

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. **2004B087**

ORDER RE: RESPONDENT'S MOTION TO DISMISS, INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS

GEORGE MUNCY,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF COLORADO STATE VETERAN'S NURSING HOME, COLORADO STATE VETERAN'S CENTER AT HOMELAKE,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on March 15, 2004 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Monica Ramunda represented Respondent. Respondent's advisory witness was Peggy Valdez Olivas. Complainant appeared and represented herself.

PROCEDURAL HISTORY

On November 24, 2003, Complainant filed his Notice of Appeal, appealing the abolishment of his position by Respondent Department of Human Services ("DHS"), Division of Colorado State Veteran's Nursing Home, Colorado State Veteran's Center at Homelake, and alleging disability discrimination. The burden of proof is on Complainant as the matter appealed was an administrative action and because Complainant alleged disability discrimination. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994) and *Bodaghi v. Dept. of Natural Resources*, 995 P.2d 288 (Colo. 2000). Complainant presented his case-in-chief, calling himself as the sole witness. Respondent, at the close of Complainant's case-in-chief, moved for dismissal under C.R.C.P. 41(b)(1), arguing that Complainant had not met his burden of proof. Complainant verbally responded to Respondent's motion. The undersigned ALJ took the matter under advisement and, after considering the relevant case law and evidence, enters the following order and initial decision.

STANDARD OF REVIEW

In ruling on a motion to dismiss under C.R.C.P. 41(b)(1), at the conclusion of Complainant's case-in-chief, the administrative law judge may weigh the evidence, determine issues of credibility,

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and reach all permissible inferences, including those favoring the Respondent. *First Nat'l Bank v. Groussman*, 29 Colo. App. 215, 483 P.2d 398, aff'd, 176 Colo. 566, 491 P.2d 1382 (1971).

FINDINGS OF FACT

General Background

1. In July 2001, Complainant began working at DHS' Colorado State Veteran's Center at Homelake ("Homelake"). In July 2002, he was certified to the classification of Structural Trades I. Complainant has not been certified to any other classification in the state personnel system.
2. Complainant worked at Homelake for the Physical Plant Division's Maintenance Unit, reporting to Mark O'Dell, the manager for the Maintenance Unit.
3. In July 2002, Complainant was injured and was on FMLA leave until May 2003.
4. In November 2002, Complainant reached his maximum medical improvement but with a 17% permanent restriction. After reviewing Complainant's doctor's statement regarding Complainant's essential job functions, Christa Davis, Homelake's Controller/Business Manager, determined that Complainant would be able to return to his Structural Trades I position and could, with his permanent restriction, still perform his job functions.
5. While Complainant was out on FMLA leave, he requested O'Dell and Christa Davis, Homelake's Business Office Control, find him a position that would accommodate his injury.
6. Complainant returned to his Structural Trades I position at Homelake on May 1, 2003.

Abolishment of Complainant's Position

7. On November 24, 2003, Complainant was laid off and given notice of his retention rights. The calculation of Complainant's retention rights gave him preference points for his military service.
8. Within the Structural Trades I classification at Homelake, there were two people junior to Complainant, Aaron Veltri, a probationary employee, and Brandie Arbogast, a certified employee with the same length of state service as Complainant but no military service. Both Veltri and Arbogast were laid off before Complainant.
9. Complainant's retention rights stated that there were no vacant Structural Trades I positions within DHS but Complainant had retention rights to an encumbered DHS Structural Trades I position in Trinidad.
10. Trinidad was 100 miles from Complainant's residence and commuting there would have presented a hardship to Complainant because he is currently helping to take care of his mother.

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11. Complainant refused his retention rights to the position in Trinidad.
12. Complainant timely filed his appeal in this action.

DISCUSSION

I. GENERAL

A. Burden of Proof

In this *de novo* proceeding reviewing an administrative action taken by the Respondent and alleging that Respondent discriminated against Complainant on the basis of a disability, the Complainant has the burden to prove by preponderant evidence that the Respondent's action was arbitrary, capricious or contrary to rule or law. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994) and *Bodaghi v. Dept. of Natural Resources*, 995 P.2d 288 (Colo. 2000). The Board may reverse Respondent's decision 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 the agency has 1) neglected or refused 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; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised 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. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

II. HEARING ISSUES

A. Respondent did not Arbitrarily and Capriciously Abolish Complainant's Position.

The only reasons for layoff are lack of funds, lack of work, or reorganization. Board Rule R-7-7, 4 CCR 801. In determining who shall be laid off, departments must consider seniority, using three-year time bands to establish seniority, and lay off or displace employees in junior time bands before employees in senior time bands. Board Rules R-7-8; 7-9; and 7-14, 4 CCR 801. If two employees have the same length of state service and one of the employees has military service, then the employee without military service will be laid off before the employee with military service. Colo. Const. art. XIII, Sec. 15(a). Finally, employees who are laid off are entitled to notice of their lay-off and an offer of their retention rights within certain prescribed timelines. Board Rule R-7-12, 4 CCR 801.

With regards to the *Lawley* arbitrary or capricious standard, Complainant presented no credible evidence demonstrating that Respondent made its layoff decisions without gathering pertinent information regarding the layoffs, without considering that information, or arrived at

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conclusions regarding the layoffs in an unreasonable manner. Complainant has not shown that Respondent acted arbitrarily or capriciously in laying off Complainant.

The credible evidence established that Complainant was laid off due to a lack of funds. In addition, the credible evidence established that Respondent laid off Complainant only after laying off two other Homelake employees who, due to their seniority or lack of military service, were junior to Complainant in the Structural Trades I class. There was no evidence that there were any other employees in the Structural Trades I class who were junior to Complainant. Finally, there was no evidence that any of the notice requirements mandated by the Board's layoff rules were violated. Respondent did not act contrary to rule or law in laying off Complainant.

Complainant has failed to establish that Respondent abolished his position arbitrarily, capriciously or contrary to rule or law.

B. Respondent did not Discriminate Against Complainant on the Basis of Disability.

Complainant alleges Respondent discriminated against him on the basis of disability, a violation of the Colorado Anti-Discrimination Act, § 24-34-401, C.R.S., *et seq.* (the "Act"). To meet his burden of proof, Complainant must first demonstrate that he is entitled to the protection of the Act. To do so he must show that he is, under the terms of the Act, a qualified person with a disability. The Act defines disability as follows: "a physical impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." § 24-34-301(2.5)(a), C.R.S.

The Colorado Civil Rights Commission's rules adopt, as persuasive authority, federal case law interpreting the Americans with Disabilities Act (the "ADA") wherever the Act and the ADA are substantially equivalent. Colorado Civil Rights Commission Rule 60.1(A) through (C), 3 CCR 708-1. Because the definitions of "disability" in both the Act and the ADA are substantially equivalent, federal case law will be given persuasive authority with respect to this provision.

Major life activities, which must be substantially limited in order for a person to be deemed disabled, include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Bolton v. Scrivner*, 36 F.3d 939, 942 (10th Cir. 1994). Complainant presented no evidence that he was unable to perform any of these major life activities, that he was unable to work full-time or even that, upon returning to work, he needed any accommodation as a result of his injury.

Complainant has not demonstrated that he had a disability, therefore he has not met his burden of proving his disability discrimination claim.

C. An Award of Attorney Fees to Respondent is not Warranted.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or 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. The party seeking an award of attorney fees and costs, in this case Respondent, shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

The above findings of fact do not warrant an award of attorney fees to Respondent. The credible evidence does not lead to the conclusion that Complainant pursued his constitutional right to a hearing in a frivolous or bad faith manner or in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

Respondent's action was not arbitrary, capricious, or contrary to rule or law. An award of attorney's fees to Respondent is not merited.

ORDER

Respondent's Motion to Dismiss is **granted**. Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 29th day of April, 2004.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-764-1472

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 April, 2004, I placed true copies of the foregoing **ORDER RE: RESPONDENT'S MOTION TO DISMISS, INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

George Muncy
250 Spruce Street
Del Norte, Colorado 81132

and in the interagency mail, to:

Monica Ramunda
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Employment Law Section
1525 Sherman Street, 5th Floor
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Andrea C. Woods