

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**NOMA R. MILLER,**  
Complainant,

vs.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,**  
Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on July 7 and 8, 2010, at the State Personnel Board, 633 17<sup>th</sup> Street, Denver, Colorado. The case was commenced on the record on March 4, 2010. The record was closed at the close of hearing on July 8, 2010. Respondent appeared through Diane Dash, Senior Assistant Attorney General. Respondent's advisory witness was Major Tom Wilcoxon, Colorado State Patrol (CSP), Colorado Department of Public Safety (DPS or Respondent). Complainant appeared through Nora Kelly, Esquire.

**MATTER APPEALED**

Complainant, Noma Miller (Miller or Complainant), appeals her involuntary termination of employment by Respondent. Complainant seeks reinstatement, back pay, benefits, and attorney fees and costs.

For the reasons set forth below, Complainant's termination is **affirmed**.

**PROCEDURAL BACKGROUND**

Complainant's appeal asserted a claim that her resignation was forced or coerced, thereby constituting a constructive discharge. On March 4, 2010, the judge issued an Order Bifurcating Issues for Hearing, determining that the constructive discharge claim would be set for evidentiary hearing on April 14, 2010, and that only in the event Complainant prevailed would the appeal of her disciplinary termination then be set for a second evidentiary hearing.

On May 13, 2010, the judge issued an Order Regarding Constructive Discharge, finding that Complainant's resignation was a constructive discharge. That Order is incorporated herein by reference and attached hereto as Attachment A. Complainant's appeal of her disciplinary termination was set for evidentiary hearing on July 7 and 8, 2010.

Complainant asserted a claim of discrimination under the Family Medical Leave Act on her appeal form. She withdrew the claim prior to the close of evidence.

### **ISSUES**

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's disciplinary action was arbitrary, capricious, or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority; and
4. Whether Complainant is entitled to an award of attorney fees and costs.

### **FINDINGS OF FACT**

#### **General Background**

1. Complainant was a certified Administrative Assistant III at CSP who worked for the State of Colorado, with brief interruptions in service in the 1980's and 1990's, for twenty-eight years.
2. From 2000 through the time of her termination in April 2009, Complainant worked as the Senior Secretary for the Aircraft Section of CSP. The Aircraft Section conducts aerial law enforcement and provides air transportation for the Office of the Governor and personnel from all state agencies.
3. Complainant's position exists to provide all administrative, accounting, budgetary, and scheduling support for the Aircraft Section. Complainant scheduled all flights for state agency personnel, which involved extensive communication and coordination of flights based on availability of aircraft, changing flight times, capability, cost, and other factors that changed daily. Complainant verified and processed all accounting and budgeting documents, monitored expenses to comply with the budget, and reconciled the operating budget for the Aircraft Section. She also processed expense reports, invoices, and vouchers for aircraft services, maintenance, and supplies.
4. Complainant's recent performance history includes "Commendable" annual ratings in the years 2000 and 2003 through 2006. She received "Meets Expectations" overall ratings in 2001 – 2003.
5. In 2007, the rating system was modified to eliminate the Commendable rating and to include Exceptional, Successful, and Needs Improvement levels. Complainant received a Successful overall performance rating in 2007.

6. Complainant's 2007 evaluation included the following comments:
  - "Noma contributes to a positive working environment by maintaining a professional demeanor throughout the day. She has developed professional relationships with our customers and is the Patrol through many of her interactions with others."
  - "Noma has received 12 compliments from our user agencies. She always puts our customers first when scheduling and arranging flights."
  - "Noma has a commitment to ensuring a successful outcome of Section objectives. Noma averages a troop budget every 6 to 8 weeks. She ensures that all our bills are paid on time and that they are accurate."
  - "This year she started using a Quicken program which has streamlined our budget process and helps provide a real-time look at our budget. It has allowed us to more accurately project and track our budget."
7. All of Complainant's evaluations contain the comment that she is excellent at customer service; she consistently received ratings of Peak Performer or Exceptional in the area of Customer Service on evaluations.
8. Complainant worked under the direct supervision of Captain Matthew Secor, Chief of the Aircraft Section. The Section consists of four pilots, one technician, one mechanic, Complainant, and Captain Secor.
9. Complainant's workstation was in an office located within the hangar at Centennial Airport. Captain Secor also has a desk in this office. Because Captain Secor and the other members of the Aircraft Section usually work in the field or in the open hangar area, Complainant often worked alone in the office.
10. Captain Secor highly valued the work Complainant performed for the Unit.

#### Discrepancies Between Internal Timesheets and Official Leave Records

11. Complainant kept a hard copy timesheet to record her daily time and leave used at her desk. The official leave slip, by contrast, was on her computer. Therefore, when Complainant used any type of accrued leave, such as annual or sick leave, she was required to fill out the leave slip form on her computer, print it and forward it to Captain Secor for signature, and then submit the form to the Human Resources (HR) Office for processing. If HR did not receive a leave slip from Complainant, HR would not subtract the accrued leave time from her official leave bank.
12. On September 24, 2008, Complainant used 8 hours of vacation time and recorded it on her daily timesheet at her workstation. Complainant did not obtain prior approval from Captain Secor for this leave. In addition, Complainant did not submit a leave slip to Captain Secor for signature or to HR for processing. Therefore, no annual leave was subtracted from her official leave bank.

13. On October 23, 2008, Complainant used 8 hours of vacation time and recorded it on her daily timesheet at her workstation. Complainant did not obtain prior approval from Captain Secor for this leave and she failed to submit a leave slip to Captain Secor for signature or to HR. Therefore, no annual leave was subtracted from her leave bank. Captain Secor was on vacation that day.
14. On November 4, 2008, Complainant used two hours of sick leave and recorded it on her timesheet. Complainant did not submit a leave slip to Captain Secor for signature or to HR and no sick leave was subtracted from her leave bank.
15. On November 7, 2008, Complainant used 8 hours of sick leave and recorded it on her timesheet. Complainant did not submit a leave slip to Captain Secor for signature or to HR and no sick leave was subtracted from her leave bank. Captain Secor was not in the office on that day.
16. On December 5, 2009, Complainant was out of the office and did not turn in a leave slip to Captain Secor for signature or to HR. No sick leave was subtracted from her leave bank. Captain Secor was on vacation on December 5, 2009.
17. On January 2, 2009, Complainant used 8 hours of sick leave and recorded it on her timesheet. Complainant did not submit a leave slip to Captain Secor for signature or to HR and no sick leave was subtracted from her leave bank. Captain Secor was out of the office on vacation on this day.
18. Complainant contracted salmonella poisoning and went out on sick leave on January 13, 2009. She ran out of all accrued paid leave on January 22, 2009, and was placed on leave without pay. Complainant returned to work on February 2, 2009.

#### February 2 and 3, 2009 Meetings

19. Captain Secor conducted an audit of Complainant's time sheets, comparing them with the official leave records at HR, and found the discrepancies listed above. He also collected and reviewed the Lotus Notes Complainant had inputted on her computer for the prior three months (prior Notes were not available); these records verified the days she was in and out of the office. He also found additional dates on which Complainant had erroneously submitted a leave slip for the wrong day; these issues were later cleared up.
20. Captain Secor scheduled a meeting with Complainant to discuss the problem on February 2, 2009.
21. The two met on February 2, 2009. Captain Secor explained the results of his audit and asked Complainant if she could produce any of the missing time sheets that had not been submitted to him or HR. Complainant was unable to produce

them, and could not explain why she had not turned in the time sheets to HR. During the meeting, Captain Secor outlined new work rules. Ms. Miller was to work Monday through Friday, 8:30 a.m. to 5:00 p.m., with no flextime permitted. She would email Captain Secor upon arrival in the morning and upon departure in the afternoon. She would email all leave slips to Captain Secor, who would sign them and forward them to HR.

22. On February 3, 2009, Ms. Miller asked to meet with Captain Secor again and he agreed. During their meeting, Ms. Miller was very upset and cried for extended periods. They spoke for an hour. Ms. Miller stated that she had been sick much of last year and was unable to focus on turning the leave slips into HR and was too busy in her job to keep track of them. She stated that she may have subconsciously not wanted to turn them in, to preserve her leave time. Captain Secor stated that regardless of her condition, it was a basic responsibility to turn in the leave slips.
23. Complainant did not fail to submit any additional leave slips to Captain Secor and HR after this meeting.

#### Memo to Major Wilcoxon

24. On February 5, 2009, Captain Secor sent a memo to his supervisor, Major Tommie Wilcoxon, Complainant's appointing authority, advising him of the time sheet/leave slip discrepancies. Captain Secor's memo outlined the information he had relied on to reach his conclusions.
25. In his memo, Captain Secor stated, "I believe there is demonstrated behavior of me not being in the office and Ms. Miller not coming in. Also only recently, maybe December 2008, I would not have to constantly remind Ms. Miller to turn in her sick leave sheets. Ms. Miller was required to call me and advise me of any sick time needed, I would then have to remind her to turn in her leave slips." He continued, "The missing annual leave sheets are not annual leave related to a planned vacation. Ms. Miller currently has no sick or annual leave available. She informed me last year she ran out of sick leave so on days where annual leave is missing I would mark her sick leave as annual. Ms. Miller has had an ongoing FMLA issue since 2006." This issue was her migraine headaches in the morning.
26. Captain Secor explained that as an accommodation of her FMLA issue, he had, since 2006, permitted Complainant to flex her schedule by altering her start time to any time until 10:00 a.m. She was required to leave the office no later than 6:00 p.m. each day, and, if unable to work a full eight hours, to submit a sick leave slip for the remaining time.

## 2008 Evaluation

27. On March 6, 2009, Captain Secor presented Complainant with her annual evaluation with an overall rating of Satisfactory. The point rating was five points above an overall Needs Improvement level. He rated Complainant at a Needs Improvement level in Organizational Accountability and Communication because of the timesheet discrepancy issue. Captain Secor presented his detailed audit findings in Complainant's evaluation, concluding that she had failed to submit leave request forms for 42 hours of missed work time, and that Captain Secor had been out of the office during 32 of those hours.
28. Complainant checked the "agree" box on this evaluation.

## Supplemental Audit of Time Records

29. Upon receipt of Captain Secor's February 5 memo, Major Wilcoxon ordered Captain Secor to audit Complainant's time keeping records for the period March 22, 2008 through September 21, 2008. The Major sought to determine whether the issue was an isolated incident or a pattern of conduct.
30. Captain Secor conducted the supplemental audit and found additional missing leave slips.
31. On April 9, 2008, Complainant used 7 hours of sick leave and recorded it on her timesheet. Complainant did not submit a leave slip to HR and no sick leave was subtracted from her leave bank. Captain Secor was not in the office on that day.
32. On June 3, 2008, Complainant used 1.5 hours of sick leave and recorded it on her timesheet. Complainant did not submit a leave slip to HR and no sick leave was subtracted from her leave bank. Captain Secor was not in the office on that day.
33. On August 6, 2008, Complainant used 8 hours of sick leave and recorded it on her timesheet. Complainant did not submit a leave slip to HR and no sick leave was subtracted from her leave bank. Captain Secor was in the office on that day.
34. On March 20, 2009, Captain Secor issued a memo to Major Wilcoxon containing the results of his second audit, concluding that 16.5 hours of sick leave were unaccounted for during the March – September 2008 period.
35. Major Wilcoxon determined that Complainant's conduct spread over an extended period and demonstrated an apparent pattern of intentional conduct. He contacted Cindy Busby in the HR office and directed her to provide him with Complainant's official leave records for 2008 and 2009.

36. Major Wilcoxon and Captain Secor reviewed all of Complainant's leave records for 2008 and 2009, comparing her internal timesheets with the official leave slips submitted to HR. They confirmed that when Complainant did not submit a leave slip to HR, HR did not deduct the hours from Complainant's accrued leave bank.

#### Pre-disciplinary Process

37. On March 19, 2009, Major Wilcoxon sent a letter to Complainant noticing a pre-disciplinary meeting pursuant to State Personnel Board Rule 6-10. He stated that the meeting would address "violations of policy concerning the proper reporting of time and the appropriate submission of leave request forms."
38. Complainant, Captain Secor, and Major Wilcoxon met for the pre-disciplinary meeting on March 30, 2009. Complainant decided to proceed without a representative present. Major Wilcoxon listed all of the dates and hours on which Complainant had been absent from work but had failed to submit leave slips to HR. He asked her to provide her response and any mitigation. Complainant did not focus on any specific dates in her response. She stated that in the past year she had begun to have memory problems, she had forgotten to submit the forms, and had not intentionally done so. She stated that the time sheets she had filled out in her work area confirmed her lack of intent to avoid using her paid leave time.
39. Complainant indicated that in the past year, Captain Secor had had to remind her to submit her leave slip forms to him. She described ways she had tried to help herself remember to do it. Major Wilcoxon asked Complainant if this memory problem applied to other parts of her job. She said that it did not.
40. Major Wilcoxon asked Complainant if there was a correlation between her failure to turn in leave slips to HR and Captain Secor's absence from the office. She said there was not.
41. Major Wilcoxon asked Complainant why she could remember to fill out the sick and annual leave time on her internal timesheets, but not to complete the official leave slips that are turned in to HR for processing. She stated that when she has something in front of her it works as a reminder, but "with the leave slip I don't have a constant reminder" because it is on her computer.
42. Major Wilcoxon asked Complainant, "why is it that you can't remember to fill out a leave slip?" She responded, "I don't know."
43. During the meeting, Complainant stated that she did not have any leave slips to prove she had turned in her time to HR on the dates identified by Major Wilcoxon. However, she did clarify that she had incorrectly submitted a document indicating she had worked in Castle Rock on January 20, 2009. She stated that she had been out of the office since January 13, 2009, and that she

had worked in Castle Rock on December 1 and 19, 2008. Captain Secor confirmed that this was correct.

44. During the meeting, Major Wilcoxon used a worksheet he had drafted, outlining the leave time at issue. He erroneously concluded that Complainant had failed to submit leave slips for 75 hours of time. This was based on his counting some of the time twice.
45. Major Wilcoxon examined Complainant's personnel record and noted her very strong performance appraisals.
46. Without an adequate explanation from Complainant for her conduct, the Major concluded that her conduct was intentional and that she had engaged in a pattern of dishonesty and fraud on the State. Major Wilcoxon concluded that Complainant's conduct was flagrant and very serious and that termination of her employment was appropriate.
47. Major Wilcoxon looked up the criminal statutes that would apply to Complainant's situation and contacted a District Attorney investigator about the situation. He believed that Complainant had engaged in criminal theft and embezzlement of public property. However, he decided that because he was going to terminate her employment, he would not press criminal charges against her.
48. Prior to issuing the termination letter, Major Wilcoxon consulted with his superiors at the Patrol, who agreed that termination was the appropriate discipline.

#### Termination

49. Major Wilcoxon scheduled a second meeting with Complainant and Captain Secor on April 3, 2010. At that meeting, the Major handed Complainant the termination letter. He concluded in the letter that Complainant had violated three CSP General Orders: 1. Members will obey the law; 3. Members will be truthful and complete in their accounts and reports; and, 6: Members will avoid any conduct that may bring discredit upon or undermine the credibility of themselves, the CSP, or the police profession. The letter stated that Complainant had violated CSP Operations and Administrative Procedure 213.01 Leave, Parts (II)(a), (II)(c), and (V)(2)(a). The letter also noted that Complainant may have violated two criminal statutes, C.R.S. Section 18-8-407, Embezzlement of Public Property, and C.R.S. Section 18-4-401(2) Theft.
50. The letter stated, "You falsified official reports to include time keeping documents. This occurred on at least 10 occasions over the last 12 months in which you were paid 75 hours for either sick leave or annual leave without completing a request for leave form as required. You also have no account for your time from November 29, 2008 through December 5, 2008. You also have claimed 8.0 hours worked for January 20, 2009 on your official time sheet in

which you in fact did not work due to being on leave without pay starting January 14, 2009 through February 1, 2009 and did not work in any capacity during that time.”

51. The termination letter contained factual errors. Complainant failed to account for 66.5 hours instead of 75 hours. Complainant was out of the office starting on January 13, 2009 and ran out of paid leave on January 22, 2009, at which time leave without pay began.
52. On April 3, 2010, Major Wilcoxon also handed Complainant a resignation letter. Complainant signed the resignation letter on that day.
53. Complainant timely appealed her resignation and termination of employment.

## **DISCUSSION**

### **I. GENERAL**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

- (1) failure to perform competently;
- (2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
- (5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee’s ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent’s decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

### **II. HEARING ISSUES**

#### **A. Complainant committed the acts for which she was disciplined.**

Respondent has proven by preponderant evidence that Complainant committed the acts for which she was disciplined. The termination letter stated that Complainant

had "falsified official reports to include time keeping documents. This occurred on at least 10 occasions over the last 12 months in which you were paid 75 hours for either sick leave or annual leave without completing a request for leave form as required." Respondent concluded that Complainant had violated CSP General Orders requiring that she be truthful and complete in her accounts and reports, and that she avoid any conduct bringing discredit upon or undermining the credibility of herself or the Patrol. In addition, Complainant was terminated for violating leave procedures.

The undisputed facts in the record show that Complainant failed to submit time slips to Captain Secor and to the HR office for a total of 66.5 hours of sick and annual leave on nine separate occasions over the period April 2008 through January 2009. The dates are as follows: April 9, 2008, 7 hours of sick leave; June 3, 2008, 1.5 hours of sick leave; August 6, 2008, 8.0 hours of sick leave; September 24, 2008, 8 hours of annual leave; October 23, 2008, 8 hours of annual leave; November 4, 2008, 2 hours of sick leave; November 7, 2008, 8 hours of sick leave; December 5, 2008, 8 hours of unidentified leave; January 2, 2009, 8 hours of sick leave. While these facts are slightly different than those cited in the termination letter, because there were nine occurrences instead of ten, over ten months instead of twelve, this difference is immaterial.

Complainant correctly points out that under Board Rule 6-12(2), Respondent must prove that Complainant's conduct constitutes "willful misconduct or violation of" the Board's or CSP's "rules or law which affect the ability to perform the job." Rule 6-12(2). Willful misconduct in the employment context does not require an actual intent to wrong the employer. *Barrett v. University of Colorado Health Sciences Center*, 851 P.2d 258, 262 (Colo.App. 1993). "A reckless disregard of the employee's duty to his employer is sufficient." *Id.* Moreover, in addition to following agency policies, classified state employees must comport with generally accepted standards of conduct that govern their employment. *Id.*; § 24-50-116, C.R.S. The CSP General Orders comprise such standards.

Complainant has asserted consistently since the February 2, 2009 meeting with Captain Secor, and throughout evidentiary hearing, that her failure to submit the leave slips was inadvertent. She contends that she had no motive to accumulate the extra leave time because she was not low on accrued leave. She also argues that there is no evidence that she attempted to hide her absences from the office because she accurately filled out her internal timesheets and, therefore, "her fingerprints are everywhere."

Contrary to Complainant's assertion of a lack of motive, Complainant was low on accrued paid leave in 2008. Captain Secor's March 2009 memo to Major Wilcoxon references the fact that during the year 2008, he permitted Complainant to use annual leave in lieu of sick leave due to the fact that she had exhausted all available sick leave. By January 22, 2009, Complainant was completely out of all paid leave, including annual leave, and had to be placed on leave without pay. In addition, on February 3, 2009, Complainant stated to Captain Secor that perhaps she subconsciously failed to submit the leave slips in order to preserve her leave time.

On March 6, 2009, Captain Secor presented Complainant with her annual evaluation containing two Needs Improvement ratings, concluding that she had failed to submit leave request forms for 42 hours of missed work time, and noting that Captain Secor had been out of the office during 32 of those hours. Complainant signed, "agree" on this document.

Once the supplemental audit had been concluded, it became clear that on seven out of the nine separate dates on which Complainant failed to turn in leave slips, Captain Secor was out of the office. This evidence demonstrates a pattern of taking advantage of the Captain's absence from the office.

Complainant was solely responsible for all of the budgeting and administrative functions in the Aircraft Section. Throughout 2008, she had no difficulty fulfilling her enormous responsibilities. In the face of this evidence, Complainant's assertion that she suffered from chronic memory problems during 2008 lacks veracity.

Lastly, and most importantly, Complainant was a state employee for twenty-eight years. She had successfully remembered to submit her leave slips to HR for nearly three decades. It is too great a strain to believe that Complainant suddenly forgot to submit those slips on her twenty-ninth year of service, particularly in view of the other evidence discussed above.

The preponderance of evidence demonstrates that Complainant more likely than not tested the waters in early 2008, to see if Captain Secor would catch her failure to account for her time out of the office. Once it became clear that she could forgo the submission of the leave slips, she continued to do so on a routine basis.

Complainant acted either intentionally or with a reckless disregard of her duty to her employer. Her actions constitute willful misconduct in violation of General Orders 3 and 6, and generally accepted standards of all state employees to accurately account for their time out of the office by submitting leave slips to HR for processing.<sup>1</sup>

**B. The Appointing Authority's action 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; or 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

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<sup>1</sup> Respondent did not offer the CSP leave policy into evidence; therefore, no discussion of this policy is possible.

conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Complainant asserts that Major Wilcoxon acted in an arbitrary and capricious manner by failing to accurately calculate the hours and some of the dates on which she failed to account for her time out of the office. This type of error by an appointing authority could be material in some cases. In this case, however, it is harmless error.

Major Wilcoxon acted in a prudent manner in investigating the conduct of Complainant. Once he received the initial report of missing leave slips from Captain Secor, the Major arranged for the supplemental audit for the period March through September 2008. This information led to him to conclude that a pattern of conduct existed. The Major then personally reviewed all official leave records from HR, comparing them to the timekeeping sheets prepared by Complainant and the leave slips she had turned in.

The Major used reasonable diligence and care to gather all relevant and available evidence. His minor math error does not detract from the findings and conclusions he reached in his investigation. A difference of less than ten hours is not material in this case, because Complainant engaged in a pattern of misconduct consisting of nine separate acts.

Complainant also argues that it was arbitrary and capricious and a violation of State Personnel Board Rule 6-2, 4 CCR 801, for Respondent to bypass progressive discipline. Board Rule 6-2 requires that certified employees "shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper."

The evidence demonstrates that Complainant's position as the administrator for the Aircraft Section was one that must be able to function independently. Captain Secor and the other members of the unit are required by their jobs to be away from Centennial Airport on a routine basis. Further, the administrator works in a small office in the airport hanger, quite often alone. Consistent with these conditions, Captain Secor trusted Complainant to work independently.

Complainant's actions demonstrate that she was not able to function successfully in this independent environment. She breached Captain Secor's trust and took advantage of her situation. Complainant's actions were tantamount to theft, and her actions were serious enough to warrant immediate disciplinary action.

**C. The Appointing Authority's action was within the range of reasonable alternatives available.**

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Complainant

asserts that there is no evidence in the record suggesting that she was not correctable; therefore, progressive discipline was mandated.

There are compelling mitigating factors present in this case. Complainant was a stellar employee who provided Peak Performance-level customer service for the Aircraft Section. She was a 28-year state employee with no prior disciplinary actions. She modified her behavior immediately following the February 2 and 3, 2009 meetings with Captain Secor. A lengthy suspension would also have been within the range of reasonable alternatives available to the appointing authority. However, in view of the independence with which Complainant's position must work, and the degree of trust that must be placed in the person occupying the position, termination of employment was also within that range.

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

Complainant requests an award of attorney fees and costs. Because Complainant's termination of employment is being upheld, the question before the Board is whether Respondent's constructive discharge of Complainant warrants an award of attorney fees and costs.

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

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

The Board has implemented the attorney fee statute in Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs bears the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Rule 8-38(B).

The May 13, 2010 Order Regarding Constructive Discharge has been incorporated herein by reference as Attachment A. Respondent did not harass or act in bad faith by providing Complainant the option of resigning on April 3, 2009. There is no basis for an award of attorney fees and costs based on the constructive discharge.

**CONCLUSIONS OF LAW**

1. Complainant committed the acts for which she was disciplined.

2. Respondent's decision was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives;
4. Complainant is not entitled to an award of attorney fees and costs.

**ORDER**

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

Dated this 23<sup>rd</sup> day of August, 2010



Mary S. McClatchey  
Administrative Law Judge  
633 – 17<sup>th</sup> Street, Suite 1320  
Denver, CO 80202  
303-866-3300

# ATTACHMENT A



**ORDER REGARDING CONSTRUCTIVE DISCHARGE**

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**NOMA R. MILLER,**  
Complainant,

vs.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,**  
Respondent.

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THIS MATTER came on for evidentiary hearing on April 14, 2010. Complainant appeared through Nora Kelly, Esquire. Respondent appeared through Diane Dash, Senior Assistant Attorney General. Respondent's advisory witness was Major Tom Wilcoxon, Colorado State Patrol (CSP), Colorado Department of Public Safety (DPS or Respondent).

**MATTER APPEALED**

Complainant, Noma Miller (Complainant), appeals her resignation from employment, asserting that it constitutes a constructive discharge. She seeks rescission of the resignation.

For the reasons set forth below, Complainant's resignation is deemed a constructive discharge. Complainant's appeal of her involuntary termination of employment will therefore be set for hearing.

**ISSUE**

1. Whether Complainant's resignation from employment constitutes a constructive discharge.

**FINDINGS OF FACT**

**General Background**

1. Complainant is a certified employee who has been employed by Respondent as a patrol officer since 1999. At all times relevant to this appeal, Complainant was assigned to the Anschutz Medical Campus. His duties included patrolling the campus.

2. Doug Abraham is the Chief of Police for Respondent and Complainant's Appointing Authority. In his long career as a police officer, Chief Abraham has many years of experience dealing with juveniles.
3. The UCD Police Department is an actual police department. Its officers are certified in Peace Officer Standards and Training, and receive all the training that municipal police officers receive.

### **Complainant's Corrective Action**

4. On October 25, 2007, Complainant received a Corrective Action. The bases of the Corrective Action were: 1) demonstrating "a lack of courtesy and uncommunicative behavior to peers subordinates and other business associates"; 2) issuing a parking ticket and inserting the paper into the cassette player of a motorcycle; and 3) an incident in June 2007 where Complainant's behavior resulted in the inability to locate a tuning fork used to calibrate radar devices for a number of months.
5. As a result, Complainant was advised to take the following Corrective Actions: "On an immediate and sustained basis, you will follow the direction provided during your coaching sessions from March 28, May 30, June 29, July 28 and August 28, 2007 and our September 12 Rule 6-10 meeting regarding your need to be courteous, friendly and communicative with all of your contacts within the department and campus community. You will treat everyone with respect, courtesy and professionalism. Additionally, you will treat department equipment appropriately to avoid damage or loss."
6. Complainant complied with the Corrective Action. He has not demonstrated any of the behaviors for which he received the Corrective Action since receiving it.
7. On September 22, 2009, a Tuesday, Complainant was at work at UCD headquarters when he heard a dispatcher say that there had been a robbery at a liquor store at Colfax and Peoria. Although this area is not part of the Anschutz Campus, it is adjacent to it.

The dispatcher described the robbery suspect as a 37-year-old Black male

1. Complainant's appeal alleges that her resignation from employment was involuntary and that she was constructively discharged. Complainant bears the burden of proof on this claim. *Harris v. State Board of Agriculture*, 968 P.2d 148 (Colo.App. 1998). If Complainant prevails on this claim, she will be entitled to a separate hearing on the merits of her termination, at which Respondent will bear the burden of proving that the termination was justified. *Id.*, 968 P.2d at 152.

10. At the end of the meeting, Major Wilcoxon stated he would inform Complainant of his decision by the end of the week.
11. Complainant discussed her situation with Captain Secor, who informed her she would probably have to make up or pay back the time and would receive at least a corrective action. Complainant understood that the ultimate decision was Major Wilcoxon's.
12. Major Wilcoxon decided to terminate Complainant's employment. He drafted a termination letter containing the reasons for his decision and appeal rights. He also drafted a resignation letter for Complainant to sign as an alternative to discipline. He contacted Captain Secor to inform him of his decision. They decided that it would be best for Captain Secor to drive Complainant to the meeting, held in Golden, a forty-minute drive from Centennial Airport.

#### April 3, 2009 Meeting

13. On April 3, 2009, Complainant arrived at the meeting with Captain Secor. The meeting was tape-recorded. Major Wilcoxon opened the meeting by informing her that he had decided to terminate her employment. He stated that while it was hard for her and equally difficult for him, "when this meeting is over today you will not be employed by the Colorado State Patrol. And you need to know that right up front. Okay, I have two pieces of paper in front of me that I will give you . . . this letter is a termination okay, this letter is an opportunity for you to resign in lieu of me terminating you. The decision on which one of those you sign is yours. But one of them needs to be signed by end of this meeting." Major Wilcoxon asked Complainant to read both letters and think about which one to sign.
14. Major Wilcoxon gave Complainant the authority to determine whether she would be terminated or whether she would resign.
15. The termination letter concluded that Complainant had violated three CSP General Orders requiring that members obey the law, be truthful and complete in their reports, and avoid conduct bringing discredit upon themselves or the Patrol. The letter also stated, "In addition to the preceding [CSP] General Orders and Procedures you may have violated Colorado Revised Statutes 18-4-401(2)(c) Theft and 18-8-407 Embezzlement of public property . . . You falsified official reports to include time keeping documents. This occurred on at least 10 occasions over the last 12 months in which you were paid 75 hours for either sick leave or annual leave without completing a request for leave form as required. You also have no account for your time from November 29, 2008 through December 5, 2008."
16. Complainant was shocked and scared when she read about criminal theft and embezzlement of public property charges in her termination letter. She became upset and began to cry. Major Wilcoxon asked her if she understood the pros and

cons of both options. She responded that she knew if she resigned she could not get unemployment.

17. Major Wilcoxon responded, "it also doesn't show on your record on your personnel record that you were terminated either." He added, "So there's option for re-hire. Well let me explain a little bit more on the resignation if you go to another business to go to work if you call personnel to find out your employment history all they can tell them with this is that you were employed from this time to this time that's it."
18. Complainant responded, "They can't say in lieu of?" Major Wilcoxon responded, "Nope."
19. The Major then repeated that if she signed the resignation letter, an employer would be told, "You were employed from this time to this time." He said that with the termination letter, "they can tell them everything, everything. Okay and if you give them a release if it's another law enforcement agency and they will require a release of information and stuff, they get this, if they get this it just shows that you resigned in lieu of that's all, it doesn't give the specifics the reasons all that. If you sign a release all they can give them is that you were employed from this date to this date that's it, no more. Those are the differences between the two. And that's why I gave both of these to you, so that you would have more, so that you would have an option."
20. The above statements of Major Wilcoxon were confusing because they contained two different and conflicting statements about the effect of signing the resignation letter. First, he stated twice that resigning would result in a potential employer being told only the dates of employment and not that Complainant resigned in lieu of disciplinary action. Second, he stated that if she signed a release for a law enforcement agency considering her for employment, the agency would learn that she had resigned in lieu of disciplinary action.
21. Complainant next asked if she could confer with her husband and Major Wilcoxon said that would be fine, he would wait while she did so. Complainant left the room and attempted to call her husband, who was unavailable. She went to the restroom to try to collect herself and calm down, then returned to the meeting.
22. Referring to the "two differences that they can tell everything here, but they can't tell anything here," Complainant asked, "Can you put that in writing for me?" Major Wilcoxon responded, "it's already in writing." Complainant asked, where? He responded that it is "in the State Personnel Rules, it's already there, and the reason I can say that is because I talked to Ed Gietl about it so I know what they can say and what they can't." He then stated that he could not advise Complainant on which letter to sign.

23. Complainant responded, "Okay." Major Wilcoxon then stated, "All I can tell you is that this one everything can be publicly disclosed everything, okay. This one it can't. Other than that I, I can't, I can't advise you on which one to sign."
24. Major Wilcoxon informed Complainant that he was providing Complainant with the opportunity to resign because he did not want to take the opportunity for future employment away from her.
25. Complainant believed that if she did not sign the resignation letter, she would or could be publicly accused of committing theft and embezzlement of public property.
26. Complainant relied on Major Wilcoxon's statements regarding the pros and cons of resigning versus being terminated, in making her decision to resign.
27. Complainant signed the resignation memorandum, dated April 3, 2009, effective April 3, 2009, and entitled, "Resignation in lieu of Termination." The memo contains the following provisions: "This is a voluntary resignation in lieu of termination being taken against me under State Personnel Board Rule 6-12. This resignation is irrevocable and I understand that it may not be withdrawn. I understand that by resigning in lieu of termination I am giving up any rights to file any appeal for this resignation or the potential termination with the State Personnel Board or any other court of law."
28. Complainant timely appealed her resignation, arguing that because she faced the choice of seeing her termination letter charging her with falsifying documents publicized, she was forced to sign the resignation memo.

### DISCUSSION

Complainant bears the burden of proof in this matter to prove that her resignation was forced or coerced. *Harris v. State Board of Agriculture*, 968 P.2d 148 (Colo.App. 1998).

Two State Personnel Board Rules govern resignations and the waiver of rights under the state personnel system. Personnel Board Rule 1-19, 4 CCR 801, states, "An employee may voluntarily and knowingly waive, in writing, all rights under the state personnel system, except where prohibited by state or federal law."

State Personnel Board Rule 7-4, 4 CCR 801, governing resignation of employment by state classified employees, states in relevant part:

"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 . . . If the employee believes the resignation was coerced or forced, the employee has 10 days from the date of the resignation to appeal to the Board,

except that an employee cannot appeal a resignation that is tendered in lieu of disciplinary action. Upon receipt of any written notice of resignation . . . , an employee must be notified, in writing, of the right to appeal a coerced or forced resignation . . . 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.”

Applying principles of statutory construction to the State Personnel Board Rules, Rules 1-9 and 7-4 must be read together to reach a meaningful understanding of the circumstances under which classified employees may resign from employment and waive all pertinent rights under the state personnel system. *See generally, Halverstadt v. Department of Corrections*, 911 P.2d 654, 657 (Colo.App. 1995). Under the two Rules, an employee who resigns in lieu of termination waives the right to appeal that resignation as forced or coerced; in addition, however, that waiver must be made “voluntarily and knowingly.”

The first question before the Board is whether Complainant’s waiver of her right to appeal her resignation was knowing and voluntary and therefore comported with Board Rule 1-19. If the waiver did not meet the standard of Rule 1-19, Complainant is entitled to challenge her resignation as having been forced or coerced under Rule 7-4.

A. Waiver of Right to Appeal Resignation in Lieu of Termination

The transcript of the April 3, 2009 meeting reveals that Complainant’s waiver of her right to appeal the resignation was made on the basis of material, erroneous information she received from Major Wilcoxon, and that she relied on that information exclusively in making her decision. Major Wilcoxon informed Complainant repeatedly that if she resigned, future potential employers would be told only her dates of employment and not that she had resigned in lieu of termination. When Complainant asked the Major if he could put that in writing for her, he responded it was already in writing in the State Personnel Rules, and that the reason he could say that was because he talked to Ed Gietl about it so he knew what they could say and what they couldn’t. The record did not disclose the position of Mr. Gietl.

Respondent failed to proffer any State Personnel Rule at hearing or any testimony from Mr. Gietl to substantiate the claim that future employers would be informed only of the dates of Complainant’s tenure, and that they would not be informed that she had resigned in lieu of termination. There is no State Personnel Board Rule or State Personnel Director’s Procedure that governs how an agency will respond to inquiries about former employees who resign in lieu of termination. Major Wilcoxon’s repeated statements on this issue were incorrect and Complainant relied on them in making her decision to waive her right to appeal her resignation. Therefore, her decision to resign and waive appeal rights was not made “knowingly.”

Major Wilcoxon also informed Complainant that “everything” in her termination letter “can be publicly disclosed,” and that the resignation letter could not be publicly

disclosed. The Major did not explain what "publicly disclosed" meant. There was no legitimate reason for him to make this statement at the meeting. At the time the statement was made, Complainant was still under the shock of discovering that the termination letter referenced two criminal charges against her. Therefore, Complainant reasonably concluded that Major Wilcoxon was informing her that unless she resigned during the meeting, Respondent intended to publicly disclose the criminal nature of her misconduct. Under these circumstances, Complainant's decision to waive her right to appeal the resignation was made under duress and was not voluntary.

The above facts demonstrate that Complainant signed the resignation form based on misinformation given to her by Respondent, and she did not knowingly or voluntarily waive her right to appeal her resignation in lieu of termination. Therefore, the waiver is deemed invalid under Board Rule 1-19 and Complainant is entitled to challenge her resignation as having been forced or coerced.

B. Complainant's Resignation was Forced or Coerced.

A resignation will be involuntary and coerced when the totality of the circumstances indicate the employee did not have the opportunity to make a free choice. *Parker v. Board of Regents of Tulsa Jr. College*, 981 F.2d 1159, 1162 (10<sup>th</sup> Cir. 1992). Factors to be considered are (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he was permitted to select the effective date of resignation. *Id.*

The choice between termination and resignation is not of itself coercive if the employee is given time and opportunity for deliberation before making a choice. *Id.* In *Parker*, the employee "was given a week to decide whether to resign. During that time period she had ample opportunity to consult with an attorney if she chose to do so." *Id.* By contrast, Complainant was given no time or opportunity for deliberation before making a choice. Major Wilcoxon informed her at the outset of the meeting that by the end of the meeting, she would have to sign either the termination letter or the resignation letter.

As noted above, Complainant did not understand the nature of the choice she was given. *Id.* In fact, she reasonably believed and relied on the misinformation given her by Major Wilcoxon. When a resignation is induced by an employee's reasonable reliance upon an employer's misrepresentation of a material fact concerning the resignation, it is an involuntary resignation. *Hargray v. City of Hallandale*, 57 F.3d 1560, 1570 (11<sup>th</sup> Cir. 1995). The employee is not required to show that the employer intentionally deceived him in order for the resignation to be held involuntary. *Id.*

Lastly, Complainant was not permitted to select the effective date of her resignation. Major Wilcoxon did not inform Complainant that she could choose the effective date of her resignation. He presented her with a document that was effective

immediately. This factor also deprived her of the ability to reflect on the decision, consult an attorney, and discuss her decision with her husband. *Parker, supra*.

Complainant's resignation was involuntary and coerced. Therefore, her resignation amounts to a constructive discharge. Under *Harris*, it is now the Respondent's burden to prove that the termination imposed was justified by the factual circumstances. *Harris*, 967 P.2d at 152.

WHEREFORE, Complainant's appeal of her termination of employment will be heard on the previously set dates of July 7 and 8, 2010.

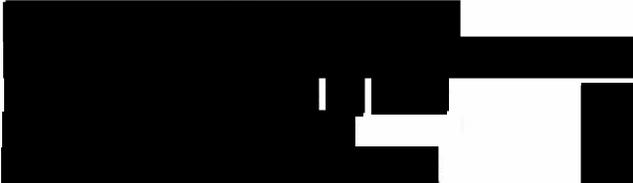
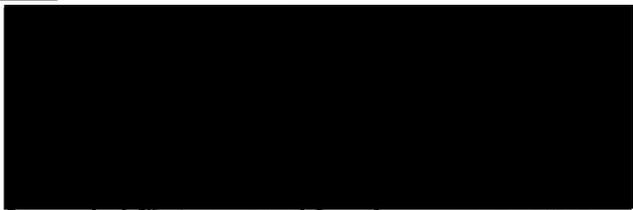
DATED this 13<sup>th</sup> day  
of **May, 2010** at  
Denver, Colorado.

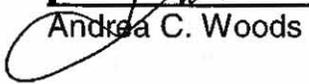
  
Mary McClatchey, Administrative Law Judge  
State Personnel Board  
633 17<sup>th</sup> Street, Suite 1320  
Denver, CO 80202

**CERTIFICATE OF MAILING**

This is to certify that on the 13<sup>th</sup> day of May, 2010, I ~~placed true copies of the~~ *electronically served*  
foregoing **ORDER REGARDING CONSTRUCTIVE DISCHARGE** in the ~~United States~~  
~~mail, postage prepaid, addressed as follows:~~

Nora V. Kelly  


Vincent Morscher  
  


  
Andrea C. Woods

## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 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**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 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 MAILING**

This is to certify that on the 23<sup>rd</sup> day of Aug. 2010, I electronically served copies of the foregoing **INITIAL DECISION** and **NOTICE OF APPEAL RIGHTS** as follows:

Nora V. Kelly



Diane Marie Dash



 Andrea C. Woods