

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**BRANDY ROGERS,**

Complainant,

vs.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,**

Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on April 29 and 30, 2003, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. The record remained open until May 16, 2003 to allow the parties to submit trial briefs and to resolve issues as to authenticity of exhibits. Thomas A. Bulger, Silvern Law Offices, P.C., represented Complainant Brandy Rogers ("Complainant" or "Rogers"). Assistant Attorney General John Lizza represented Respondent Department of Public Safety, Colorado State Patrol ("Respondent" or "CSP" or "the Patrol").

**MATTER APPEALED**

Complainant appeals her disciplinary termination by Respondent and seeks reinstatement, back pay, and attorney fees and costs.

For the reasons set forth below, Respondent's action is **rescinded**.

**ISSUES**

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether Complainant is entitled to an award of attorney fees and costs.

**FINDINGS OF FACT**

### **Complainant's Dispatcher Job**

1. Complainant worked as a Communications Technician in the Denver Communications Center for CSP from July 2000 until her termination on January 6, 2003.
2. Complainant's job is essentially that of dispatcher. Dispatchers field a high volume of calls over radio and telephone for police, ambulance, and fire emergency response teams. They track all information received on computer terminals as they receive it.
3. Dispatchers also perform criminal background investigations for officers on computerized crime databases, and report back on information obtained.
4. The dispatcher position is a high stress one, requiring mental alertness, great attention to detail, quick thinking, and multi-tasking. In some situations, lives are on the line.
5. Dispatchers spend at least 75% of their time performing data entry tasks on the computer.
6. Complainant worked the 2:30 p.m. to 10:30 p.m. shift.
7. Complainant has chronic asthma, which is serious enough to necessitate that she have a nebulizer machine in her home. She has been hospitalized several times for asthma attacks, and has used a significant amount of sick leave over the years at CSP, due to her asthma.
8. Complainant's performance in the dispatcher position was generally excellent.

### **Secondary Employment**

9. On June 14, 2002, Complainant submitted a written request to her appointing authority, Communications Director Kathleen Jameson, for permission to engage in secondary employment at 24 Hour Fitness. In her request, she stated that she was in the hiring process there, and was aware of the new CSP policy limiting such secondary employment to twenty hours per week.
10. At the time she drafted her request, Complainant discussed with one of her line supervisors how and when she would learn if her request had been granted. She was informed that if, after a period of time, she did not hear back, it was presumably approved. Complainant relied on this information and was unaware until September or October 2002 that in fact, under CSP's secondary employment regulation, approval had to be in writing. This finding is based on the following: a) Rogers testified credibly about this conversation at hearing; b) none of Rogers' supervisors testified in rebuttal; c) when Rogers commenced secondary employment in August, she immediately disclosed it to her supervisors, thereby demonstrating that she was open and honest about it throughout the process; and d) Jameson's hearsay testimony concerning her conversations with supervisors was insufficient to rebut Rogers' testimony.

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11. Complainant waited for word back on her request, but heard nothing. Her request was never forwarded up the chain of command.
12. On August 17, 2002, after waiting two months for a response to her request, Complainant commenced employment at 24 Hour Fitness, working in the child care facility there.
13. Rogers immediately informed her supervisors about her second job. They expressed no objection. She worked a morning shift, never more than four hours in duration, and never past 12:00 noon. Therefore, her fitness center shift did not overlap with her CSP shift from 2:30 p.m. to 10:30 p.m.
14. In September or October 2002, Complainant learned that the Patrol policy regarding secondary employment required that approval be in writing. She spoke to some coworkers about it at the time and was informed that they had received permission verbally. Complainant was satisfied that she was in the clear.

### **Complainant's Serious Injury in mid-November 2002**

15. On November 18, 2002, Complainant worked a shift at 24 Hour Fitness, then reported for duty at CSP at 2:30 p.m. During her shift, Complainant began to experience severe muscle spasms in her back and neck. They quickly became so severe that her entire left side became numb and she was unable to function. She had to leave the workplace and saw a doctor that evening.
16. Complainant's condition quickly worsened. The muscle spasms become so severe that four separate muscle groups became locked permanently into a spasm position. This in turn caused other, related muscle groups to spasm. This condition led to her suffering from a number of pinched nerves, which were extremely painful.
17. At home, Rogers was barely able to function, and could not cook. She spent most of the time on the couch. She saw a chiropractor two to three times per week, and regularly saw her treating physician and numerous specialists (neck, back, spine).
18. Rogers was on heavy pain medication, often rendering her dazed and unable to recall conversations after they occurred.
19. From November 18, 2002 through her termination, Rogers' medical condition precluded her from working in her dispatcher position at CSP.
20. From November 18 through December 5, 2002, she utilized the remainder of her paid sick leave at the Patrol.
21. Rogers' physician wrote a series of notes indicating she was unable to work due to her current spinal condition on November 21 through 30, 2002. He further noted, "if can work 1/2

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days 12/1 and 12/2 can do that." She was unable to do so. On December 3, he wrote a note indicating she "may return to work on trial basis. Start with four hours per day. If tolerating well, may increase to full duties." She was still unable to work at CSP.

### **Family Medical Leave**

22. In December 5, 2002, Rogers was placed on Family Medical Leave ("FML") based on her serious health condition. The doctor indicated that she would "need to be evaluated on a day-to-day basis" and that the interval between treatments was one day.
23. During the evening of December 5, 2002, one of Rogers' supervisors, Kaylynn Duncan, came to her house to obtain her signature on the FMLA paperwork. Rogers was in extremely poor condition that evening. Duncan reviewed the paperwork with Rogers, but Rogers did not pay close attention to all Duncan said and did not read the paperwork during the meeting.
24. Duncan took the paperwork back to CSP in order to make copies prior to providing Rogers with a copy. Duncan and Rogers agreed that Duncan would leave a copy in Rogers' mailbox at CSP. Duncan did so.
25. On December 8, 2002, CSP placed Rogers on leave without pay indefinitely.

### **December 9, 2002 Fitness to Return Certification Form with Restrictions**

26. Rogers' physical condition was unpredictable and changed daily. In early and mid-December, her treating physicians repeatedly changed her medication in an attempt to reduce her pain and stabilize her condition, with mixed results. They increased her pain medication a number of times.
27. Rogers was very interested in attempting to return to her Patrol position. She had numerous discussions with her treating physician, in which she requested a release to return to work for four-hour shifts. These discussions appear to have been based more on wishful thinking than on a realistic self-assessment of her actual physical condition. More often than not, her condition was such that she was simply unable to go to work.
28. On December 9, 2002, Rogers' treating physician submitted a Fitness To Return Certification form, allowing her to work four-hour shifts, from December 11 through 21, 2002. However, it contained the following restrictions: no sitting for over two hours each day; no reaching away from the body greater than 12 inches with the right or left arm; no grasping objects with the left hand; no fine manipulation with the left hand; no operating machinery or equipment; no typing, keyboarding, or entering data for more than 1 hour each day; and no use of a CRT or computer monitor for more than one hour each day.
29. Under these restrictions, Rogers could only have worked in the dispatcher position for one-hour shifts each day. The only reduced shift period available to Rogers at CSP was a four-hour

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shift. Therefore, the December 9 work restrictions completely precluded Rogers from performing her dispatcher job at CSP.

30. During this period, Rogers called into work every day at 12:30 p.m. to discuss her physical condition with her immediate supervisors. On nearly every day, she was unable to come in. Rogers had no belief that the December 9 Fitness to Return Certification form mandated that she report for work at CSP if physically unable to do so. None of Rogers' supervisors informed her that the form obligated her to do so.
31. On December 13, 2002, after having been unable to sleep for two entire days due to pain and discomfort, Rogers was finally sleeping. She slept through her customary 12:30 p.m. call-in time. At approximately 6:30 p.m., her line supervisor called her and woke her up. Rogers apologized and told her supervisor about not having slept, and about needing to sleep. Her supervisor said that was fine.
32. On December 14, Rogers reported for duty at CSP. She was unable to complete a four-hour shift because of her medical condition. While at CSP, she picked up the FMLA paperwork she had filled out on December 5. She did not read it at that time.

### **Work at 24 Hour Fitness**

33. After incurring her injury on November 18, Rogers discussed her situation with her supervisor at 24 Hour Fitness. She entered into two agreements: 1. Rogers was allowed to refrain from any physical exertion while there, by sitting at the check-in counter in the day care center; and 2. Rogers was permitted to come in and try to work for a short period, and if unable to complete a shift, to leave early. (Rogers' presence at the day care facility enabled the fitness center to meet day care licensing requirements for staffing.)
34. During this period, Rogers worked at the fitness center on November 23 and 25 for less than two hours, November 29 for four hours and fifteen minutes, on December 1 for three hours and fifteen minutes, on December 5 for four hours, and on December 8 and 9 for three hours.
35. Rogers' work at the fitness center after she incurred her serious injury in mid-November 2002 did not interfere with her work at CSP.

### **Jameson's Secret Investigation into Rogers' Secondary Employment**

36. At some point in early December 2002, Jameson became concerned about Rogers working at 24 Hour Fitness but not working at CSP. Jameson believed that if Rogers could work one job, she should be able to work the other at CSP too.
37. Jameson never read the December 9, 2002 Fitness to Return Certification with the work restrictions precluding Rogers from working in her dispatcher position. Further, there is no evidence Jameson consulted with any of Rogers' supervisors about her physical condition and its

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effect on her ability to work.

38. Jameson knew that Rogers had been placed on FML leave on December 5, 2002.
39. On December 10, 2002, Jameson drafted a letter to 24 Hour Fitness' Operations Manager, for Lt. Colonel Wolfe's signature. The letter requested information concerning the types of duties Rogers performed there, and her work schedule from July 1 through December 10, 2002.
40. Jameson never informed Rogers about her concerns about her working at 24 Hour Fitness during a period when she was not working at CSP. Further, Jameson never informed Rogers that she was contacting 24 Hour Fitness.
41. After the December 10 letter was sent, Jameson contacted numerous individuals at 24 Hour Fitness, ultimately speaking with the Human Resources Director. On legal advice, 24 Hour Fitness refused to release any documents to Jameson, but verbally disclosed the information. Jameson then followed up with an email to the Human Resources Director.
42. Jameson also drafted a memorandum for Lieutenant Colonel Wolfe's signature revoking Rogers' secondary employment approval at 24-Hour Fitness, on December 9, 2002. Rogers immediately ceased working there. The memo stated in part, "When you are released from your doctor to return to full duty in the Denver Communication Center, you may resubmit a request for consideration."
43. Jameson learned that in addition to working the days listed above after incurring her mid-November injury, Rogers had also worked the following shifts at the fitness center prior to her serious injury:
  - A. On August 17, 2002, Rogers worked for three hours and 15 minutes at 24 Hour Fitness, then called in sick to CSP due to an upper respiratory illness;
  - B. On August 18, 2002, Complainant worked at 24 Hour Fitness for 15 minutes, then went home ill. She called in sick again to CSP;
  - C. Rogers visited her doctor on August 19 and obtained a Medical Certification Form diagnosing her condition as "upper respiratory infection with myalgias and vertigo."
  - D. The doctor's note excused Rogers from work through August 23, 2002;
  - E. On August 22, 2002, Complainant worked for three hours and forty-five minutes at 24 Hour Fitness, and called in sick to the Patrol based on her upper respiratory illness, for which she had the doctor's note excusing her from work;
  - F. On August 23, 2002, Complainant worked at 24 Hour Fitness for two and a half hours, then called in sick to the Patrol for the same upper respiratory illness for

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which she had the doctor's note;

- G. On October 3, 2002, Complainant worked for three and a half hours in the morning at 24 Hour Fitness, but had an asthma attack, visited the doctor that day, and called in sick at the Patrol. Her doctor gave her a note excusing her from work;
- H. On November 14, 2002, Rogers worked a four-hour shift in the morning at 24 Hour Fitness, and later that day suffered an asthma attack. She called the Patrol indicating she would be late. Then, she called again and indicated she would not be able to come in. She submitted a doctor's note for this absence.

#### **December 18, 2002 Medical Certification Form**

- 44. On December 18, 2002, Rogers' physician submitted a Medical Certification Form indicating that the "trial back to work failed" and that the duration of her absence was unknown. He stated she had been compliant with her treatment recommendations, was unable to perform her job duties, and requested that she be excused from work until improved. He estimated the probable duration of her condition to be two-to-three months.

#### **December 23, 2002 Fitness to Return Certification**

- 45. On December 23, 2002, Rogers' physician submitted another Fitness to Return Certification form, allowing her to work four-hour shifts. It contained a number of restrictions: no sitting for more than 4 hours; no typing, keyboarding, or entering data for more than 4 hours each day; no use of a CRT or computer monitor for more than four hours each day. It was possible for Rogers to work under these restrictions.
- 46. There is no evidence in the record concerning Rogers' work schedule after December 23, 2002.

#### **Notice of R-6-10 Pre-disciplinary Meeting**

- 47. On December 30, 2002, Jameson sent a memo to Rogers concerning an impending R-6-10 pre-disciplinary meeting. The memo stated in part, "This [meeting] is in reference to your alleged violations of Operations Manual General Orders 3, 6, 7, related to calling in sick and working at 24 Hour Fitness, failing to call in sick, failing to check in as directed in your FMLA paperwork, and your conversation with Communication Supervisor Duncan in reference to my conversation with personnel at 24 Hour Fitness. Please bring a copy of your approval to work secondary employment to the meeting."
- 48. Rogers was shocked to receive this letter.

#### **R-6-10 Pre-Disciplinary Meeting**

49. On January 2, 2003, Jameson, Rogers, and Scott Liska, a Trooper for the Patrol and Rogers' boyfriend, attended the pre-disciplinary meeting. Rogers felt extremely ill during the meeting, and at the end of it had an asthma attack necessitating that she be taken to the hospital in an ambulance.
50. Jameson asked Rogers about whether she had received written approval for her request to engage in secondary employment. Rogers responded that she did not have anything in writing. She informed Jameson that when she wrote the request, one of her immediate supervisors, probably Verlaine Harris, had informed her that she did not know if they would get a memo back or not, and that if they heard nothing rejecting the request, it was probably alright.
51. Jameson next asked Rogers why, after her doctor had released her to return to work on December 3 for four hours a day, she had not returned to work. Rogers explained that her spasms had not gone away as they were projected to, and that her condition actually worsened.
52. Jameson next stated that Rogers had received FMLA paperwork on December 5 that instructed her to call in every Monday by noon. Complainant responded, "And that's I guess where I have a question. . . I'm not sure if you know more there or not. I never received - this says that I should have received a copy of written paperwork stating those things. I never received that. I don't have anything that says that I was supposed to call in every Monday by noon. I don't have anything that says I'm supposed to call in every other day or every day or . . . ."
53. Jameson then showed Rogers the papers she had signed on December 5, copies of which she had picked up at CSP on December 14. Rogers was then reminded that these were the documents she had picked up on December 14. She informed Jameson that she had never read them and therefore should not have signed them. Rogers did not falsely state to Jameson at the pre-disciplinary meeting that she did not see the FMLA form or that Supervisor Duncan had failed to review the form with her.
54. Rogers had not read the paperwork on December 5 or on December 14 when she picked it up at work. Rogers had, however, talked to her immediate supervisors on a daily basis at 12:30 p.m., from the period of her injury through the pre-disciplinary meeting. Her supervisors had never informed her that she was in breach of an FMLA call-in requirement.
55. Rogers informed Jameson of her daily contact with her immediate supervisors at CSP on two separate occasions during the R-6-10 meeting.
56. Jameson next asked Rogers about the December 9 fitness to return certification form, for four hours a day starting on December 11. Jameson pointed out that instead of returning on the 11<sup>th</sup>, Rogers had come in on the following Saturday. She asked Rogers why she had not come in on the 11<sup>th</sup> and why she had not called in on the 13<sup>th</sup>.
57. Rogers explained that she had asked her physician if she could attempt to return to work, but

that her condition was a day-to-day thing, unpredictable, and that at that time her treating physicians were still changing her medication because her condition was so poor. Rogers again explained that she had called into work every day. Jameson left the meeting briefly to confirm the date in her records, and learned that it was on December 13<sup>th</sup> that Rogers had fallen asleep and not called in. Jameson reviewed the facts as: Verlaine had called and woken her up, and Rogers had said she had fallen asleep, apologized for not calling, and that was it. There was no further discussion on that issue.

58. Jameson next asked Rogers about working at 24 Hour Fitness on days she had called in sick at CSP. Jameson first asked her to recall the reasons for calling in sick in August, four months prior. Rogers' response was "Oh Lord." Jameson stated if she could not remember, that was ok. Rogers responded, "I don't." Jameson said, "On any of them?" Rogers then stated the following: on November 14<sup>th</sup> she was out for an asthma attack; at the end of August or in October she had had stomach flu which put her out for quite a while; and November 18 was when her neck and back injury occurred.
59. Jameson again asked, "What about the August dates?" Rogers responded, "I don't remember to be honest with you." Jameson then asked, "Do you know if any of those dates you worked at 24 Hour Fitness?" Rogers replied, "I know several of them I attempted to." She explained that some days she worked 24 Hour Fitness in the morning, intending to go to CSP in the afternoon, but that she often was unable to even complete a shift at 24 Hour Fitness. This statement was supported by the evidence at hearing.
60. Jameson then asked, "How about since you've had this issue this most recent issue since mid-November? How often have you worked there when you called in sick here?" Rogers replied, "For any amount of time? I can think of four days specifically that I tried to go in there. (unintelligible) I had to leave. . ." Jameson then stated, "So you're saying four days that you know of?" Rogers stated, "That I can remember. That I can think of actually being there. . ."
61. Jameson then stated, "Ok. Well the information that they provided shows quite a bit more than that, Brandy. . . In fact, out of - let me count. Since back to the first date that you called in sick, after your secondary employment was approved, was in August, August 17<sup>th</sup>. And since then, of twenty-one days that you called in sick, fourteen of those days you worked at 24 Hour Fitness."
62. Jameson then stated that since her back injury Rogers had called in sick and worked at 24 Hour Fitness seven times. Rogers explained that since her back injury, she had been able to just sit and not handle the kids or lift heavier toys.
63. Rogers explained to Jameson that her condition was variable on a day-to-day basis. She informed Jameson that her doctors had been unable to determine what was provoking the severe spasms, and that she had several spasms that would not release. This caused other muscles to spasm in conjunction with the first set, which in turn caused pinching of her nerves, an extremely painful condition that rendered her unable to do anything.

64. Rogers requested a copy of the transcript of the pre-disciplinary meeting. Jameson refused to provide her with one.
65. After the meeting, Jameson spoke with Rogers' immediate supervisors.
66. Jameson considered the information in Complainant's personnel file in making the termination decision. Part of what she considered was Complainant's history of using significant amounts of sick leave. The Patrol has a policy of requiring a doctor's note for use of sick leave exceeding 80 hours in any given fiscal year; in both 2001 and 2002, Complainant had been placed under this requirement. In addition, Jameson considered that Complainant had received two prior corrective actions (for unknown reasons).
67. On January 6, 2003, Jameson sent a termination letter to Complainant. It concluded that Complainant had violated the following:
- Patrol General Orders 2 and 3 and the Patrol's Secondary Employment policy, for working secondary employment without approval and "falsely stating that a communication supervisor authorized you to work secondary employment without written approval from the region commander;"
  - Patrol General Orders 2, 3, and 6, "for failure to check in every Monday morning with a supervisor to provide an update on your physical condition as directed on the FMLA paperwork and falsely stating that you did not see the form and that Communication Supervisor Duncan did not review the form with you;"
  - Patrol General Orders 3, 4, 6, and 7, "as related to calling in sick but working at your secondary employment on 14 different occasions since August 17, 2002 and stating it had occurred only four times;" and
  - Patrol General Order 2 and the Patrol's sick leave policy "for failure to notify a supervisor you were sick and would not be in to work on December 13, 2002."
68. Patrol General Orders cited in the termination letter are as follows:
- "2. Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements.
  3. Members will be truthful and complete in their accounts and reports.
  4. Members will cooperate and work toward the common goals of the Colorado State Patrol in the most efficient and effective ways possible.
  6. Members will avoid any conduct which may bring discredit or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.
  7. Members will conduct themselves to reflect the highest degree of professionalism and

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integrity and to ensure that all people are treated with fairness, courtesy, and respect."

69. The State of Colorado Family/Medical Leave policy governing state employees states in part as follows: "Can the manager place any restrictions on how the employee uses his or her time while on FML? If an agency has an established policy on outside employment while on leave, it should be uniformly applied and include those on family/medical leave. Otherwise, no restrictions can be imposed as long as the reason for leave remains valid and all requirements have been fulfilled."
70. Respondent presented no evidence that the reason for Rogers' FML was invalid.
71. Patrol Policy 216.1 governs Secondary Employment. The policy states in part, "Members may engage in a maximum of 20 hours per week secondary employment after approval has been given by the region commander. Involvement in secondary employment will not be such that it interferes in any way with the member's present work assignment or ability to respond as required to a call back to duty and will not conflict with the interest of the State."
72. The policy sets forth procedures for applying and processing applications for secondary employment as follows: patrol members are to submit a memorandum requesting approval to his or her immediate supervisor; the supervisor is to forward the memo up through channels to the region commander; the region commander notifies the member and supervisor in writing of approval or disapproval.
73. Jameson did not consult the State of Colorado Family/Medical Leave policy at any time relevant.
74. Jameson admitted repeatedly on cross-examination at hearing that many of her factual assumptions on which Rogers' termination was based were erroneous.
75. The central reason Jameson fired Rogers was she believed Rogers was able to work in her dispatcher position at CSP.
76. Jameson was not a credible witness.
77. Rogers was a credible witness.

## **DISCUSSION**

### **I. GENERAL**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

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- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the Respondent has the burden to prove by preponderant evidence that Rogers committed the acts or omissions on which the termination was based and that just cause warranted the termination. *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. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine 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 has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

## **II. HEARING ISSUES**

### **A. Complainant did not commit most of the acts for which she was terminated.**

CSP Policy 216.1 requires that approval for secondary employment be in writing. Rogers violated the letter, but not the spirit, of that rule. She had no intent to violate the rule, as evidenced by the following: 1. she openly submitted a written request, in compliance with the rule; 2. she had the apparent authority from one of her immediate supervisors to start such employment after waiting two months for an agency response (Finding of Fact #10); and 3. she informed all of her immediate supervisors at CSP when she commenced work at 24 Hour Fitness, and none of them objected to it. Rogers had a good faith belief that she had CSP's approval to work secondary employment.

Rogers did not falsely state to Jameson at the pre-disciplinary meeting that one of her supervisors informed her she could work a second job if she heard nothing back from CSP administration over time. Finding of Fact #10.

Rogers did not fail to check in with a supervisor every Monday to provide an update on her physical condition. In fact, she did so on a daily basis, exceeding the requirement fivefold, and informed Jameson of this twice during the pre-disciplinary meeting. Rogers did not falsely state to Jameson at the pre-disciplinary meeting that she did not see the FMLA form or that Supervisor Duncan had failed to review the form with her.

Rogers did not state that she had worked only four times at the fitness center since August 2002. Rogers stated that she knew of four specific dates that she had worked at the fitness center since her November 2002 injury. Finding of Fact #60.

Rogers' job at the fitness center did not interfere with her job at CSP. Her serious medical condition precluded her from working at CSP after November 18, 2002. Prior to that time, all of

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Rogers' absences from CSP on days she worked at the fitness center were excused.

Rogers did fail to call into work on December 13, 2002 to notify a supervisor she would be unable to attend work on that date. Having not slept for two days, she mistakenly slept through her regular 12:30 p.m. call-in time. However, the December 9, 2002 Fitness to Return Certification form makes it crystal clear that the work restrictions precluded Rogers from working for more than one hour in the dispatcher position anyway. Because the only reduced hours schedule available to Rogers was for a four-hour period, it was inappropriate for CSP to expect Rogers to work at all. There is no evidence in the record that any of Rogers' supervisors or even Jameson was aware of her work restrictions.

**B. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.**

Arbitrary or capricious exercise of discretion can arise in three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

Jameson's termination of Rogers was arbitrary and capricious for two reasons: first, it was based on erroneous factual assumptions arising from a failure to procure essential information; second, the appointing authority failed to consider strong mitigation.

Jameson knew that on December 5, Rogers had been approved for FML leave due to a serious medical condition. Yet she never consulted Rogers' medical records, the Return to Work Certification, Rogers' supervisors, or Rogers herself in an attempt to determine how Rogers' medical condition affected her ability to do the dispatcher job. This failure created an erroneous impression in Jameson's mind that Rogers was being dishonest with CSP in failing to report for duty. Jameson fired Rogers because, in her heart, she felt that Rogers did not have a serious medical condition and was fully capable of reporting to work at CSP. Jameson was wrong, and the termination cannot stand.

Had Jameson simply educated herself in a reasonable and prudent manner, she would have understood that Rogers' medical restrictions precluded her from performing the dispatcher job at CSP.

Jameson failed to give honest and candid consideration to the mitigating information Rogers presented at the pre-disciplinary meeting. First, Rogers informed Jameson twice in the pre-disciplinary meeting about her daily calls to her supervisors regarding her medical condition. Jameson ignored that information and cited her failure to call in every Monday morning in violation of FML rules as one of the four grounds for termination. Second, Rogers repeatedly explained to Jameson in the meeting that she had been unable to work because her condition was so painful,

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variable, and difficult to control with medication. Jameson appears to have completely disregarded this mitigating information; there is no evidence in the record she considered it. Third, Jameson terminated Rogers in large part for lying during the pre-disciplinary meeting. Yet the transcript of the meeting makes it clear that Rogers did not lie to Jameson about the number of days she worked at the fitness center or about the December 5 meeting with Duncan and the FML paperwork. A reasonable and prudent appointing authority would double check the transcript of that meeting to assure that his or her memory of the meeting was accurate, and that the employee intentionally lied, prior to imposing discipline. Had Jameson done so, she would have clarified a number of errors and eliminated the bulk of the reasons for Rogers' termination.

Lastly, any reasonable manager fairly and honestly considering Rogers' situation would not have decided to terminate Rogers. Rogers did not intentionally violate the secondary employment policy; it was a good faith error. Rogers' medical condition precluded her from working in the CSP dispatcher position, yet she repeatedly requested return to work certifications. Rogers called in every day to discuss her condition with her supervisors. She did her best in a tough situation.

Respondent argues in its post trial brief that Rogers committed sick leave abuse by calling in sick at CSP and working at the fitness center six times prior to her November 18, 2002 injury. The termination letter does not cite Rogers for sick leave abuse. Even if Rogers had been fired in part for abusing sick leave, Respondent did not meet its burden of proof. A review of Finding of Fact #43 reveals that Rogers became ill on August 17 while working at the fitness center, and left 45 minutes early. The next day, on August 18, Rogers attempted to work at the fitness center but had to leave after just fifteen minutes due to her illness. These facts support a conclusion that Rogers was sick. Rogers then visited her doctor on August 19 and obtained a note excusing her from work through August 23. The fact that Rogers worked short shifts at the fitness center on August 22 and 23 but did not work at all at CSP does raise a question as to how sick she remained on those dates. However, Respondent failed to prove by a preponderance of the evidence that she abused the sick leave policy on those dates. Rogers had a doctor's note excusing her from work, in compliance with CSP's policy. On the remaining days, she suffered asthma attacks and obtained doctor's notes for those absences.<sup>1</sup>

#### **D. Attorney fees are warranted in this action.**

Complainant has requested an award of attorney fees. Attorney fees "shall" be awarded if it is found that a personnel action or appeal thereof was instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801.

Board Rule R-8-38(A)(2) defines a personnel action as in bad faith, malicious, or as a means of harassment if it is "pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was **disrespectful of the truth.**" (Emphasis added.)

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<sup>1</sup> If an appointing authority believes that an employee is untrustworthy or is abusing the sick leave policy, it is that manager's responsibility to develop an appropriate means of addressing the issue.

Jameson's termination of Rogers was disrespectful of the truth and therefore attorney fees and costs are awarded to Complainant. Jameson's entire approach to Rogers's situation demonstrates a pattern of ignoring critical undisputed mitigating facts, and failing to assure she had other essential facts correct, prior to imposing termination. Jameson completely overlooked Rogers' serious medical condition and the documents supporting it warranting her approval for FML. Acting out of ignorance of the facts, she assumed that Rogers was fully capable of reporting for work and fired her for failing to do so. Jameson ignored Rogers' statements in the pre-disciplinary meeting that she had had daily contact with her immediate supervisors regarding her medical condition. In flagrant disregard of those statements, Jameson terminated Rogers in part for violating an FMLA call-in policy, whose terms Rogers had exceeded fivefold. Lastly, Jameson failed to go back to the R-6-10 meeting transcript to seek the truth as to whether Rogers had in fact lied to her repeatedly during that meeting. This pattern of failing to assure she had the relevant facts straight constitutes a disrespect for the truth warranting an award of attorney fees and costs.

### **CONCLUSIONS OF LAW**

1. Complainant did not commit most of the acts for which she was disciplined.
2. Respondent's action was arbitrary, capricious, or contrary to rule or law.
3. Attorney fees and costs are warranted.

### **ORDER**

Respondent's action is **rescinded**. Respondent is ordered to reinstate Complainant, with back pay and benefits to the date of termination, and to pay Complainant attorney fees and costs incurred in this action.

Dated this \_\_\_ day of June, 2003.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203  
303-894-2136

## **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 the Board does not receive a written notice of appeal 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 1/4 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.

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**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_ day of July, 2003, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Silvern Law Offices, P.C.  
Thomas A. Bulger  
1801 Broadway, Suite 930  
Denver, Colorado 80202

and in the interagency mail, to:

John August Lizza  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods