

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2014B061

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DORIS MCCAULEY,
Complainant,

vs.

DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES, DRIVER'S LICENSE SECTION,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the commencement hearing in this matter on June 10, 2014. Following a number of other procedural developments detailed below in "Procedural Background," ALJ Susan J. Tyburski held the evidentiary hearing on October 5, 2016, at the State Personnel Board (Board), Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on October 6, 2016, after the exhibits admitted during the hearing were reviewed and redacted for inclusion in the record. At the evidentiary hearing, Complainant appeared in person, represented by her attorney, Bill Finger. Respondent was represented by Davin Dahl, Assistant Attorney General. Respondent's advisory witness was David Lindsay, Respondent's Operations Director and Complainant's appointing authority.

MATTER APPEALED

Complainant, a certified employee, appeals Respondent's refusal to accept the withdrawal of her notice of resignation. Complainant argues that this refusal was arbitrary, capricious, and contrary to rule and law. She seeks reinstatement, reimbursement of back pay and lost benefits, and an award of attorney fees and costs. Respondent argues that its refusal to accept Complainant's withdrawal of her resignation was appropriate and should be affirmed, that Complainant's appeal be dismissed with prejudice, and that all relief requested by Complainant be denied.

For the reasons discussed below, Respondent's decision not to accept Complainant's withdrawal of her resignation, and to terminate Complainant's employment, is **reversed**.

PROCEDURAL BACKGROUND

Following Respondent's refusal to accept Complainant's withdrawal of her notice of resignation, Complainant filed several appeal forms on February 18 and 24, 2014. After these appeals were clarified by both parties, ALJ DeForest issued a Procedural Order on March 21, 2014, identifying the key issue to be determined as "whether Complainant could withdraw her notice of resignation." Following a prehearing conference with the parties on April 3, 2014, the parties agreed to a briefing schedule to address this key issue.

Respondent filed a Motion for Summary Judgment, arguing that the Board's repeal of Board Rule 7-5 in 2013 eliminated an employee's right to withdraw a notice of resignation.

Following review of Respondent's Motion for Summary Judgment, Complainant's Response, Respondent's Reply and Complainant's Response to Respondent's Reply, and after taking judicial notice of the administrative record for the Board rulemaking in January 2013, ALJ DeForest denied Respondent's Motion for Summary Judgment on February 28, 2015. ALJ DeForest determined that, after reviewing the administrative record concerning the Board's repeal of Board Rule 7-5, there was no evidence establishing that the Board intended to eliminate an employee's right to withdraw a notice of resignation. ALJ DeForest further determined that an employee's right to withdraw a notice of resignation was implicit in Article XII, Section 1.3(8) of the Colorado Constitution. Therefore, ALJ DeForest ruled that, after the repeal of Board Rule 7-5, state employees have the right to withdraw a notice of resignation until the effective date of such resignation.

Following ALJ DeForest's February 28, 2015 ruling, ALJ DeForest left the State Personnel Board and this case was transferred to ALJ Pamela Sanchez, who set it for an evidentiary hearing on October 27, 2015. This evidentiary hearing was rescheduled for March 1-2, 2016. In February 2016, this case was transferred to the undersigned ALJ. On March 1, 2016, the ALJ granted Respondent's unopposed motion to vacate the evidentiary hearing due to the parties' tentative settlement. Complainant subsequently retained new counsel and filed a Status Report on April 14, 2016, requesting that the case be reset for an evidentiary hearing. Following a Scheduling Conference held with the parties on May 5, 2016, the parties were allowed to engage in additional discovery and this case was set for hearing on October 5, 2016.

ISSUES

1. Whether Respondent's refusal to accept Complainant's resignation, and subsequent termination of her employment, was arbitrary, capricious or contrary to rule or law; and
2. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

Background

1. Complainant was a certified state employee employed by Respondent as a Driver's License Examiner II in its Montrose office. Complainant was originally hired by Respondent on December 8, 2008, and was promoted to the position of Driver's License Examiner II in December 2011.

2. At all times relevant to this appeal, Robert Morgan, manager of the Grand Junction Driver's License office, was the interim manager of the Montrose Driver's License office and Complainant's immediate supervisor. In February 2014, Mr. Morgan was physically stationed in Grand Junction.

3. At all times relevant to this appeal, Pamela Hardwick was the Regional Manager of DMV's Region 4, which includes offices in Montrose, Cortez, Durango, Delta, Gunnison and Grand Junction.

4. At all times relevant to this appeal, Joi Simpson was Respondent's Operations Manager. Four Regional Managers, including Ms. Hardwick, reported to her.

5. At all times relevant to this appeal, David Lindsay was Operations Director for Respondent's Driver's License section and Complainant's appointing authority. Ms. Simpson reported to Mr. Lindsay.

6. At all times relevant to this appeal, Jessica Cuellar was an employee in the Division of Human Resources.

7. The Montrose Driver's License office was staffed by two employees, including Complainant; a third employee staffed a Driver's License office in Delta. Because of a shortage of staff on the western slope, these three employees shared coverage of the Driver's License office in Gunnison, taking turns traveling to that office.

Administrative History of the Board's Rules Concerning Withdrawal of an Employee's Resignation¹

8. Prior to 2002, the provision limiting an employee's ability to withdraw a resignation notice was contained in State Personnel Board Rule R9-1-2, which allowed an employee to withdraw a resignation "at any time prior to 7 full working days before the set resignation date." Rule R9-1-2 subsequently became R-7-5.

9. In May 2002, R-7-5 was amended to allow an employee only two business days to withdraw a notice of resignation:

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.

10. In October 2007, R-7-5, which became Board Rule 7-5, was further modified to provide additional restrictions on an employee's ability to withdraw a notice of resignation:

An employee who has submitted a notice of resignation at least 10 working days before its effective date may withdraw a resignation by the close of two business days after giving notice of resignation. The day that notice of resignation is given shall not be counted. A business day shall be the normal hours of operation for the department or employee's division. However, if the department or employee's division operates on a 24-hour basis, the business day shall end at midnight. The appointing authority must approve a timely withdrawal of resignation. Approval of a request to withdraw a resignation when that request is made more than two business days after the notice of resignation is within the discretion of the appointing authority.

The Board's 2013 Repeal of Board Rule 7-5

11. On December 31, 2012, the Board announced rulemaking to implement changes to the state constitution and state statutes required by Amendment S, including the repeal and replacement of Chapter 7. The Board's statement of basis and purpose for the repeal of Chapter 7 provided:

¹ The ALJ incorporates these facts from the Board's rules and rulemaking record, which were previously noted in ALJ DeForest's February 28, 2015 decision denying Respondent's Motion for Summary Judgment.

Chapter 7, Separation, in its entirety, including rules concerning general principles, resignation, layoff principles, notice requirements, determining priorities for layoff and retention rights, retention areas, retention rights, reallocation, appeals and recordkeeping, to simplify and make more clear the State's separation process.

12. The Board held its rulemaking public hearing on January 30, 2013. During that public hearing, Board Director Dana Shea-Reid stated that Board Rule 7-5 was to be repealed; no comments were made concerning the intended effect of such repeal. A Department of Personnel and Administration staff person, Skye Brunnick, made a single comment concerning the proposed repeal of Board Rule 7-5:

Under Resignation, old rule 7-5 was repealed, in which an employee who has submitted a resignation notice is later allowed to withdraw that notice and it was mandated that that the appointing authority must accept that withdrawal.

13. Board Rule 7-5 was repealed. The administrative record is devoid of any statement that such repeal was intended to completely eliminate an employee's right to withdraw a notice of resignation.

Complainant's Decision to Submit Her Notice of Resignation

14. Beginning in December 2013, Complainant began looking for a part-time job to supplement the income she received from Respondent. In the process of this job search, she was offered a full-time job outside of state employment.

15. On Wednesday, February 12, 2014, Complainant informed Mr. Morgan, via an email sent at 2:02 p.m., that she was considering submitting her notice of resignation:

This may come as a complete surprise,...and maybe not....
I want you to know that I am considering taking another job. I made it to the interview on Monday over my lunch hr and they called today to offer me the job. I am still considering some things and I realize I must give this dept 10 days notice. Should I accept their job offer they want me to start Feb. 25.

Can you tell me who I should talk to about separation details? I have questions like will I get paid my sick/vac time and carry over with PERA and things like that...

Sorry to be the bad-news-bear...but I'd appreciate your help.
THANKS.

16. Mr. Morgan responded to Complainant via email at 2:31 p.m. on February 12, 2014:

Sorry to hear you are thinking of leaving us. Usually a two week notice is necessary to be able to get rehired back with the State in the future, anything less would put you on a non re-hire list. Please let me know if you need a voluntary resignation form.

I am sure that if you contact **Jessica (303) 866-4492**; she can answer any questions you might have about separation from the state.
hope this helps
please let me know if I can be anymore [sic] assistance.
[Boldface type in original.]

17. Mr. Morgan did not advise Complainant that, if she submitted her notice of resignation, she could not withdraw it.

18. Ms. Hardwick was blind-copied on Complainant's email to Mr. Morgan and his response, and forwarded these two emails to Ms. Simpson at 3:11 p.m. on February 12, 2014. Neither Ms. Hardwick nor Ms. Simpson advised Complainant that, if she submitted her notice of resignation, she could not withdraw it.

19. As Mr. Morgan suggested, Complainant attempted to contact Jessica Cuellar in Respondent's Human Resources office. She made numerous telephone calls to Ms. Cuellar on February 12 and 13, 2014. Complainant reached Ms. Cuellar's voice mail message, which appeared to be outdated, as it stated that Ms. Cuellar was out of the office on February 5, 2014. Complainant never received a return telephone call from Ms. Cuellar or anyone else in the Human Resources office.

20. Complainant went onto Respondent's website and found an employee handbook containing the following information concerning resignation:

You are expected to submit a written resignation to your appointing authority at least 10 working days before the effective date, unless you and your appointing authority agree to less time. If you do not give sufficient notice, your records may reflect that fact, and it may result in a delay of leave payout and forfeiture of reinstatement privileges. You may withdraw your resignation within two business days of giving notice. Your appointing authority has the option of approving a request to withdraw a resignation that is made after two business days.

21. The employee handbook consulted by Complainant had a cover page stating: "State Personnel System Employee Handbook FY 10-11. A publication of the Department of Personnel & Administration." The first page of this handbook contained an initial section titled "Note to readers," which included the following statement:

This handbook was written in accordance with federal and state laws, Personnel Board rules, personnel director's rules, and fiscal rules in effect at the time of publication. Subsequent revisions to these could cause conflicting statements. If such a situation should arise, **the laws, personnel rules, and fiscal rules will always be the official documents upon which a ruling will be based or an interpretation will be made. This handbook is a guide, not a contract.** The same caution applies to department handbooks. [Boldface, italics and underlining in original.]

22. Complainant did not read the entire handbook, but simply looked for sections that related to resignation and separation from employment. She considered this handbook to be an "agreement," because if she did not follow the rules it contained for employees, she could be

disciplined.

23. Complainant did not see any information on Respondent's website informing her that she would not be allowed to withdraw her notice of resignation. She never received any training or other information from Respondent that such withdrawal was not permitted.

24. At 4:55 p.m. on Wednesday, February 12, 2014, Complainant sent Mr. Morgan the following email:

I left a message for Jessica...thanks for the info...she hasn't called me back yet. I will go ahead and give my 10 day notice. Im [sic] pretty sure I'll take the job and therefore that needs to be transmitted to you.

25. At 5:12 p.m. on February 12, 2014, Mr. Morgan forwarded Complainant's email to Ms. Simpson. At 8:08 p.m. on February 12, 2014, Ms. Simpson responded via email to Mr. Morgan: "I will get a letter of acceptance of her resignation out tomorrow. Thanks, Robert."

26. Ms. Simpson did not have the authority to accept an employee's resignation. Instead, she prepared an acceptance of resignation letter for Mr. Lindsay to sign.

27. Complainant completed and submitted a written notice of resignation to be effective February 28, 2014. Complainant's notice of resignation was received by Ms. Simpson on February 13, 2014.

28. Complainant relied on the information she found in this handbook to submit her notice of resignation on Thursday, February 13, 2014. Complainant explained that, based on the information she read in the online employee handbook, she understood that she had to give at least ten days' notice before resigning, and believed she had the option to withdraw her resignation within two business days of giving her notice of resignation.

29. Because Monday, February 17, 2014 was President's Day, an official state holiday, the second business day following Complainant's submission of her notice of resignation was Tuesday, February 18. Complainant believed that she had sufficient time over the 3-day weekend to review the benefits offered by her new job, consider her decision to resign and, if necessary, withdraw her resignation.

30. At 2:56 p.m. on Thursday, February 13, 2014, Complainant sent Mr. Morgan a hand written fax stating: "I cannot get Jessica to return my calls since yesterday 2-12-14 & now her voice mail said she's out – Do you have another person I can contact for employment separation?" [Underlining in original.]

31. On February 14, 2014, Mr. Morgan left for a trip to California over the long holiday weekend. He did not respond to Complainant's fax query.

32. On Friday, February 14, 2014, Mr. Lindsay signed a letter accepting Complainant's resignation, and providing her notice of her appeal rights. Ms. Simpson attempted to fax this letter to Complainant at her place of work in Montrose. This fax transmission was not received by Complainant.

33. The fax at Complainant's workplace in Montrose was connected to the public telephone line. When the telephone line was in use, no fax transmissions could be received.

Complainant's Attempts to Withdraw Her Notice of Resignation

34. On Saturday, February 15, 2014, Complainant researched her new job, and discovered that her new employer did not participate in PERA or offer insurance benefits comparable to those available through her employment with Respondent.

35. On Sunday, February 16, 2014, Complainant sent Mr. Morgan a text message indicating that she wished to retract her notice of resignation. Mr. Morgan contacted his supervisor, Ms. Hardwick, about Complainant's desire to withdraw her notice of resignation. Ms. Hardwick instructed Mr. Morgan to have Complainant contact her. Mr. Morgan relayed that message to Complainant. Ms. Hardwick subsequently instructed Mr. Morgan to tell Complainant to contact Ms. Simpson.

36. On Monday, February 17, 2014, Mr. Morgan contacted Complainant and told her to contact Ms. Simpson the next day (Tuesday, February 18), as Monday was a holiday. No one advised Complainant that she could not withdraw her notice of resignation.

37. Mr. Morgan never asked to meet with Complainant to discuss her request to retract her notice of resignation. He was never consulted by anyone in management about whether there was a need for Complainant to continue to work in the Montrose office, or whether she should be allowed to withdraw her notice of resignation.

38. At 11:02 a.m. on Monday, February 17, 2014, Complainant sent Ms. Simpson, Ms. Hardwick, Mr. Morgan, Jessica Cuellar and HR Director Andrew Gale the following email:

Hello to all,
I contacted Robert first and then Joy Latham [sic] on Sunday by text and phone to withdraw my resignation. When Robert got my message I was instructed to Contact Pam as he was out of state. Therefore I sent her the same text I sent to Robert.
Robert contacted me on Monday when he returned to town and said I had to contact Joi on Tuesday per Pam.
Therefore I'm sending an email to all parties today.
I would like to withdraw the resignation I submitted on feb. 13.
Thank you.

39. Complainant did not receive a response to her request to withdraw her notice of resignation.

Mr. Lindsay's Decision Not to Accept Complainant's Withdrawal of Her Notice of Resignation

40. Mr. Lindsay conferred with Andrew Gale in the Human Resources department, and was advised that, because Board Rule 7-5 was repealed, Complainant was not allowed to withdraw her resignation. After the repeal of Board Rule 7-5, it was a "standard practice" not to accept a withdrawal of an employee's notice of resignation, because the existing Board Rule 7-4 did not mention such withdrawal.

41. In deciding not to accept Complainant's withdrawal of her notice of resignation, Mr. Lindsay did not consider Complainant's work record or the staffing needs of the Driver's

License section on the western slope, because "the Rules did not mention" those considerations. He did not attempt to meet with, or contact, Complainant to discuss her separation from employment, and did not notify her that he was refusing to accept the withdrawal of her notice of resignation. Mr. Lindsay explained that there was no requirement that such communication take place.

42. Mr. Lindsay told Ms. Simpson he was not going to accept Complainant's withdrawal of her notice of resignation, and expected her to inform Complainant.

43. On February 18, 2014, Ms. Simpson told Complainant she was sending her Mr. Lindsay's February 14, 2014 acceptance of Complainant's notice of resignation, along with her appeal rights. Ms. Simpson informed Complainant that she would have to "pack her things" and be out of the office by February 28, 2014. Complainant testified that she "was forced out."

44. On February 18, 2014, a fax of Mr. Lindsay's letter accepting Complainant's resignation, with a notice of her appeal rights, was sent to Complainant's workplace in Montrose and was received by Complainant. Mr. Lindsay explained that it was "our responsibility to inform employees of their rights."

45. Mr. Lindsay was not aware of any training or other information provided to employees concerning the effect of a notice of resignation after Board Rule 7-5 was repealed. He explained that employees were expected to be familiar with, and to follow, the "Rules" posted on Respondent's website, and could also contact Human Resources for clarification.

46. After receiving Mr. Lindsay's letter, Complainant filed a timely appeal of Respondent's refusal to accept the withdrawal of her notice of resignation on February 18, 2014.

47. Mr. Morgan stated that, after Complainant's employment was terminated, her position at the Montrose office remained vacant for months. He had to send an employee from the Grand Junction office to fill in at the Montrose office. If no state vehicle was available for that employee to travel to Montrose, he had to pay that employee mileage.

48. Mr. Lindsay acknowledged that he read ALJ DeForest's February 28, 2015 summary judgment decision, but that he was not a lawyer and therefore did not fully comprehend the legal implications of that decision.

DISCUSSION

I. BURDEN OF PROOF

Complainant has the burden to prove by preponderant evidence that Respondent's refusal to accept Complainant's withdrawal of her resignation, and to terminate Complainant's employment, was arbitrary, capricious, or contrary to rule or law. If Complainant succeeds in meeting this burden of proof, the Board may reverse or modify Respondent's actions. § 24-50-103(6), C.R.S.

II. RESPONDENT'S REFUSAL TO ACCEPT COMPLAINANT'S WITHDRAWAL OF HER NOTICE OF RESIGNATION PRIOR TO ITS EFFECTIVE DATE WAS CONTRARY TO RULE OR LAW.

A. The Board's Repeal of Board Rule 7-5 Did Not Eliminate An Employee's Right to Withdraw a Notice of Resignation From a State Agency.

Board Rule 7-4, in effect in February 2014, provides:

An employee must give 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 written notice, as required by 24-50-126(1), C.R.S., 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 reasonably 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. Upon receipt of any written notice of resignation or upon an appointing authority providing a written confirmation of an oral resignation, an employee must be notified, in writing, of the right to appeal a coerced or forced resignation, including the time for such an appeal, and the Board address and telephone and facsimile numbers for filing the appeal. The 10 days for an employee to appeal to the Board an alleged coerced or forced resignation shall be from the date of receipt by the employee of the notification of appeal rights. If an employee tenders a resignation in lieu of disciplinary action, the employee shall be notified in writing that he or she has waived his or her right to appeal the resignation to the Board.

Mr. Lindsay rejected Complainant's request to withdraw her notice of resignation solely because Respondent's Human Resources department informed him that, after the Board's repeal of Board Rule 7-5 and the absence of any guidelines concerning a withdrawal of a notice of resignation in Board Rule 7-4, employees could no longer be permitted to withdraw resignation notices. This information was contrary to the information provided to state employees in an employee handbook found by Complainant on Respondent's website in February 2014. While Respondent argued that employees were expected to be familiar with the most recent version of the State Personnel Board Rules, Mr. Lindsay was unable to interpret the revised Rule 7-4 as it applied to an employee's request to withdraw a notice of resignation without consulting Respondent's Human Resources department.

The interpretation advanced by Respondent ignores the right of state employees to withdraw a notice of resignation before that resignation becomes effective. In ALJ DeForest's February 28, 2015 summary judgment decision, she explains that the source of an employee's right to withdraw a notice of resignation is grounded in the Colorado Constitution, Article XII, Section 13(8), which mandates, in pertinent part: "Persons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." ALJ DeForest explains:

Under the state constitution, the employee is an active partner in the employment relationship. Respondent has its right, under the terms of the

constitution, statutes and rules, to terminate employment under certain circumstances. Absent such action, however, an employee will remain working for the state until they retire or resign. In this respect, the relationship between state employer and employee is akin to a partnership contract.

ALJ DeForest distinguishes an employee's constitutional right to continued employment during satisfactory service, which necessarily includes the right to withdraw a notice of resignation prior to its effective date, from the Board's authority to promulgate rules to administer the constitutionally mandated state personnel system, explaining that "the effect of the Board's old rules was to create a preference for a ten-day notice to be given, and to limit the exercise of the right to withdraw a notice so as to eliminate last-minute withdrawals."

In repealing Board Rule 7-5 and revising the existing Board Rule 7-4, the Board issued a general "statement and purpose" concerning its January 2013 rulemaking session. This "statement and purpose" did not indicate that it intended to eliminate an employee's right to withdraw a notice of resignation and to prohibit an employee, under any circumstances, to make such a withdrawal. Instead, the administrative record indicates that the Board was intending "to simplify and make more clear the State's separation process." No public comments addressed the elimination of an employee's right to withdraw a notice of resignation.

ALJ DeForest concludes:

After the elimination of the limitations in old Board Rule 7-5, if there is a withdrawal [of a notice of an employee's resignation], it simply is effective unless and until the day that the resignation takes place.

Respondent argues that the Colorado Court of Appeals' decision in *Harris v. State Board of Agriculture*, 968 P.2d 148 (1998), supports its position that Colorado state employees do not have the right to withdraw a resignation independent of Board Rules. In *Harris*, the employee submitted a notice of resignation that was effective immediately, in order to obtain access to her PERA funds as soon as possible. Under the prior Board Rule R9-1-2 in effect at that time, employees were allowed to withdraw a resignation "at any time prior to 7 full working days before the set resignation date." Because Ms. Harris asked that her resignation be withdrawn after it was effective, the Court affirmed the ALJ's conclusion that the employee "waived any right she might have had under R9-1-2 to withdraw her resignation." *Id.* at 152-3.

Respondent argues that the appellate court's sole reliance on an interpretation of existing Board Rules to determine whether Ms. Harris had a right to withdraw her resignation establishes that no right to resign exists absent a Board Rule affirmatively providing such a right. This argument ignores the constitutional right of certified state employees to continued employment during satisfactory service emphasized by ALJ DeForest, which the Court did not consider in *Harris*, *supra*.

Under the doctrine of the law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *McIlravy, et al. v. Kerr-McGee Coal Corporation*, 204 F.3d 1031 (10th Cir. 2000) (citations omitted). Under this doctrine, ALJ's DeForest's ruling that the Board's repeal of Board Rule 7-5 did not, and could not, eliminate a state employee's right to withdraw a notice of resignation, implicit in Article XII, Section 1.3(8) of the Colorado Constitution, continues to govern the determinations made by the ALJ in this Initial Decision.

As ALJ DeForest outlines in her February 28, 2015 Order, because Complainant submitted her request to withdraw her notice of resignation before its effective date, Respondent acted contrary to rule or law in refusing to accept this withdrawal and terminating Complainant's employment. Under § 24-50-103(6), C.R.S., Respondent's termination of Complainant's employment should be reversed.

B. Respondent's Failure to Communicate With Complainant Prior to the Decision to Separate Her From Employment Violates Board Rule 7-1.

When Respondent refused to allow Complainant to withdraw her resignation, it involuntarily separated her from employment. Board Rule 7-1 provides the following "General Principles" concerning "any involuntary separation":

The appointing authority must communicate, or make a good faith effort to communicate, with an employee before conducting any involuntary separation. The communication may be oral or written, and must provide an opportunity for the appointing authority and employee to exchange information about the separation.

Complying with Board Rule 7-1 would have permitted Respondent to review the work load and staffing requirements in the Montrose office, and the potential benefits to Respondent in allowing Complainant to continue to work in that office. Neither Mr. Lindsay, Ms. Hardwick nor Ms. Simpson made any attempt to communicate with Complainant, or ascertain whether there was a need for this experienced employee to continue to serve in the Montrose office, before Mr. Lindsay rejected Complainant's request to withdraw her resignation.

The failure of Respondent's managerial employees to respond to Complainant's repeated queries and efforts to communicate with them prior to a decision concerning her request to withdraw her notice of resignation violates Board Rule 7-1. Therefore, Respondent's termination of Complainant's employment should be reversed, pursuant to § 24-50-103(6), C.R.S.

III. COMPLAINANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

§ 24-50-125.5(1), C.R.S., provides, in pertinent 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 ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless ... the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee ... against whom such personnel action was taken...

A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Personnel actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which it is found that "a party fails to offer or produce any competent

evidence to support such an action..." Board Rule 8-33(C).

Complainant concedes that Respondent's initial refusal to accept Complainant's withdrawal of her notice of resignation in February 2014 was not frivolous; was not made in bad faith, maliciously, or as a means of harassment, and was not otherwise groundless. However, Complainant seeks attorney fees and costs from March 2, 2015, the date that ALJ DeForest's decision denying Respondent's motion for summary judgment was served on Respondent. Complainant argues that once this summary judgment decision was issued, Respondent was on notice that its refusal to allow Complainant to withdraw her notice of resignation was arbitrary, capricious, and contrary to rule or law. Therefore, Complainant argues that Respondent's refusal to resolve this case and reinstate Complainant after March 2, 2015 was "stubbornly litigious" under Board Rule 8-33(B).

ALJ DeForest's February 28, 2015 decision denied Respondent's motion for summary judgment "on Complainant's claim that Respondent should have accepted her withdrawal of her resignation," and definitively ruled that Complainant had a right to withdraw her resignation at any time until its effective date. Respondent was served with a copy of this decision on March 2, 2015, and from that date, was on notice that its refusal to accept Complainant's withdrawal of her notice of resignation had been determined to be contrary to rule or law. During the evidentiary hearing in this case, Respondent did not offer any new evidence to support its position that the repeal of Board Rule 7-5 allowed it to reject Complainant's withdrawal of her notice of resignation. Under these circumstances, Respondent's continued insistence on its position that Complainant had no right to withdraw her notice of resignation was "stubbornly litigious" under Board Rule 8-33(B). Therefore, Complainant is entitled to an award of attorney fees and costs incurred in pursuing this appeal after March 2, 2015.


CONCLUSIONS OF LAW

1. Respondent's refusal to accept Complainant's withdrawal of her resignation was contrary to rule or law.
2. Complainant is entitled to an award of attorney fees and costs incurred in pursuing this appeal after March 2, 2015.

ORDER

Respondent's action is **reversed** and the termination of Complainant's employment is rescinded. Complainant shall be reinstated with full back pay and statutory interest on that pay, minus any income she earned from the date of the termination of her employment to the date of her reinstatement. Complainant shall also be made whole for all lost benefits, and shall be reimbursed for attorney fees and costs she incurred in pursuing her appeal after the March 2, 2015 receipt of ALJ DeForest's Order Denying Respondent's Motion for Summary Judgment.

Dated this 22nd day
of November, 2016.




Susan J. Tyburski, Administrative Law Judge
State Personnel Board
1525 Sherman St., 4th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the 22nd day of November 2016, I electronically served a true copy of the foregoing AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE as follows:

William S. Finger, Esq.
29025-D Upper Bear Creek Road
Evergreen, CO 80439
bill@fn-pc.com

Davin Dahl
Assistant Attorney General
Litigation Section
1300 Broadway, 10th Floor
Denver, CO 80203
Davin.Dahl@coag.gov



Jenney Reed

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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 electronic record on appeal in this case is \$5.00. 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 8-64, 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 8-66, 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 8-70, 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 8-60, 4 CCR 801.