another episode within a week, Burnbaum determined once again that Hockett should not operate heavy equipment or perform other safety-sensitive functions in the course of his employment, for the sake of his safety as well as the safety of others. But Hockett was not discharged because of Burnbaum's diagnosis of partial complex seizures. He was administratively discharged as a result of a long history of these episodes and their continuing nature. The appointing authority was not required to produce absolute proof that a particular diagnosis was the correct one in order to rely on the opinion of the neurologist who had been agreed upon by other doctors to determine Hockett's ability to perform his job duties. The appointing authority's reliance on Burnbaum's diagnosis and report was reasonable.

Complainant does not point to any area in which respondent's action was arbitrary, capricious or contrary to rule or law. The appointing authority complied fully with Procedure P-5-10, 4 CCR 801.

There was no agency abuse of discretion. 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). Here, there is substantial evidence showing that the

agency considered all the pertinent medical documentation as well as the opinion of other transportation maintenance employees regarding Hockett's ability to safely perform his duties. There was unanimous agreement that he could not.

There is no basis for granting complainant's request that his discharge be termed a medical rather than administrative termination. Pursuant to P-5-10, "the employee may be administratively discharged." Procedure P-5-10 forms the foundation for the termination, providing for an "administrative," not "medical," discharge.

II. Discrimination

The employee carries the burden to prove intentional discrimination by a preponderance of the evidence. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 400 (Colo. 1997), citing *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Although Hockett raised the issue of disability discrimination in his prehearing statement, he presented no evidence to that effect. He made no argument or allegation that he had been discriminated against in any way on the basis of disability. He stipulated that the agency went through the ADA process, which requires a determination that there were no reasonable accommodations for him. He presented no credible evidence to show that similarly situated employees had been treated more favorably than he. Under these circumstances, he failed to meet his burden. On the other hand, respondent offered substantial evidence establishing that it complied with the requirements of the ADA, if not the Colorado Anti-Discrimination Act, C.R.S. § 24-34-301 *et seq.*

III. 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 was instituted or defended "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. See Rule R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

1. Respondent’s action was not arbitrary, capricious or contrary to rule or law.
2. Complainant was not discriminated against on the basis of disability.
3. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent’s action is affirmed. Complainant’s appeal is dismissed with prejudice.

DATED this ___ day
of October, 2002, 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 October, 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:

Earl Hockett
P.O. Box 72
Maybell, CO 81640

And through the interagency mail to:

Danielle Moore
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
