STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B013**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

WILLIAM THOMAS LITTLE,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on April 11, 2006. Complainant appeared through William S. Finger and Andrew M. Newcomb, from the law office of Frank & Finger, P.C. Respondent appeared through Assistant Attorney General Christopher J. Puckett.

MATTER APPEALED

Complainant, William Little ("Little" or "Complainant") appeals Respondent's rejection of his withdrawal of resignation, and asserts that he was constructively discharged. For the reasons set forth below, it is found that Respondent erred in rejecting Complainant's withdrawal of his resignation and that Complainant was constructively discharged. Complainant is therefore entitled to a separate evidentiary hearing to appeal his termination.

ISSUES

1. Whether the Negotiated Resignation form was ambiguous and therefore unenforceable;

2. Respondent erred in refusing to accept Complainant's withdrawal of his resignation;

3. Whether Complainant forfeited his right to appeal his resignation;

4. Whether Respondent constructively discharged Complainant;

5. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

YOS Tenure

1. Complainant Little first became employed by the Respondent as a Correctional Officer I, Drill Instructor, at Youthful Offender System (YOS), on August 1, 1998. He was certified into the position in 1999. (Stipulated Fact)

2. Complainant worked at YOS from July 1999 through July 2004. (Stipulated Fact)

3. As a drill instructor, Complainant worked with youth, ages 14 to 17, who were referred to the YOS program from county jail. Most of the YOS youth had committed violent crimes and had a gang mentality.

4. The drill instructors' main job during 28 days of boot camp was to break down the youth's defenses towards authority, and attempt to build them up as better individuals.

5. Complainant received Commendable performance ratings from mid-2001 through mid-2005. [1] Prior to 2001, Complainant received Competent ratings.

6. In 2002, Complainant became a member of the SORT team, "Special Operations Response Team." Being a SORT team member is an honor among DOC employees. The requirements to become a SORT member are to be recommended for membership by one's supervisor and warden, to have above Satisfactory performance ratings, to take a physical fitness exam, and to attend the SORT academy for 160 hours. It is a volunteer assignment. Complainant was promoted to squad leader of the SORT sniper team due to the extra work, dedication, and leadership skills he demonstrated as a SORT team member.

7. Complainant has no prior corrective or disciplinary actions.

Promotion to Limon

8. In July 2004, Complainant was promoted to Sergeant and transferred to Limon Correctional Facility. His position in Limon was unrelated to his previous YOS assignment.

9. Al Estep was the Warden of Limon Correctional Facility.

Investigation of YOS

10. In mid-2004, the Colorado Department of Criminal Justice conducted its routine bi-annual review and evaluation of the YOS program. The evaluation contained

[1] There is a short period in the second half of 2004 wherein he was given a second performance rating of Satisfactory. The reason for this duplicative rating is not in the record.

findings that funding cuts had resulted in programs being lost, and it recommended reinstatement of those programs. The final report also found allegations of abuse by YOS staff towards residents.

11. The Criminal Justice report was forwarded to the Governor and the General Assembly. Public forums were held, at which YOS officials answered questions raised by the report.

12. Upon learning of the allegations of abuse contained in the Criminal Justice report, DOC opened its own internal investigation through its Office of the Inspector General ("IGO"). That investigation resulted in a written report.

13. Ms. Cherie Greco was appointed Warden of YOS in the Fall of 2004, just prior to the publication of the Criminal Justice report. She had previously served Respondent as Legislative Liaison, and had lobbied the Colorado General Assembly for the continuation of the YOS program in that position.

14. Respondent delegated Warden Greco appointing authority over all corrective and disciplinary actions that might result from the Criminal Justice and IGO investigations.

15. Ms. Greco issued corrective and disciplinary actions to several YOS officers in connection with the two investigations. Some officers resigned.

16. In July 2005, Ms. Greco sent Complainant a notice of an upcoming pre-disciplinary meeting in connection with the YOS investigations.

17. Complainant was aware that some former co-workers at YOS had been terminated as a result of the investigations. He believed that all of them had been terminated for incidents involving use of force. Complainant had never been corrected or disciplined for a use of force violation during his previous tenure at YOS.

18. Prior to his pre-disciplinary meeting, while on vacation, Complainant called his former supervisors at YOS to assess his situation. He asked Lieutenant Mike Romero, the Acting Security Manager at YOS at the time, if he should use his vacation time wisely, meaning, should he look for other employment because his job was in jeopardy. Romero said, "No."

19. Complainant also asked Romero if he should bring a representative to the meeting, and Romero responded that it was not necessary.

<u>July 11, 2005 Pre-Disciplinary Meeting</u>

20. Complainant attended the pre-disciplinary meeting on July 11, 2005 without a representative. It had been one year since he had worked at YOS.

21. Warden Greco reviewed the history of the investigations and the specific allegations that had been raised against Complainant in connection with his previous tenure at YOS. She explained that many of the tactics used by drill instructors had been challenged as unacceptable in the Criminal Justice and IGO reports. Ms. Greco explained that legislators, the public, and the media, would not approve of many of the tactics. She also informed Complainant that attorneys representing former YOS participants had expressed concern about actions taken against the residents, and her difficult position in not having a manual or rule book expressly authorizing some of the challenged tactics.

22. Ms. Greco advised Complainant to read State Personnel Board Rules governing corrective and disciplinary actions, Chapters 6 and 8.

23. Ms. Greco made it clear to Complainant that of greatest concern were specific methods used to gain acquiescence to authority from the more defiant YOS participants. Several tactics used by Little and others to humiliate the youth in order to "break them down" and gain their acceptance of the drill instructors' authority were discussed at length.

24. At the conclusion of the meeting, Warden Greco informed Complainant that improvements to the YOS program were being made. A manual with clear instructions would be given to the drill instructors. Two years would be the maximum time permitted to serve as a drill instructor. Complainant had served for five.

25. As the meeting closed, Ms. Greco asked Complainant what effect a corrective or disciplinary action would have on his SORT participation. He responded that he would be removed from the SORT team.

26. Ms. Greco also ended the meeting by informing Complainant that once she had completed her decision, Mr. Estep, the Warden at Limon Correctional Facility, would resume appointing authority over Complainant.

27. Warden Greco told Complainant that she would advise him of her decision in writing.

28. Complainant left the meeting fearing his removal from a position on the SORT team, a duty he valued highly.

<u>August 4, 2005 Meeting</u>

29. On August 4, 2005, Respondent called Complainant into work on a customary day off, in order to meet with Ms. Greco to discuss her decision.

30. When Complainant arrived at the DOC office for the meeting, the armed security guard met him and escorted him to a waiting area.

31. The guard escorted Complainant to the meeting in a conference room.

32. Complainant, the armed guard, Warden Greco, and another DOC employee sat at the conference table.

33. Warden Greco introduced herself to Complainant again. Then she introduced Rick Thompkins as her representative from Human Resources. She explained to Complainant that Mr. Thompkins was present to provide her with technical assistance in the event that was necessary.

34. Warden Greco then informed Complainant that she had decided to terminate his employment with DOC.

35. Warden Greco had an unsigned termination letter in her possession. She read the entire letter to Mr. Little at that time, leaning over the table so that he could look on as she read it to him.

36. The termination letter Warden Greco read to Complainant contained a notice of appeal rights. Specifically, it stated, and she read to him, "You may protest this action by filing an appeal. Personnel Board Rules, Procedures, and standard appeal forms are available at the agency personnel office for your information and use. The appeal must be in writing, signed by you or your representative, and must be mailed or hand-delivered no later than ten(10) days after the date you receive the notice of your right to appeal. Your appeal should be addressed as follows: [address of State Personnel Board]."

37. The effective date of Complainant's termination was August 5, 2005, because he had been paid for reporting to duty on August 4, 2005.

38. Mr. Little was so shocked that he found it difficult to follow along as Warden Greco read the termination letter. He had not expected to be terminated.

39. The primary thought running through Complainant's mind at this time was how he would support his family, and whether being terminated would result in his loss of retirement, or PERA, benefits.

40. The security guard present at the meeting noticed that Complainant looked shocked and upset throughout this meeting.

41. Mr. Thompkins left the meeting after Ms. Greco had read the termination letter to Mr. Little.

42. After reading the six-page, single spaced termination letter to Complainant, Warden Greco offered him the option of resigning instead of being fired. She explained that he would be better able to obtain employment in the private prisons in Colorado if he

resigned his position at DOC. A resignation would avoid his having a termination on his employment record.

43. Warden Greco informed Complainant that he could decide between termination and resignation during the meeting.

44. Complainant asked if he could make a phone call. Warden Greco agreed, stating that he could have "ten or fifteen minutes" to go make the call.

45. Complainant left the meeting under the escort of the armed security guard. Complainant retrieved his cell phone from his car and made one call.

46. Mr. Little called the person he trusted most, his SORT commander, Nate Walter. He informed Mr. Walter that he was being terminated from DOC employment, and had a choice of resigning. He asked if Walter knew how a resignation and termination would affect his PERA. Mr. Walter did not know the answer, and he forwarded the call to an administrative assistant whom he believed would give Complainant good advice.

47. The administrative assistant informed Complainant that if he chose termination, he would forfeit his PERA benefits. She informed him of this in error, without any intention of misleading him.

48. Complainant decided to resign because he believed it was the only way to save his retirement benefits.

Resignation Form

49. Complainant and the security guard returned to the meeting. Complainant informed Warden Greco that he had decided to resign.

50. Warden Greco then presented Complainant with a document entitled, "Negotiated Resignation." Ms. Greco had received this document from her attorney, who drafted it.

51. Ms. Greco read the document aloud to Complainant. She did not inform him he could negotiate the terms of his resignation.

52. Complainant did not negotiate the terms of the Negotiated Resignation form.

53. Warden Greco did not inform Complainant that could have time to consider his decision of whether to resign or be terminated. Complainant did not request time to do so.

54. Warden Greco asked Complainant if he had any questions about the Negotiated Resignation form. He indicated that he did not.

55. Warden Greco did not adjourn the meeting. She required Complainant to choose between termination and resignation prior to leaving the meeting.

56. Complainant signed the "Negotiated Resignation." The document is dated August 4, 2005. It reads as follows in its entirety:

> I William Little, herby (sic) resign my position #9151 as a Correctional Officer II with the Department of Corrections, effective August 5, 2005 and agree this is a voluntary resignation in lieu of disciplinary action taken against me.
>
> William Little agrees to submit a written, irrevocable voluntary resignation effective August 5, 2005, and agrees he will not seek nor accept reinstatement or future employment with the Colorado Department of Corrections.
>
> William Little agrees to release the State of Colorado, Department of Corrections, and its employees from any and all claims he may have arising from this disciplinary action. Mr. Little understands that by resigning in lieu of disciplinary action, he is giving up any rights he may have to file an appeal of this resignation or the potential disciplinary action to the State Personnel Board. This release does not apply to claims for unemployment compensation or workers compensation.
>
> Mr. Little's final paycheck will reflect his wages and any accrued annual leave through August 5, 2005, and will be mailed under separate cover from the payroll office. The payroll office will answer any questions regarding COBRA or any other insurance/benefits he may be entitled. (sic) The payroll office can be reached at (719) 269-4043. Mr. Little is also encouraged to contact the Public Employee's Retirement Association (PERA) at (303) 832-9550 for information regarding his retirement account and benefits he may have.

57. Complainant never submitted a separate document consisting of a "written irrevocable voluntary resignation effective August 5, 2005," referenced in paragraph two of the Negotiated Resignation form. Nevertheless, he considered himself to have resigned when he left the meeting on August 4, 2005.

58. Complainant spoke with his wife and consulted with legal counsel after signing the Negotiated Resignation. He learned that he would not lose PERA benefits if he were terminated. He determined it had been a mistake to resign, because he could appeal his termination without losing his PERA benefits.

Withdrawal of Resignation

59. On August 5, 2005, Complainant faxed a letter to Respondent withdrawing his resignation. It stated, "I William Little, hereby withdraw my resignation from the Colorado Department of Corrections, effective August 5, 2005. If you have any questions please contact my attorney [name and number]." Complainant copied his attorney on the letter.

Rejection of Withdrawal of Resignation

60. On August 5, 2005, Respondent's attorney sent a letter to Complainant's attorney, rejecting the withdrawal of resignation. It indicated that because the Negotiated Resignation document stated that it was an "irrevocable voluntary resignation," Mr. Little had waived his right to withdraw his resignation and had no right to do so.

61. Complainant appealed Respondent's rejection of his withdrawal of the resignation and alleged constructive discharge, within ten days of his resignation.

DISCUSSION

I. BURDEN OF PROOF

Complainant's appeal contains two separate claims. First, he contends that because he withdrew his resignation within the two-day period permitted by Board Rule 7-5B, Respondent had no authority to reject that withdrawal. Second, assuming but not conceding Respondent had the authority to reject Complainant's withdrawal of his resignation, Complainant asserts that the circumstances of his resignation were coercive and therefore constitute a constructive discharge. Both causes of action share the common remedy of placing him in the position he would have been in at the time Respondent terminated him on August 4, 2005: providing him with the right to appeal his termination to the Board.

On both claims, Complainant bears the burden of demonstrating that Respondent's actions were arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. Complainant bears the burden of proving that he was constructively discharged. *Harris v. State Board of Agriculture*, 968 P.2d 148 (Colo.App. 1998).

II. THE NEGOTIATED RESIGNATION WAS AMBIGUOUS; HOWEVER, COMPLAINANT INTENDED TO RESIGN WHEN HE SIGNED IT.

As a threshold issue, Complainant contends that the Negotiated Resignation was ambiguous, and, therefore, must be construed against the Respondent as not constituting a valid resignation. *Atmel v. Vitesse*, 30 P.3d 789 (Colo.App. 2001). The determination of ambiguity in a contract is a question of law. *Schaefer v. Horton-Cavey*, 692 P.2d 1132 (Colo.App. 1984). Terms used in a contract are ambiguous when they are susceptible to more than one reasonable interpretation. *Browder v. United States*

Fidelity & Guaranty Co., 893 P.2d 132, 133 (Colo. 1995). Any ambiguity or uncertainty in a contract prepared exclusively by the employer "must be construed against the employer." *Kuta v. Joint District No. 50(J) of the Counties of Delta*, 799 P.2d 379, 382 (Colo.1990).

The Negotiated Resignation contains language requiring a subsequent act by Complainant. It states, "William Little agrees to submit a written, irrevocable voluntary resignation effective August 5, 2005 . . ." This provision renders the Negotiated Resignation susceptible to more than one reasonable interpretation, namely, that it is effective only upon the completion of the subsequent act. Therefore, the Negotiated Resignation is ambiguous and must be construed against Respondent.

To clarify ambiguity in a contract, the court may look to extrinsic evidence. *Atmel Corporation v. Vitesse SemiConductor Corp.*, 30 P.3d 789, 792 (Colo. App. 2001). A contract must always be interpreted in light of the intentions of the contracting parties. *Id.* While the Negotiated Resignation must be construed against the Respondent, *Kuta, supra,* the evidence at hearing established that Complainant knew he had resigned when he left the August 4, 2005 meeting. It is uncontested that Complainant intended to resign on August 4, 2005 in order to save his PERA. Therefore, Complainant intended to resign when he signed the Negotiated Resignation. [The question of waiver of rights attendant to that resignation is a separate issue addressed below.]

III. RESPONDENT HAD NO AUTHORITY TO REJECT COMPLAINANT'S TIMELY WITHDRAWAL OF HIS RESIGNATION UNDER BOARD RULE 7-5B.

A. Complainant timely withdrew his resignation within the two-day cooling off period provided in Board Rule 7-5B.

Complainant contends that Respondent had no authority to deny the withdrawal of his resignation. Board Rule 7-5B, 4 CCR 801, governs withdrawals of resignation. It states:

> 7-5B An employee may withdraw a resignation within two business days after giving notice of resignation. The appointing authority has discretion to approve a request to withdraw a resignation that is made more than two business days after the notice of resignation.

Complainant had the right to withdraw his resignation within two business days after giving notice of his resignation to Respondent. He resigned on August 4 and withdrew that resignation on August 5; therefore, his withdrawal was timely.

Neither Board Rule 7-5B, nor any other Board Rule, limits state employees' right to withdraw a resignation. In fact, Rule 7-5B on its face grants appointing authorities the discretion to act on a withdrawal only <u>after</u> that initial two-day period has expired.

The policy behind the two-day cooling-off period codified in Rule 7-5B is to provide employees who resign in the heat of the moment two days to reflect on the decision, consult with their spouse and/or an attorney, and make a thoroughly informed judgment. The Rule also recognizes the gravity of the decision by a classified state employee to forfeit his or her property right to state employment. Colo. Const. art. XII, Section 13(8).

Respondent asserts in its trial brief that under *Harris v. State Board of Agriculture*, 968 P.2d 148 (Colo.App. 1998), when a written resignation becomes immediately effective, "the agreement renders inapplicable the right to withdraw the resignation." *Harris*, 968 P.2d at 153. However, *Harris* is inapposite, because the 1994 Board rule in effect at that time required that the withdrawal be tendered seven days prior to the effective date of the resignation. *Harris*, 968 P.2d at 153, citing Board Rule R-9-1-2. In *Harris*, such notice was impossible, because the resignation was immediately effective. *Id.*

The Board has rescinded the rule in *Harris* which required seven days advance notice for tendering a withdrawal of resignation. Under the current rule, 7-5B, no advance notice is required; employees have unfettered discretion to withdraw a resignation for two business days after resigning. And, the right to withdraw a resignation is not related to the effective date of the resignation.

B. <u>Complainant did not waive his right to withdraw his resignation under Board Rule 7-5B.</u>

Respondent asserts that Complainant's execution of the Negotiated Resignation constituted a waiver of his right to withdraw his resignation. Board Rule 1-19B governs waiver of rights by classified employees. It states, "An employee may **voluntarily and knowingly waive**, in writing, all rights under the state personnel system, except where prohibited by state or federal law." (Emphasis added.) Rule 1-19B appears in Chapter 1 of the Board Rules. Chapter 1 establishes the general rights, responsibilities, and ethics of all appointing authorities and employees in the state classified system. The Rule is universal in application and therefore governs all waivers of rights by classified state employees.

Rule 1-19B requires that waivers of rights by state employees be express, not implied. Waiver is the intentional relinquishment of a known right. *In re Marriage of Robbins*, 8 P.3d 625, 630 (Colo.App. 2000). Waiver may be express, as when a party states its intent to abandon an existing right, or implied, as when a party engages in conduct which manifests an intent to relinquish the right or acts inconsistently with its assertion. To constitute an implied waiver, the conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit. *Id.*

To find that Complainant expressly waived his right to withdraw his resignation, the evidence must demonstrate that Complainant stated his intent to abandon this existing right. *Id.* Rule 1-19B requires that state employees' waiver of rights be "in

writing." The Negotiated Resignation is silent on the issue of Complainant's right to withdraw his resignation. The document on its face contains no reference to Rule 7-5B, no reference to the issue of withdrawal of resignation, and no waiver of the right to withdraw his resignation under Rule 7-5B.

Assuming arguendo that an implied waiver were permissible under Rule 1-19B, to find an implied waiver, Complainant's conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit of his right to withdraw his resignation under Rule 7-5B. *In re Marriage of Robbins, supra.* The record does not support a finding of an implied waiver. Complainant withdrew his resignation within twenty-four hours of signing the Negotiated Resignation form; this is not conduct free of ambiguity. Complainant's conduct demonstrates that he had no intention of waiving his right to withdraw his resignation when he signed the document on August 4, 2005.

Respondent asserts that Complainant waived his 7-5B right under the following provision of the Negotiated Resignation: "William Little agrees to submit a written, irrevocable voluntary resignation effective August 5, 2005 . . ." As noted above, the entire second paragraph of the Negotiated Resignation is ambiguous and must be construed in Complainant's favor. More importantly, the specific phrase upon which Respondent relies, "irrevocable voluntary resignation," is particularly ambiguous: An agreement to submit a separate, irrevocable resignation at some point in the future is not necessarily equivalent to an agreement to waive the right to withdraw a resignation under 7-5B. Respondent's construction of "irrevocable" in this context is strained. To adopt its interpretation of this contract provision would require that the ambiguity be construed against the employee. Under *Kuta*, 799 P.2d at 382, this would be error. Lastly, there is no extrinsic evidence supporting a finding that Complainant intended to waive the right to withdraw his resignation when he signed the Negotiated Resignation.

The same analysis applies to the express waiver language in the Negotiated Resignation. It states, "Mr. Little understands that by resigning in lieu of disciplinary action, he is giving up any rights he may have to file an appeal of this resignation or the potential disciplinary action to the State Personnel Board." Waiving the right to appeal a resignation to the Board is materially different than waiving the right under Rule 7-5B to withdraw his resignation. One calls for initiating litigation before an objective tribunal; the other involves a unilateral act of notice to the appointing authority. They are two distinct rights.

Complainant did not knowingly and voluntarily waive his right to withdraw his resignation. Board Rule 1-19B. Hence, Complainant is entitled to have his withdrawal of resignation accepted by Respondent, and the termination letter issued on August 4, 2005 is given full force and effect. Complainant therefore has a right to appeal his termination on the merits.

IV. COMPLAINANT DID NOT FORFEIT THE RIGHT TO APPEAL HIS RESIGNATION ON GROUNDS IT WAS COERCED OR FORCED.

Respondent's second claim is that the circumstances of his resignation were coercive and therefore constitute a constructive discharge. Before reaching the merits of that claim, however, it must be determined whether Complainant forfeited the right to raise it, by resigning in lieu of disciplinary action.

Respondent points out that two separate Board rules state that an employee who resigns in lieu of disciplinary action forfeits the right to appeal the resignation as having been forced or coerced. See, Board Rules 7-4B and 6-13B, 4 CCR 801 (2005). As noted below, however, these rules must be read in conjunction with Board Rule 1-19B.

Rule 7-4B states,

> An employee must give written notice of resignation directly to the appointing authority at least 10 working days before its effective date, unless the employee and appointing authority mutually agree to less time. Failure to provide notice may result in a delay in payout of leave and forfeiture of reinstatement privileges. If the notice is oral, the appointing authority shall provide written confirmation as soon as possible. **If the employee believes the resignation was coerced or forced, the employee has 10 days from the date of the resignation to appeal to the Board, except that an employee cannot appeal a resignation that is tendered in lieu of disciplinary action.**" (Emphasis added.)

Board Rule 6-13B states,

> Corrective and disciplinary actions are subject to the "Dispute Resolution" chapter. An appointing authority who has decided to discipline may also discuss alternatives with the employee in an attempt to reach a mutually acceptable resolution. If no resolution is reached, the employee retains the right to appeal. **When resigning in lieu of disciplinary action, the employee forfeits the right to file any appeal**. (Emphasis added.)

Director's Procedure 1-10 states,

> Appointing authorities have a duty to ensure employees are oriented to the work place, including communicating requirements and rights.

Board Rule 1-19B states,

> An employee may voluntarily and knowingly waive, in writing, all rights under the state personnel system, except where prohibited by state or federal law.

Principles of statutory construction apply to the interpretation of State Personnel Board Rules. *Lucero v. Department of Institutions*, 942 P.2d 1246, 1249 (Colo.App. 1997); *Halverstadt v. Department of Corrections*, 911 P.2d 654, 657 (Colo.App. 1995). Therefore, the above provisions must be read together, so as to give them consistent, harmonious, and sensible effect. *Id.* Under §2-4-201, C.R.S., the above Board Rules are to be interpreted to further a just and reasonable result, to promote the public interest over private interest, and to be constitutional. Under § 2-4-205, C.R.S., "If a general provision conflicts with a special or local provision, it shall be construed, if possible, so that effect is given to both."

Reading the three Board Rules above together, to give effect to each, results in the following general Board rule that shall govern resignations tendered in lieu of disciplinary action: State employees who believe a resignation was coerced or forced have ten days from the date of the resignation to appeal to the Board; employees who resign in lieu of disciplinary action presumptively forfeit their right to appeal the resignation, unless the forfeiture of that right was not made "voluntarily and knowingly," in writing.

The question, therefore, is whether Complainant voluntarily and knowingly forfeited his right to appeal his resignation at the time he signed the Negotiated Resignation. There is no question that Complainant knowingly waived his right to appeal his resignation to the Board: the language in the Negotiated Resignation states, "Mr. Little understands that by resigning in lieu of disciplinary action, he is giving up any rights he may have to file an appeal of this resignation or the potential disciplinary action to the State Personnel Board."

The second question is whether Complainant's forfeiture of appeal rights was voluntary. It is uncontested that the Respondent's administrative assistant informed Complainant that he would lose his PERA benefits if he chose termination. Complainant received this erroneous information in the heat of the moment of having to decide whether to resign or be terminated. He was not permitted any additional time to obtain confirmation of the information; he had to choose between resignation and termination before leaving the meeting with Warden Greco. Complainant resigned in order to save his PERA.

An employee who signs a resignation form in the belief it is the only means to assure his family will maintain its retirement savings is not committing a voluntary act. Therefore, it is concluded that Complainant did not knowingly <u>and voluntarily</u> forfeit his right to appeal his resignation on August 4, 2005, when he signed the Negotiated Resignation. Complainant has a right to Board review of his claim that his resignation was coerced or forced.

V. COMPLAINANT WAS CONSTRUCTIVELY DISCHARGED.

Complainant bears the burden of proving that his resignation was involuntary and constituted a constructive discharge. *Harris v. State Board of Agriculture*, 968 P.2d 148

(Colo.App. 1998). "An employee who claims that his resignation was forced or coerced bears the burden of proving that the resignation was not voluntary, but, rather, was given and accepted under circumstances that amounted to a constructive discharge." *Koinis v. Colorado Department of Public Safety*, 97 P.3d 193, 197 (Colo. 2004), citing *Harris, supra*.

A request for resignation does not support a claim of constructive discharge unless it is accompanied by harassment, coercion, or similar conduct. *Id.* To assess the voluntariness of an employee's resignation, the following factors must be considered: (1) whether the employee was given an alternative to resignation, (2) whether the employee understood the nature of the choice he was given, (3) whether the employee was given a reasonable time in which to choose, and (4) whether the employee could select the effective date of resignation. *Lenz v. Dewey*, 64 F.3d 547, 552 (10th Cir. 1995).

Complainant was given an alternative to resignation: termination. However, as noted above, due to an unfortunate, innocent error on the part of an administrative assistant for Respondent, the "choice" of termination was untenable to Complainant, as it represented the certain loss of his accrued retirement benefits. Therefore, the "choice" between termination and resignation was not a meaningful one. Complainant has established that he did not fully understand the nature of the choice he was given, because he misunderstood the impact of termination on his PERA.

Complainant was not given a reasonable time in which to choose between termination and resignation. Ten to fifteen minutes is unreasonable. Complainant had no time to walk away from the pressurized termination meeting to clear his head. Having to make the decision immediately after receiving the news that his career at DOC was over, while under armed escort, in the context of an uninterrupted meeting with the appointing authority, is not a reasonable time in which to choose. Lastly, Complainant was not empowered to choose the effective date of resignation. The choice Respondent gave him was to sign the Negotiated Resignation form as it was written by Respondent's counsel, with an immediate effective date, or accept the termination.

In *Lenz*, *supra*, the employee claiming his resignation was involuntary engaged in a two-month process to negotiate the terms of his resignation; this is a reasonable amount of time to make an informed choice. Further, Lenz chose the effective date of the resignation and achieved favorable terms, including not only severance pay but a stock buyout from the company. Therefore, Lenz was found to have resigned voluntarily. *Id.* By contrast, Complainant had no time to consider his decision, either with or without the advice of an attorney, and was not permitted to negotiate any of the terms of the resignation, including but not limited to the effective date.

The totality of circumstances demonstrate that the request for resignation in this case was accompanied by coercion. Therefore, Complainant's resignation was a constructive discharge.

Respondent asserts that *Koinis, supra*, controls this case. However, *Koinis* is distinguishable on several grounds. First, the appointing authority in *Koinis* excused the employee from the meeting in order to assure he had time to independently reflect on the decision. Koinis left the termination meeting, and later returned to inform his appointing authority that he had not yet made up his mind. The appointing authority gave him until 5 p.m. that day, during which time he could consider his options and contact any individual he deemed appropriate. There was no rush to return to a meeting at which his appointing authority awaited his imminent return. Koinis again left the presence of the appointing authority, and later "went to the director's office to tender his resignation." *Koinis*, 97 P.3d at 196.

In the instant matter, it is uncontested that Warden Greco required Mr. Little to decide between termination and resignation <u>before</u> leaving the termination meeting. An employee who has just been terminated is under the shock of the event. (See Finding of Fact #40). A meeting wherein an appointing authority reads a termination letter to the employee, ending his career at that state agency, is a high-pressure meeting. Under objective standards, a terminated employee cannot make a decision free of coercion unless he or she is permitted to leave the termination meeting, to independently reflect on the choice between termination and resignation. That did not occur here.

Koinis is also distinguishable in light of the fact Mr. Little believed the only means of saving his PERA was to resign. His resignation was made under financial duress. Koinis's was not.

Lastly, *Koinis* is distinguishable because it contained no discussion of Board Rule 1-19B. This Rule provides that state employees may waive their rights under the personnel system knowingly and voluntarily. Complainant <u>knew</u> he was waiving his right to appeal his termination when he resigned (see express waiver in Negotiated Resignation, Finding of Fact #56). However, he did not do so voluntarily, for the reasons previously discussed: he resigned on the mistaken belief it was the only means to save his PERA, in the coercive environment of the same meeting wherein he had just been terminated, without any meaningful opportunity to reflect on the decision.

Having prevailed on the issue of constructive discharge, Complainant is entitled to appeal his termination. *Harris*, 968 P.2d at 152.

<u>The Termination Letter was Valid.</u>

Complainant asserts that because Warden Greco did not sign the termination letter, Respondent did not actually terminate his employment on August 4, 2005. Warden Greco opened the meeting by stating that she had decided to terminate his employment. She then read the entire termination letter to him, and handed him the letter. Warden Greco's action was not equivocal; it was decisive. Her failure to sign the letter was a mere technical error on her part, but did not detract from the validity of the act of termination.

VI. ATTORNEY FEES AND COSTS ARE NOT WARRANTED.

The Board's enabling act mandates an award of attorney fees and costs upon certain findings. Section 24-50-125.5, C.R.S. It states in part,

> "Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . ."

There is no evidence in the record warranting an award of attorney fees and costs. The error made by Respondent's administrative assistant was an innocent one. There is no evidence of bad faith or harassment by Respondent.

CONCLUSIONS OF LAW

1. The Negotiated Resignation is ambiguous; however, Complainant intended to resign when he signed the document;

2. Respondent violated Board Rule 7-5B in rejecting Complainant's timely withdrawal of his resignation;

3. Complainant did not knowingly and voluntarily forfeit his right to appeal his resignation;

4. Complainant was constructively discharged;

5. Complainant is entitled to a hearing to challenge the basis for his termination;

6. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent shall accept Complainant's withdrawal of resignation, retroactive to August 5, 2005. The termination letter issued to Complainant is given full force and effect, retroactive to August 5, 2005. In addition, the circumstances of Complainant's resignation constituted constructive discharge. For both of these reasons, Complainant is entitled to a hearing to appeal his termination. This case will be set for hearing. Complainant is not entitled to an award of attorney fees and costs.

DATED this 25th day
of **May 2006** at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
633 17th St., Suite 1320
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the 25th day of **May 2006,** I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

William S. Finger
Frank & Finger, P.C.
29025-D Upper Bear Creek Road
P.O. Box 1477
Evergreen, Colorado 80437-6955

And interagency mail to:

Christopher J. Puckett
Assistant Attorney General
Employment Section
1525 Sherman Street 5th Floor
Denver, Colorado 80203

Andrea C. Woods

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.); Board Rule 8-68B, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69B, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

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 appellant may file a reply brief within five days. Board Rule 8-72B, 4 CCR 801. An original and 8 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. Board Rule 8-73B, 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. Board Rule R-8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule R-8-65B, 4 CCR 801.