STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2009G018**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL RODRIGUEZ DEPAUL,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, MARVIN FOOTE YOUTH SERVICE CENTER,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on March 3 and 5, 2009, at the State Personnel Board, 633 - 17th Street, Courtroom 6, in Denver, Colorado. The record was closed on March 5, 2009. Assistant Attorney General Michael Scott represented the Respondent. Respondent's advisory witness was Michael Padilla, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Michael Rodriguez DePaul (Complainant), appeals his resignation, which he alleges was forced, from Respondent, Department of Human Services, Division of Youth Corrections, Marvin W. Foote Youth Service Center (Respondent or DHS). Complainant seeks reinstatement, back pay and benefits, and an award of attorney fees and costs. Respondent seeks denial of Complainant's appeal of his resignation and dismissal of Complainant's appeal with prejudice.

For the reasons set forth below, Complainant's appeal is **denied.**

ISSUES

1. Whether Complainant's resignation was a constructive discharge entitling him to reinstatement;

2. Whether Respondent violated Complainant's rights under the Family Medical Leave Act;

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

FINDINGS OF FACT

General Background

1. Complainant commenced his employment as an Security Officer I with Marvin W. Foote Youth Service Center (Marvin Foote) on June 1, 2008. Prior to that date, he had been employed at another DHS youth facility. Marvin Foote has residents from ages ten to twenty.

2. When Complainant was hired by Marvin Foote, he was on Family Medical Leave (FML). He received a full clearance from his physician which allowed him to work at Marvin Foote.

3. Complainant was well-liked by other employees at Marvin Foote; they found him to be helpful. The residents also liked Complainant.

4. Complainant's Appointing Authority at Marvin Foote was Michael Padilla, the Assistant Director for the facility. When Padilla interviewed Complainant for a position at Marvin Foote, he emphasized the importance of employees following the chain of command.

Team Training and Social Activity

5. Periodically, for the past ten or twelve years, Padilla has made arrangements to provide team training for the Marvin Foote employees. Padilla feels that team training is important because a lot of the employees at Marvin Foote have no contact with one another; Padilla wanted the employees to have a chance to meet one another.

6. After the team training is over, the employees' supervisor may select a social activity for the team in order to generate camaraderie. The social activity usually lasts about four hours, and is not mandatory. An employee may opt to go home instead of participating in the social activity if it is that employee's day off. If the employee is scheduled to work, and does not want to participate in the social activity, he or she must report to work after the training portion is completed.

7. Marvin Foote scheduled team training for June 26, 2008. After the training was over, the team members could attend a social event at Elitch Gardens. If the employees chose to go to Elitch Gardens after the training, they were expected to pay the entrance fee, which was between $20.00 and $40.00.

8. When Complainant objected to a supervisor, Kevin Harvey, about having to go to Elitch Gardens, Harvey laughed and said, "It's only forty bucks." Based on comments made by Complainant's supervisor, Richard Oliver, Complainant and other employees believed that they either had to go to Elitch Gardens or report to work even if they were not scheduled for that day. Complainant was not scheduled to work that day.

9. Complainant sent an email to his supervisor, Richard Oliver, regarding his concerns, but received no response from Oliver. Complainant then called the Human Resources Office for DHS to ascertain whether he had to report to work instead of going to Elitch Gardens when he had the day off. Complainant did not want to ask Harvey any other questions about the event because he was intimidated by Harvey's position of authority. Harvey was known for saying, "I am the baddest 50-year-old motherfucker in the building," or words similar to that, which made Complainant uncomfortable.

10. The Human Resources Home Page on the Internet provides, in part, "[s]taff are available to assist employees in obtaining all appropriate entitlements and are available to internal and external managers, Appointing Authorities, supervisors and decision makers regarding the expectation of CDHS policies and related state and federal mandates. In addition, staff provides support and/or representation in program related situations such as, but not limited to, litigation, entitlement disputes, audits, and compliance surveys."

11. The person with whom Complainant spoke at Human Resources, Susan Spencer, did not know the answer to his question regarding his obligations if he did not attend the social activity, and contacted Padilla.

Performance Reminder and Grievance

12. When Padilla learned that DePaul had contacted Human Resources instead of his chain of command, he became concerned. Had Complainant asked those individuals in his chain of command, including Padilla, someone could have explained to him that he did not have to attend the activity at Elitch Gardens.

13. Padilla did not believe that Complainant's question was an appropriate issue to take to Human Resources because Complainant was not going to get clarification from Human Resources on an internal Marvin Foote procedure.

14. Because Complainant chose to contact Human Resources instead of those in his chain of command, Oliver, at Padilla's direction, issued a Negative Performance Reminder document to Complainant dated July 11, 2008. Padilla did not believe that the issue regarding the social activity was appropriate for the Human Resources office, and could have been clarified if Complainant had asked someone at Marvin Foote about it.

15. A Performance Reminder (either negative or positive) is the equivalent of a verbal reminder. The document goes into the supervisor's file so he or she will have it when an employee's annual performance review is completed. A Performance Reminder document never goes in the employee's personnel file.

16. Complainant was upset when he received the Performance Reminder, and discussed it with some of his coworkers. One of his coworkers, a lead worker, told him, "They are trying to fire you. If I were you, I'd leave and not come back."

That coworker believed that employees should be able to contact Human Resources without reprisal.

17. Complainant filed a grievance against Richard Oliver for issuance of the Performance Reminder. After he filed the grievance, Complainant had a meeting with Padilla during which Padilla did most of the talking. Complainant did not want Padilla involved in the grievance process because Padilla had been instrumental in Complainant receiving the Performance Reminder.

18. Padilla offered to remove himself from the process, but Complainant felt that he would not get fair due process, and that there was nothing left for him to do except to go on FML. It is common for Padilla to remove himself from the grievance process if he is involved in the underlying situation.

19. Complainant went to see his physician who told Complainant that he would put him on FML. Complainant got the FML forms from the Human Resources office for his doctor to complete. Shari Russell from the Human Resources office told Complainant that he was on FML so Complainant believed that to be the case. It is not clear from the evidence produced at hearing whether Complainant was on FML when he spoke with Russell.

Events Following Telephone Call Regarding Short Term Disbility

20. Complainant telephoned Standard Insurance Company regarding short term disability benefits on July 21, 2008, and spoke with a benefits examiner, Lindsey Steinpreis. During that conversation, Steinpreis perceived that Complainant became increasingly angry as he discussed his employer.

21. Steinpreis was concerned enough about her conversation with Complainant that she discussed it with a supervisor at Standard Insurance Company, Lincoln Dirks. Dirks wrote an email about it to Jeff Isham of the State of Colorado's Employee Benefits Unit. In that email, Dirks reported that Complainant was angry when discussing his employer and yelled such things as, "it makes you so mad you want to reach across the table and strangle them until they die," and that he understood why people go to work with guns and blow someone's head off. Dirks further reported that Complainant said that he "has been able to keep calm, but they have made him more mad than he has ever been and they just keep pushing you until you go postal," and that he was going to lose it because everyone is asking for something. Dirks also telephoned Isham and spoke to him about the situation.

22. When Isham received the information from Dirks, he contacted Rita Laitres, the Human Resource Manager, and official records custodian (including personnel files) for DHS's North/Central region. He also forwarded Dirks' email to her.

23. After Laitres reviewed the email and spoke with Isham, she was concerned about the extremity of the language in the email. She contacted Padilla, who went to her office and read the email from Standard Insurance Company.

24. When he read the email, Padilla was concerned about the Marvin Foote facility and its residents. He was primarily concerned about the safety of the facility's parking lot during shift changes.

25. Laitres and Padilla spoke with Brent Buford, the manager for another DHS facility, and Scott Bowers, DHS's Safety and Risk Manager. Padilla decided to put Complainant on administrative leave while DHS conducted an investigation. DHS takes allegations of workplace violence very seriously, and felt that an investigation was necessary for to assure safety.

26. Complainant was scheduled to go into work on the night of July 21, 2008. DHS was unable to reach Complainant so Padilla contacted the Arapahoe County Sheriff's Office and asked them to go to Complainant's home and tell him not to go to work. He also asked them to patrol the parking lots of some of the DHS facilities. Beyond that request, DHS did not involve the Arapahoe County Sheriff's Office, or any other law enforcement agency in the matter.

27. Padilla also sent Complainant a letter dated July 21, 2008, informing him that he had been placed on administrative leave with pay effective that day and to continue until an investigation regarding the alleged threats was completed. The letter further informed Complainant that he was prohibited from visiting Marvin Foote or any other DHS facility. He was also instructed to not contact any other DHS employees. Padilla emailed a copy of the letter to Laitres to put in Complainant's personnel file. If Complainant was on FML on July 21, 2008, Padilla and Laitres were not aware of it.

28. A few days later, on July 24, 2008, Bowers sent an email which went to fourteen people, including Laitres and Padilla, which provided that Complainant had been placed on administrative leave for making "several threats to third parties while on the phone" with someone from Standard Insurance Company. The email further indicated that Complainant's picture was posted at key access points of certain DHS buildings. Bowers stated that certain employees had been instructed to call 911 if Complainant was seen at one of the facilities.

29. Based on the information provided by Standard Insurance Company, Respondent's action of placing Complainant on administrative leave and taking the safety precautions it did were appropriate.

Notice of Rule 6-10 Meeting and Complainant's Resignation

30. Once the investigation had been completed, Padilla determined that he needed to hold a meeting with Complainant pursuant to Board Rule 6-10. In a letter to Complainant dated August 7, 2008, Padilla wrote, "I have received information that indicates the possible need to administer disciplinary action. The information is based on your performance and alleged workplace violence." The letter informed Complainant that the meeting would be held on August 15, 2008, at

8:30 a.m. Padilla emailed a copy of this letter to Laitres to put in Complainant's personnel file.

31. Complainant did not want to attend the Rule 6-10 meeting. Complainant called Padilla on August 11, 2008, and asked him what his options were. Padilla told Complainant that he either had to attend the Rule 6-10 meeting or resign.

32. Complainant said that he wanted to resign, and did not want to go through the Rule 6-10 process. He stated that he wanted to provide reasons in his resignation which would suggest a negotiated resignation. Padilla counseled Complainant against a negotiated resignation, and encouraged him to resign for personal reasons instead. Padilla gave this advice because a person who resigns for personal reasons is more likely to be hired by a state agency than a person who gives a negotiated resignation.

33. During the conversation between Complainant and Padilla on August 11, 2008, Complainant asked Padilla if he would not put any negative documents in Complainant's personnel file if Complainant resigned. Padilla agreed. He stated that he had already sent the letter putting Complainant on administrative leave and the letter advising Complainant of the Rule 6-10 meeting to Human Resources to put in Complainant's personnel file, but to his knowledge those documents were not yet in Complainant's file. Padilla agreed to not send any additional documents to Human Resources to put in Complainant's personnel file, and he did not.

34. Complainant called and spoke with Laitres on August 11 or 12, 2008. He told her that he wanted to submit his resignation to her instead of to Padilla because he did not trust Padilla. He also expressed great concern to her regarding the documents in his personnel file because he did want them to be seen by a potential employer. Laitres told Complainant that the letter placing him on administrative leave and the letter noticing the Rule 6-10 meeting were in his file. Complainant said that he wanted to put a rebuttal in his file, and Laitres told him that he could do so.

35. During Complainant's conversation with Laitres, he told her that he was being forced to resign, and that he did not want to attend the Rule 6-10 meeting; Laitres told Complainant that he did not have to resign.

36. Rule 6-10 meetings are not uncommon at DHS; the Human Resources office receives them on a daily basis.

37. The next day, on August 12, 2008, Complainant had a number of telephone conversations with Padilla, which he recorded. Complainant had spoken with Laitres and learned that the letter placing him on administrative leave and the notice of the Rule 6-10 meeting were in his file, and he wanted Padilla to authorize the removal of those documents from the file.

38. Padilla said that he would not do that. Padilla stated that he was required to send those documents to Human Resources and he did not feel that they were negative or derogatory because no decision regarding discipline had been made. Both letters could be perceived as negative.

39. Once documents are placed in a DHS employee's personnel file, DHS does not remove them unless they are directed to do so by the Attorney General's office.

40. When Complainant told Padilla that he thought Padilla was revoking what he had said the day earlier regarding negative documents in the file, Padilla said, ". . . .I understand what you are saying ahh again I don't think I have misrepresented myself. If you are not comfortable with it, you know, that is your decision. I'm not trying to push you in one direction or the other . . . I think if you're gonna if you want to do what you said resign, that's your choice. You know, I am not going to remove anything, but at the same time, I will tell you what I've been told. Whatever I sent, didn't reach there and I don't know why, and I would recommend . . . is that you . . . call Rita once again and see if you can have permission to look at your file."

41. Later in the conversation Padilla said, "The notification of the administrative leave with pay and the notice of 6-10 are requirements that I must submit for your personnel file." After further discussion with Complainant, Padilla stated, "Well, I'm . . . not gonna get into a contest with you and I'm not gonna negotiate with you . . . I have a notification and I'll see you at 8:30 Friday morning [for the Rule 6-10 meeting], and I'm not gonna, I'm not gonna change my mind."

42. At the end of the conversation, Complainant said, "Ok, well we'll find out, we'll find out if it is in my file or not, so I will go ahead and submit the letter for my resignation, and if there is something in my file after that point, then I'll take action." Padilla responded, "That's, that's good."

43. Complainant did submit a letter of resignation addressed to Rita Laitres dated August 13, 2008. The letter, which was typewritten, stated, "This letter will serve as my official resignation effective on August 15, 2008 at 0800 hours (am). I am resigning for personal reasons. At the bottoms of the letter, Complainant printed, "Mike Padilla told me specifically that I had to put down personal reasons. I told him I wanted to put down the reason why I was resigning was because I did not trust him and was already lied to by the state. He said he would not accept it, and I would have to quit on the spot, this meant I could not be re-hired by the state for not giving notice. If I did not quit, I would have to go to the R-610B meeting with him."

44. Complainant submitted his resignation with full knowledge that the letter placing him on administrative leave and the letter noticing his Rule 6-10 meeting were in his personnel file, and that Padilla would not remove them. Padilla accepted Complainant's resignation.

45. The decisions to place Complainant on administrative leave and to hold a Rule 6-10 meeting with him were not related to his FML status, or in any way related to FMLA.

46. Complainant filed an appeal with the Board on August 22, 2008.

DISCUSSION

I. GENERAL

A. Complainant Was Not Constructively Discharged.

To prove an allegation of constructive discharge, an employee "must present sufficient evidence establishing deliberate action on the part of an employer that makes or allows the employee's working conditions to become so difficult or intolerable that a reasonable person in the employee's position would have no other choice but to resign." *Wilson v. Board of County Commissioners of the County of Adams,* 703 P.2d 1257 (Colo. 1985); *Koinis v. Colorado Department of Public Safety,* 97 P.3d 193 (Colo.App. 2003). Moreover, the determination of whether there has been a constructive discharge requires an objective evaluation of the employer's actions and the effects of those actions on the employee instead of the employee's subjective view. *Christie v. San Miguel County School District R-2(J),* 759 P.2d 779 (Colo.App. 1988).

Complainant argues that he was constructively discharged when he tendered his resignation. To support this assertion, Complainant states that the Respondent was requiring him to attend a meeting pursuant to Board Rule 6-10. Having to attend a Rule 6-10 meeting is not objectively intolerable. While it may have been stressful for Complainant to attend the meeting, it was not a requirement that made Complainant's working conditions so difficult that a reasonable person in his position would be compelled to resign. In fact, Rule 6-10 meetings are a very common at DHS; the Human Resources office receives notices of them on a daily basis. In this case, no decision had yet been made regarding what discipline, if any, Complainant would receive. In addition, his resignation was not requested.

Complainant also testified that he was fearful of his work environment, yet provided insufficient evidence that Respondent had done anything to instill fear in him. Kevin Harvey's statement about being "baddest 50-year-old motherfucker in the building" did not appear to be directed at Complainant, or intended as a threat. Such a statement, while inappropriate, did not make Complainant's working conditions objectively intolerable compelling him to resign.

Complainant's receipt of the Performance Reminder document was a very minor incident, which cannot be said to objectively compel Complainant to resign from his position. The document is the equivalent of a verbal reminder, and was not placed in his personnel file. Lastly, Complainant was placed on administrative leave, and his picture was circulated to a number of DHS facilities with there being an indication that Complainant had threatened violence. When Respondent received the information from

Standard Insurance Company regarding the conversation one of its employees had with Complainant, it had no choice but to take action. Respondent had no way of knowing whether the information was accurate, but certainly had an obligation to take measures to prevent possible violence while it conducted an investigation. The actions taken by Respondent, based on the information it had, were completely reasonable. While these actions caused Complainant embarrassment, Respondent was not engaging in a deliberate action to create an intolerable or difficult workplace for Complainant; it was simply taking appropriate precautionary measures.

Complainant asserts that Padilla told him that he would not put any negative documents in his file in exchange for Complainant's resignation. Complainant argues that based on that representation from Padilla, he did resign, and later Padilla recanted his promise. The facts do not support this argument. Padilla did tell Complainant on August 11, 2008, that he would not send any additional documents to Human Resources to put in Complainant's personnel file. He also stated that although he had already sent the letter placing Complainant on administrative leave and the notice of the Rule 6-10 meeting to Human Resources, he did not believe they were in his file yet. Complainant found out from Laitres that those documents were indeed in his file. When he learned this information, he called Padilla and asked him to remove them. Padilla refused. With full knowledge that the documents were in his file and that Padilla would not remove them, Complainant submitted his resignation a day later on August 13, 2008. Both Laitres and Padilla told Complainant that he did not have to resign, and Padilla was willing to go forward with the Rule 6-10 meeting. Complainant was not tricked into resigning; he was aware that the documents would remain in his file.

Based on the foregoing, Complainant cannot be said to have been constructively discharged. He resigned voluntarily; Padilla advised Complainant to state "personal reasons" was the cause of his resignation to maximize Complainant's chances of obtaining another job within the state system.

B. Respondent did not violate Complainant's Rights Under the Family Medical Leave Act.

Complainant asserts that he was on FMLA when he was placed on administrative leave and when the Rule 6-10 meeting was noticed. He had been to his doctor, began the necessary paperwork, and was told by a DHS employee that he was on FML. Laitres and Padilla had no knowledge of this. However, for purposes of this opinion, it is assumed that Complainant was on FMLA. As such, Complainant argues that Respondent violated his rights under the FMLA when it placed him on administrative leave and by scheduling a Rule 6-10 meeting. While it is true that an employer cannot discriminate or take a negative action against an employee for exercising his rights under the FMLA, Complainant has not demonstrated, or alleged, that the actions taken by Respondent were in any way related to his FMLA. An employee who is on, or has requested FML, has no greater protection against termination, or other negative employment actions, for reasons unrelated to his FML status or request. *Gunnell v. Utah Valley State College,* 152 F.3d 1253 (10th Cir.1998);

29 C.F.R. Section 825.216(a) ("An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee has been continuously employed during the FMLA period. . . ."). Because Complainant's administrative leave and subsequent scheduled Rule 6-10 meeting were not related to his use of FMLA, Respondent did not violate his rights under the FMLA.

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

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 shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B), 4 CCR 801.

Complainant requested an award of attorney fees and costs. Because he did not prevail in this matter, there is no basis for such an award.

CONCLUSIONS OF LAW

1. Respondent did not constructively discharge Complainant.
2. Respondent did not violate Complainant's rights under the Family Medical Leave Act.
3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Complainant's appeal is dismissed with prejudice.

Dated this 29th day of April, 2009.

Hollyce Farrell
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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 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 8-65B, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of April, 2009, 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:

Michael Rodriguez DePaul
[redacted]

and in the interagency mail, to:

Michael Scott
[redacted]

[redacted]

Andrea C. Woods