STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2010B101**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PATRICIA GRIFFITH,

Complainant,

vs.

THE BOARD OF TRUSTEES OF THE COLORADO SCHOOL OF MINES,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on May 10 and June 2, 2010, at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on June 2, 2010, at the conclusion of closing arguments. First Assistant Attorney General Vincent Morscher represented Respondent. Respondent's advisory witness was Gary Bowersock, Director of Facilities Management and Complainant's appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant, Patricia Griffith ("Complainant") appeals the administrative decision to separate her from employment due to exhaustion of leave. Complainant seeks reinstatement to her position.

For the reasons set forth below, Respondent's decision to terminate Complainant's employment is **affirmed**.

ISSUE

1. Whether Respondent's decision to terminate Complainant's employment for exhaustion of leave was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

General Background – Complainant's Injury

1. Complainant was a classified employee and held the position of Custodian I with Respondent.

2. While at home on July 19, 2009, Complainant cut her finger. The injury was sufficiently severe that Complainant called in sick to work on July 20, 2009, and arranged to be seen by her doctor.

3. Complainant's finger did not heal easily or quickly. The treatment of Complainant's injury required two hand surgeries prior to August of 2009. These two surgeries were not successful in allowing her finger to heal properly, and Complainant's finger bone eventually became infected.

4. Complainant had a third surgery on her finger on August 5, 2009. This third surgery fused the bones in Complainant's finger and required the placement of three pins.

5. Complainant submitted a Medical Certification Form signed by her orthopedic doctor on or about August 27, 2009, informing Respondent that she would be incapacitated for a single continuous period of time from July 20 to October 12, 2009, and that the probable duration of Complainant's condition was unknown. The Medical Certification Form listed no possible part-time schedule for Complainant and included no other indication that Complainant could return to work during her period of incapacitation.

6. Complainant remained under her doctor's care from the time she injured her hand until after she had lost her employment with Respondent at the end of January 2010. During this period of time, Complainant was not able to perform her regular custodian duties fully because her hand was in a fragile state and had not healed fully. Complainant kept Respondent's Human Resources department informed of her condition.

7. Complainant's doctor told her as late as December 30, 2009, that she had to be very careful with her hand and that she could not lift anything with that hand until her finger had healed completely.

8. Complainant was finally released from her doctor's care when a March 16, 2010 medical examination revealed that the infection in her finger and her hand had healed.

Complainant's Use Of Leave and Disability Benefits

9. Complainant did not return to work after she injured her hand, except for a few days or partial days before she understood the seriousness of her injury.

10. It was Complainant's understanding, based upon her prior observations of several co-workers who had been off work because of on-the-job injuries, that a job would be held open as long as the injured worker needed in order to return to work able to accomplish all of the tasks necessary for the position. Complainant's understanding was not based upon any policy or statement by Respondent to that effect.

11. It was Respondent's Human Resources department's practice to send out notifications of Americans with Disabilities Act (ADA) rights to employees who had taken more than three days of sick leave. These notifications are generally sent out shortly after the employee takes three days of sick leave. In Complainant's case, Respondent sent out ADA rights information to Complainant shortly after she began to use her sick leave because of her injury.

12. Complainant did not ask Respondent for any accommodation to her job duties, for light duty, or any other arrangement that would permit her to return to work while her hand was healing or after her finger had been fused. Complainant believed that her position would simply be held open for her until she was healed sufficiently to no longer be under a doctor's care for her hand.

13. Ann Hix of Respondent's Office of Human Resources contacted Complainant by letter dated August 5, 2009 (the August 2009 letter). The August 2009 letter provided Complainant with a short explanation of her Family Medical Leave (FML) Act rights, provided Complainant with FML forms to be completed by Complainant, and informed Complainant that she may be eligible for short-term disability benefits through the State's policy with The Standard.

14. Complainant was granted FML leave status beginning on August 5, 2009. Complainant received some donated leave from co-workers, but she exhausted her paid leave in August 2009.

15. On or about September 24, 2009, Complainant received notification that her claim for short-term disability (STD) benefits had been approved by The Standard. Complainant's STD benefits payments of $303.60 per week were calculated to begin as of August 22, 2009.

16. SDT benefits take effect only after paid leave is exhausted and after a 30-day waiting period from the date of disability. The benefits are payable for a maximum of 150 days after the 30-day waiting period is complete; the recipient

is responsible for periodically providing required medical information to The Standard to maintain STD benefits during that period.

17. Complainant's maximum STD benefits through The Standard expired on January 16, 2010.

18. Complainant also received short-term disability benefits of $1,114.90 per month through the Colorado Public Employees Retirement Association (PERA) short-term disability program beginning September 19, 2009.

Respondent's Decision To Terminate Complainant's Employment For Exhaustion of Leave and Benefits

19. By letter dated October 19, 2009, Ms. Hix informed Complainant that her FML leave would end on November 2, 2009. In a follow-up letter dated October 22, 2009, Ms. Hix informed Complainant that Respondent would continue to pay the state's portion of Complainant's benefits so long as Complainant was receiving benefits under the State of Colorado's short-term disability plan. Ms. Hix notified Complainant in this follow-up letter that her short-term disability benefits would be effective for a maximum of 180 days, including the 30-day STD benefit waiting period. Ms. Hix also informed Complainant that the state guaranteed her employment during this period.

20. Complainant was approved for long-term disability benefits through the policy held by the State with The Standard as of January 17, 2010.

21. By letter dated January 22, 2010 (the January 2010 Notice Letter), Respondent informed Complainant that all of her available leave had been exhausted and that she had been unable to return to work for medical reasons. The January 2010 Notice Letter provided Complainant with the language of Director's Procedure 5-10, and informed Complainant that her employment would be terminated at the end of the month in order for Respondent to hire a replacement worker. The January 2010 Notice Letter referred Complainant to the PERA to inquire about retirement and other PERA services.

22. By letter dated January 29, 2010 (the January 2010 Termination Letter), Respondent informed Complainant that her employment was terminated. The January 2010 Termination Letter informed Complainant of her right to appeal the decision to the Board and provided Complainant with the correct information for filing an appeal with the Board.

23. Complainant filed a timely appeal with the Board concerning her separation from employment.

DISCUSSION

I. GENERAL

In this non-disciplinary appeal, Complainant bears the burden to prove that Respondent's decision to administratively terminate her employment was arbitrary, capricious, or contrary to rule or law. *See Velasquez v. Department of Higher Education*, 93 P.3d 540, 542 (Colo.App. 2003) (noting that "[e]xcept as otherwise provided by statute, the proponent of an order shall have the burden of proof in an administrative hearing," and that "the proponent of an order" is the person who brings forward a matter for litigation or action;" holding that in a non-disciplinary dismissal appeal, a certified state employee carries the burden of proof).

II. HEARING ISSUES

The Appointing Authority's decision to terminate Complainant's employment due to exhaustion of leave was not arbitrary and capricious, and was not contrary to rule or law.

1. Respondent's decision to terminate Complainant's employment was not shown to be contrary to rule or law:

The proper standards and procedures to be followed in consideration of whether an employee who has exhausted her leave may be separated from employment are found in Director's Procedure (DP) 5-10, 4 CCR 801:

> If an employee has exhausted all credited paid leave, unpaid leave may be granted or the employee may be administratively separated by written notice after pre-separation communication. The notice must inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement. No employee may be administratively separated if FML or short-term disability leave (include the 30-day waiting period) apply or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship. When an employee has been separated under this rule and subsequently recovers, a certified employee has reinstatement privileges.

DP 5-10 allows separation from employment only if: 1) all credited paid leave has been exhausted, 2) the employee is not, or is no longer, eligible for FML leave and is not receiving STD benefits through the agency provided STD benefits program, and 3) the employee is not a qualified individual with a disability who could reasonably be accommodated without undue hardship.

In this case, Complainant's employment was terminated only after her paid and donated leave was exhausted in August of 2009, her FML leave status expired in November of 2009, and the 180-day period during which she was awaiting STD benefits or receiving STD benefits expired in mid-January 2010. The timing of Respondent's decision meets at least the first two requirements under DP 5-10.

Complainant's ability to perform her job with a reasonable accommodation was not established at hearing. The job of custodian is a physical one, and Complainant testified at hearing that she could not perform all of her duties in the manner expected with her finger bone fused. The record also shows that Complainant did not raise the issue of accommodation or attempt to return to even a light duty schedule. At hearing Complainant did not argue that Respondent should have accommodated her injury in any manner. As a result, Complainant has not demonstrated that Respondent's decision to terminate her employment was contrary to DP 5-10 because she was an employee with a disability that could be reasonably accommodated.

DP 5-10 also includes two notification or communication requirements.

First, DP 5-10 requires a pre-separation communication between the employer and the employee. The rule does not require any particular form, timing, or content for that communication. In this case, Respondent informed Complainant on or about January 22, 2010, of its decision to separate her from employment at the end of the month. This notice also included a reference to Complainant's ability to contact PERA for retirement benefit information. While such retirement information was to be in the Termination Notice, it was harmless error to include the information in a written notice provided to Complainant approximately a week before her termination from employment. The January 2010 Notice Letter meets the limited requirements in DP 5-10 for a pre-separation communication.

Second, DP 5-10 requires that a written notice of separation from employment be provided to the employee, and that this notice include two pieces of information: 1) the employee's appeal rights, and 2) the employee's ability to contact his or her retirement plan for information on retirement benefits. As noted above, the information previously provided to Complainant concerning her retirement benefits should have been in this written notice. The fact that the information was provided in writing approximately a week prior to her termination from employment constitutes harmless error in this case. The written notice also properly advised Complainant of her appeal rights. Respondent's written termination letter, therefore, met the requirements of DP 5-10.

Accordingly, the process utilized in this case meets the requirements of DP 5-10. Complainant has not demonstrated that Respondent's decision to separate her from employment was contrary to rule or law.

2. Respondent's decision to terminate Complainant's employment was not shown to be arbitrary or capricious:

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).

Complainant's primary argument at hearing was that it was unreasonable for Respondent to terminate her employment while she was still under a doctor's care. In essence, Complainant contends that Respondent's decision to terminate her employment was arbitrary or capricious because it was a fundamentally unreasonable decision.

Complainant's argument, however, does not take into account that DP 5-10 balances the needs of employees and managers by requiring employment to be held open while an employee is on FML or is awaiting or receiving agency-provided STD benefits, but permitting replacement of that worker if the worker cannot or does not return to work at the end of the period of FML or after STD benefits end. As a result, there is a guarantee that an injured or ill employee's job will be held open for at least a period of time; in this case, Complainant's job was held open during the period she was on short-term disability. There is a limit to the period of time that the state must wait to allow an employee to recover physically from illness or injury, however. The fact that an employee is still under doctor's orders at the conclusion of the guaranteed time period does not serve to extend the period. Once that guaranteed period had passed, Respondent had the discretion to replace Complainant in order to bring its workforce staffing back to a full level.

Complainant has not demonstrated that Respondent's decision to separate her from employment in order to re-open her position was made without sufficient information, made without consideration of her circumstances, or by drawing unreasonable conclusions from the information gathered by Respondent. Accordingly, Complainant has not demonstrated that Respondent's decision in this case was arbitrary or capricious.

CONCLUSION OF LAW

1. Respondent's decision to separate Complainant from employment was not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's decision to separate Complainant from employment is **AFFIRMED**. Complainant's appeal is dismissed with prejudice.

Dated this 19th day of July, 2010.

Denise DeForest
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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. 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 8-68, 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 8-69, 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

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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 8-75, 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 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of July, 2010, I electronically served copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** addressed as follows:

Patricia Griffith

[redacted]

Vincent Morscher

[redacted]

[redacted]

Andrea C. Woods

(rev'd. 5/07)