STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B075**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EZEKIEL A. MARTINEZ,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF FACILITIES MANAGEMENT,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on January 9, 2008 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The matter was commenced on the same date. The record was closed on the record by the ALJ at the conclusion of the hearing. Assistant Attorney General Joseph F. Haughain represented Respondent. Respondent's advisory witness was Dennis Buck, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Ezekiel A. Martinez ("Complainant") appeals the termination of his employment by Respondent, Department of Human Services, Division of Facilities Management ("Respondent") due to exhaustion of Complainant's leave. Complainant also asserts claims of unlawful discrimination on the basis of disability, age, and race, and a claim of medical discrimination. Complainant seeks accommodation with a job in state employment, medical insurance, one year of severance pay, and documentation of Custodian II and Vocational Education work and recognition of five years of good service.

For the reasons set forth below, Respondent's action is **affirmed.**

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

General Background:

1. Complainant worked at the Platte Valley Youth Services Center as a Custodian II. Complainant was certified to this position, and had served in this position for approximately five years at the time of the termination of his employment. Complainant's position included duties as a vocational education trainer as well as custodian duties, which meant that Complainant worked with youths housed at the detention facility to teach them the job duties of a custodian.

2. As part of Complainant's job, he performed such functions as cleaning and sanitizing restrooms, cleaning walls, doors and floors, moving furniture, assembling equipment, stocking materials, distributing equipment, cleaning carpets, stripping floors, and finishing floors.

3. Complainant's assignment as a teacher required that he also be able to demonstrate these activities to others.

Complainant's Diagnosis With Carpal Tunnel Syndrome:

4. Prior to August of 2006, Complainant began experiencing neck pain and numbness in both arms.

5. On September 6, 2006, Complainant's doctor, Dr. John Viola, diagnosed Complainant with Carpal Tunnel Syndrome and removed him from work.

6. Complainant's last day at work was August 14, 2006.

Complainant's Benefits Coverage:

7. By letter dated August 23, 2006, Jeannie Mai from Respondent's Human Resources section informed Complainant about the programs that were potentially available to assist him while he was not working due to medical issues.

8. Ms. Mai explained that Complainant may be eligible for Family Medical Leave Act ("FMLA") status if his medical condition qualified him for coverage. Ms. Mai informed Complainant that full-time employees with more than a year of service may be able to receive up to 520 hours of unpaid FMLA leave in a fiscal year. She provided Complainant with the necessary forms to apply for FMLA status.

9. Ms. Mai also informed Complainant that, as a permanent state employee, he was entitled to apply for Short Term Disability ("STD") benefits. STD benefits provide 60% of

an employee's wages on a weekly basis while the employee is off work for medical reasons for up to 150 days. The 150 days of coverage begins after a waiting period of 30 calendar days or the use of all accrued sick leave, whichever is later. Ms. Mai included all of the forms necessary to apply for STD with her letter.

10. Ms. Mai also explained to Complainant that PERA also had a short-term disability program in place for vested employees. She described the PERA program as a short-term disability benefit that could last up to 22 months after a waiting period of 60 calendar days. The PERA program required that Complainant contact PERA directly to obtain the forms.

11. Finally, Ms. Mai informed Complainant that he may be eligible to make use of the department's leave sharing program if he was able to demonstrate a catastrophic illness or injury. Application for participation in the program required that Complainant contact the Human Resources office for the application form and provide it to his supervisor as soon as possible, but no later than the date Complainant's state STD benefits expired.

Complainant's Leave and FMLA Status:

12. At the time Complainant left work, he had accrued approximately 20 hours of sick leave.

13. Complainant's sick leave, annual leave, compensatory time and holiday time were exhausted as of August 31, 2006.

14. Complainant applied for, and was granted FMLA status, effective August 15, 2006, because he had a serious health condition.

15. Respondent calculated that Complainant exhausted his FMLA leave status as of November 14, 2006.

Complainant's Short Term Disability Benefits:

16. By application signed August 28, 2006, Complainant applied for state STD benefits through the state's STD insurance company, The Standard.

17. The Standard granted Complainant's request for STD benefits by letter dated September 13, 2006. Because of the 30-day waiting period required before short term disability is available, Complaint became eligible for STD benefit payments as of September 14, 2006.

18. Respondent calculated that Complainant's STD was exhausted as of February 10, 2007.

Complainant's Hand Surgery:

19. While Complainant was off work, Complainant was on medication for his pain. Complainant also had surgery to one of his hands on January 7, 2007. The hand surgery left him unable to drive and unable to work with his hands during his recuperation period. Complainant was living with his mother in Colorado Springs during this period.

Exhaustion of Leave:

20. Ms. Mai formally notified Complainant's appointing authority, Dennis Buck, that Complainant had exhausted all of his paid leave as of August 31, 2006, that Complainant's FMLA status was exhausted as of November 14, 2006, and Complainant's short-term disability was exhausted on February 10, 2007. Ms. Mai also informed Mr. Buck that Complainant had been informed of his option to apply for a reasonable accommodation under the Americans With Disabilities Act (ADA) and the possibility of applying for donated leave.

21. Ms. Mai's letter to Mr. Buck also informed him that, as appointing authority, he had two choices once Complainant had exhausted his paid leave, FMLA protections, and STD benefits, and if no reasonable accommodations for Complainant's medical limitations had been found. Mr. Buck could grant leave without pay to Complainant or could administratively discharge Complainant after a pre-termination communication under Director's Procedure 5-10. Ms. Mai stated that her office recommended that appointing authorities use an Employee Status meeting to permit the employee to present information for Mr. Buck's consideration before a decision was made as to termination of employment.

Scheduling of the Employee Status Meeting:

22. Mr. Buck notified Complainant in writing that he intended to hold an employment status meeting on March 1, 2007 at a conference room in Ft. Logan in Denver. The meeting was to discuss Complainant's "current status with regard to your benefits (Short Term Disability, ADA, etc.) and any remaining entitlements." Mr. Buck explained that, at the meeting, Complainant was to "provide any pertinent information to be considered regarding your future employment status."

23. Complainant was living in Colorado Springs at the time of the scheduled Employee Status meeting. He was on medications from his recent hand surgery and was unable to attend the meeting.

24. Complainant informed Respondent that he was not able to attend the meeting because of his medications and weather problems. The meeting was re-scheduled for March 9, 2007. In the follow-up letter from Ms. Mai re-scheduling the meeting, Ms. Mai reminded Complainant that all of Complainant's entitlements were exhausted as of February 10, 2007 and that Complainant was currently on leave without pay status.

March 2007 Return to Work Certification:

25. Complainant's doctor, Dr. Kenneth Finn, completed a Fitness-to Return Certification for Complainant on March 7, 2007.

26. The certification allowed Complainant to return to work under work restrictions. The restrictions were to be imposed for an indefinite period.

27. Complainant's work restrictions included the following: Complainant was not to lift or carry more than 10 pounds, not to push or pull objects over 10 pounds, not to crawl for more than 15 minutes a day, not to work or climb on equipment, not to grasp objects with either his right or left hand, not to use fine manipulations with either his right or left hand. Complainant's work restrictions also included no typing or keyboarding, no driving a vehicle, and no operating machines.

28. With these restrictions in place, Complainant could not perform the essential functions of his position as a custodian.

Complainant's Request for Reasonable Accommodation:

29. On March 7, 2007, Complainant also submitted a completed Request for Reasonable Accommodation Due To Mental/Physical Disability to Rose Estrada, Respondent's Americans With Disabilities Act ("ADA") coordinator.

30. Complainant reported that his doctor had told Complainant that he was not able to use both hands, and that his physical impairment was pain. Complainant reported that his impairment limited his ability to lift and the use of both hands, and that the extent of his impairment was still unknown due to the fact that he was still in medical care.

31. Complainant requested an accommodation, which provided "another job opportunity to work in the Colorado Springs, Colorado area."

32. Complainant also filed a completed State of Colorado Application for Announced Vacancy job application, which provided Respondent with Complainant's language skills, education, and employment history.

The March 9, 2007 Employee Status Meeting:

33. Mr. Buck, Complainant, Ms. Mai, and Roseli Frederico of the Human Resources section held an Employee Status meeting on March 9, 2007. Complainant attended the meeting by phone. At the time of the meeting, Complainant was still unable to use either of his hands sufficiently to use the phone handset, so Complainant put the phone call on speaker phone.

34. During this meeting, Mr. Buck read the work restrictions that had been on the Return

to Work Certification from Complainant's doctor. Complainant told Mr. Buck that he was physically incapable of returning to work.

35. Complainant was asked if would be able to accept a position if a search revealed one that fit within his restrictions and for which he was qualified. Complainant told Mr. Buck that he may be able to accept a position if it was in Colorado Springs and on transportation lines.

36. Mr. Frederico informed Complainant during the meeting that, if he were to be administratively separated, he would have reinstatement privileges if he recovered his ability to perform the essential functions of his position.

Respondent's Handling of the Request for Reasonable Accommodation:

37. Based upon the information provided in Complainant's request for accommodation, Respondent considered Complainant to have a disability for purposes of the ADA. Respondent also determined that, with the medical restrictions placed upon his work, Complainant could not perform the essential functions of his current position.

38. Respondent conducted a search for new possible positions which met four criteria: 1) the position had to be vacant as of the date the search was performed, March 11, 2007; 2) the position had to have a maximum pay range which was the same or lower than Complainant's Custodian II pay range; 3) the position had to be compatible with Complainant's work restrictions; and 4) the position had to meet Complainant's request to work in the Colorado Springs area.

39. In conducting this search, Respondent first considered a number of possible positions, which would meet the requirement that Complainant transfer into a position that had a maximum pay range the same or lower than his Custodian II position. Respondent compared the minimum qualifications for these possible positions to the work restrictions and work history found in Complainant's job application.

40. After analyzing the restrictions placed on Complainant's work and considering that the position needed to be at or below Complainant's current classification, Respondent decided that the State Services Trainee I, II, or III positions were the types of positions for which Complainant may qualify.

41. Respondent then ran a search for vacant position listings to find State Services Trainee positions.

42. The initial results of the search indicated that there were several vacant part-time positions in the state service trainee class, but none of these positions were in the Colorado Springs area.

43. By letter dated March 19, 2007, Respondent's ADA Coordinator, Ms. Estrada,

notified Complainant that Respondent had conducted a search for a reasonable accommodation. Ms. Estrada reported to Complainant that Respondent was unable to find a reasonable accommodation that would assist him in performing the essential functions of his Custodian II position. Ms. Estrada also informed Complainant that Respondent had searched for vacant positions within the Colorado Department of Human Services system in the Colorado Springs area and found that none were available for which Complainant met the minimum qualifications and were within his medical limitations.

Termination of Complainant's Employment:

44. Mr. Buck was concerned that, without the use of his hands, Complainant was unable to perform many of the essential duties of a Custodial II position, and that he could not demonstrate functions to the youth who were being trained on custodial functions. Mr. Buck was also concerned that attempting to return Complainant to Platte Valley with such extensive restrictions would create problems because staff at the facility needed to have a level of physical agility to handle problems that may occur with detained youth.

45. By letter dated March 20, 2007, Complainant's appointing authority, Mr. Buck, informed Complainant that Respondent was separating Complainant from employment effective that day, pursuant to Director's Procedure 5-10, because Complainant was not able to return to his position as Custodian II and there was no reasonable accommodation available for his medical limitations.

46. Mr. Buck's letter of March 20, 2007, informed Complainant of his right to appeal the decision to the Board. The letter also provided Complainant with the phone number to call for PERA retirement benefits information, and informed Complainant that he should contact Respondent's HR section for any questions about COBRA rights or other insurance benefits.

47. Complainant filed a timely appeal of Respondent's decision to terminate his employment with the Board.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be removed from state service for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. §§ 24-50-101, *et seq.*; *Department of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Just cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801. The rule includes the "willful failure or inability to perform duties assigned" as one of the permissible reasons to discharge an employee.

In an appeal of a non-disciplinary discharge of an employee, the employee bears the burden of proof in the proceeding challenging that discharge. *See Velasquez v. Dept.*

of Higher Education, 93 P.3d 540, 542 (Colo.App. 2004)(holding that the state APA requirement that, "[e]xcept as otherwise provided by statute, the proponent of an order shall have the burden of proof" requires that the employee who has lost a position for non-disciplinary administrative reasons bears the burden of proof at a Board hearing). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6). Complainant also bears the burden of proof on his claims of discrimination. *Colorado Civil Rights Division v. Big O Tires, Inc.*, 940 P.2d 397, 402 (Colo. 1997).

II. HEARING ISSUES

A. Complainant Did Not Present A *Prima Facie* Case Of Discrimination:

In his Consolidated Appeal Form, Complainant raised four claims of discrimination: disability, age, race, and a claim of "medical" discrimination. The burden of proof is placed upon a complainant to establish a *prima facie* case of discrimination. *Big O Tires*, 940 P.2d at 401-02. If the claimant establishes such a case, a presumption then arises that the employer unlawfully discriminated against the plaintiff. This presumption places upon respondent the burden of producing an explanation to rebut the *prima facie case, i.e.,* the burden of producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. *Id.* at 402.

At the conclusion of Complainant's case-in-chief, Respondent moved for directed verdict on all of Complainant's claims of discrimination on the grounds that Complainant had failed to present a *prima facie* showing of discrimination under any of his theories. A motion for a directed verdict can only be granted when the evidence, considered in the light most favorable to the nonmoving party, compels the conclusion that a reasonable jury could not find in favor of the nonmoving party. *McGlasson v. Bargar,* 431 P.2d 778, 779 (Colo. 1967).

1. Complainant Did Not Present A *Prima Facie* Showing of Discrimination on The Basis of Age or Race; Complainant Did Not Present Sufficient Grounds To Support A Claim Of Medical Discrimination:

A *prima facie* case of age discrimination required that Complainant present evidence: 1) that he belongs to a protected class; 2) that he was qualified for the job at issue; 3) that, despite his other qualifications, he suffered an adverse employment decision *e.g.,* a demotion or discharge or a failure to hire or promote; and 4) that the circumstances give rise to an inference of unlawful discrimination. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo.App. 1997).

Complainant did not present any testimony at hearing concerning his age or any other reason to believe that his age placed him into a protected class. As a result, Complainant did not establish the first element of the *prima facie* case of age

discrimination. *See Evenson v. Colorado Farm Bureau Mutual Ins. Co.*, 879 P.2d 402, 405 (Colo.App. 1993) (holding that to establish a *prima facie* showing of age discrimination, a claimant had to show that "he or she was 40 years of age or older"). Complainant also did not establish any circumstance under which it would be reasonable to infer that age played a role in Respondent's considerations. Additionally, Complainant's testimony established that he was not able to work at the time the decision to terminate his employment was made. As a result, there was insufficient evidence presented in this case that Complainant was qualified for the job at issue. Complainant did not present sufficient evidence in his case-in-chief to support a *prima facie* showing of age discrimination.

In order to present a *prima facie* case of race discrimination, Complainant was required to present sufficient evidence that: (1) he belongs to a protected class; (2) he was qualified for the job at issue; (3) he suffered an adverse employment decision despite his qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination. *Big O Tires, Inc*, 940 P.2d at 402.

In his case-in-chief, Complainant presented no evidence related to his race or other sufficient information which would prove that he belongs to a protected class, or that the circumstances of this matter are such that they give rise to an inference of unlawful discrimination on the basis of Complainant's race. Additionally, Complainant did not present sufficient evidence in his case-in-chief that he was qualified for his position as a Custodian II or any other position. The evidence presented by Complainant was that he was unable to work at the time that the decision to terminate his employment was made. As a result, Complainant did not provide a *prima facie* showing that Respondent discriminated against him on the basis of race.

In his Consolidated Appeal Form, Complainant also asserted a claim of discrimination that he referenced as "medical" discrimination. At hearing, Complainant offered insufficient argument that medical discrimination was an unlawful form of discrimination under state or federal law. Complainant's arguments at hearing instead suggested that he intended to assert a disability discrimination claim.

As a result of this analysis, Complainant's claims of age, race and medical discrimination were dismissed at the conclusion of Complainant's case-in-chief.

2. Complainant's Did Not Present A *Prima Facie* Showing that He Had Been Unlawfully Discriminated Against On The Basis Of Disability:

Complainant also argued at hearing that Respondent discriminated against him on the basis of his disability because it had promised to find him another job and then failed to provide him with a job, leaving him entirely without employment. Complainant's argument is the equivalent of alleging disability discrimination under the Americans With Disabilities Act (ADA") on the grounds that the agency failed to find a reasonable accommodation for

Complainant through a transfer to a vacant position.1 Respondent argued that Complainant had failed to present a *prima facie* case of disability discrimination. The ruling on Complainant's ADA claim was reserved for the conclusion of the hearing.

In order to establish a *prima facie* showing that Respondent has failed to provide Complainant with a suitable transfer position as a reasonable accommodation, Complainant must establish: (1) that he is a disabled person within the meaning of the ADA; (2) that he was otherwise qualified for his current position; (3) that he was terminated from that position because of his disability; (4) that he required reasonable accommodation either within his current position or through transfer to a vacant position for which he was qualified; and (5) that, despite his request for reasonable accommodation by transfer to a vacant position, the employer continued to seek applicants for the vacant position or hired persons who possessed the disabled employee's qualifications. *Community Hospital v. Fail,* 969 P.2d 667, 672 (Colo. 1998).

The evidence at hearing presented by Complainant established that Respondent treated Complainant as disabled for purposes of the ADA and that Respondent had informed Complainant that it was attempting to find a transfer position for him which was consistent with the work restrictions applied by Complainant's doctor. Complainant also established that Respondent terminated his employment because, at the time the decision was being made as to his employment status, he was unable to work because of his hand problems, medications, and recent hand surgery. At best, these facts support the first, third and fourth elements under *Fail*.

Complainant did not establish, however, that he was otherwise qualified for his position. The undisputed testimony at hearing was that Complainant told Mr. Buck that he was simply not able to work and that, if a position was open in Colorado Springs, he *may* be able to perform it. An individual is "otherwise qualified" under the ADA if he or she can perform the essential functions of a position held or desired. *Smith v. Midland Brake*, 180 F.3d 1154, 1159 (10th Cir. 1999). *See also* Colorado Division of Civil Rights, Rule 60.2(B)("'Qualified disabled person' means a person with a disability who, with reasonable accommodation, can perform the essential functions of the job in question"). Complainant presented no information from which to conclude that there was any type of

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1 The Colorado Ant-Discrimination Act ("CADA") includes a provision prohibiting disability discrimination which is similar to the ADA. C.R.S. §24-34-402(1)(a). The Colorado Civil Rights Commission has promulgated rules to implement CADA in which it interprets the disability discrimination provisions to be "substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act of 1990 and the Fair Housing Act concerning disability". Commission Rule 60.1, Section B, 3 Code Colo. Reg. 708-1. Therefore, interpretations of the state Act "shall follow the interpretations established in Federal regulations adopted to implement the [ADA and Fair Housing Act] . . . and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." *Id.* at Section C As a result, the analysis of Complainant's *prima facie* showing of disability discrimination would be the same under either the ADA or the CADA.

accommodation that could have permitted him to perform Custodian II duties without significant use of his hands and in a manner consistent with the medical restrictions on his work. Complainant also presented no persuasive evidence that he was able to perform the functions of any other position for which he was qualified. As a result, Complainant did not present sufficient evidence at hearing that he met the second element of his ADA *prima facie* showing.

Complainant also presented no information which would satisfy the fifth element of his *prima face* showing. Complainant introduced no persuasive or competent evidence that Respondent continued to seek or hire persons with Complainant's qualifications.

As a result, Complainant has not met his burden of proof to present a *prima facie* showing of unlawful discrimination on the basis of disability. Complainant's disability claim is, therefore, dismissed.

B. The Appointing Authority's action in terminating Complainant's employment for exhaustion of leave was not contrary to rule or law:

Director's Procedure 5-10, 4 CCR 801, permits an agency to administratively separate an employee who has exhausted all leave. The procedure states:

> 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 [Family Medical Leave] or short-term disability leave (includes 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.

In order for an administrative separation under this procedure to be lawful, therefore, the agency must have determined or undertaken the following:

1) There must be a pre-separation communication with the employee;
2) The employee must have exhausted all credited paid leave;
3) The employee must not be covered by Family Medical Leave;
4) The employee cannot be eligible for short-term disability;
5) The employee cannot be a qualified individual with a disability who can reasonably be accommodated without undue hardship;
6) There must be a written notice sent to the employee notifying the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.

As the findings of fact demonstrate, Mr. Buck and Complainant had a pre-termination communication during the March 9, 2007 Employee Status meeting. This meeting took place after Complainant had exhausted all of his sick, annual, compensatory time and vacation leave. Complainant 's FMLA–covered leave and his state Short Term Disability benefits were also exhausted by the time that the decision was made to administratively discharge Complainant.

Respondent also concluded that Complainant was a qualified individual with a disability. Complainant was provided with an opportunity to apply for reasonable accommodation. The extensive medical restrictions on Complainant's work, however, coupled with Complainant's decision to limit his search for available vacant positions to the Colorado Springs area, meant that there was no reasonable accommodation available for him in early March 2007.

Finally, Mr. Buck sent Complainant a letter that included the two notifications that Respondent was expected to provide to Complainant under Director's Procedure 5-10.

Complainant has not presented credible or competent evidence that Respondent has failed to meet any of these six criteria in Director's Procedure 5-10 or that Respondent's decision to administratively terminate Complainant's employment for exhaustion of leave was otherwise contrary to rule or law.

C. The Appointing Authority's action in terminating Complainant's employment due to exhaustion of leave was not arbitrary, capricious, or contrary to rule or law.

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).

The record in this case demonstrates that Respondent worked extensively with Complainant to obtain the necessary information to make its decisions as to FMLA status and as to ADA accommodation. Complainant has not demonstrated that Respondent failed to collect or consider relevant evidence related to his medical issues, leave status, or employment possibilities. The record shows that Mr. Buck considered Complainant's submissions of information and Complainant's statements during the March 9, 2007 Employee Status meeting concerning Complainant's inability to work. Finally, Mr. Buck's conclusion that Complainant was unable to return to work as of March 9, 2007 was

uncontested at hearing. Mr. Buck's conclusion that there was no reasonable accommodation available to Complainant under the conditions specified by Complainant and Complainant's doctor was also a reasonable conclusion under the facts of this case.

This case represents an unfortunate series of medical events which left Complainant unable to perform his position as Custodian II, or any other acceptable vacant position, just at the time when his leave, FMLA coverage and STD benefits expired. Under such circumstances, administrative separation from employment is not arbitrary, capricious, or contrary to rule or law.

Complainant still retains reinstatement privileges should his condition improve to the point that he could perform the essential functions of his position. *See* Board Rule 5-10.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 25th day of February, 2008.

[redacted]

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 26th day of February, 2008, 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:

Ezekiel A. Martinez
[redacted]

and in the interagency mail, to:

Joseph F. Haughain
[redacted]

[redacted]

Andrea C. Woods

(rev'd. 5/07)