

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2023B067

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EUGENE F HOFACKER III,
Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held an evidentiary hearing in the above-captioned case via web conference on February 13 and 14, and March 12 and 13, 2024. Throughout the hearing, Complainant appeared in person via Google Meet, representing himself. Respondent appeared via Google Meet through its attorneys, Second Assistant Attorney General Jack D. Patten, III, Esq. and Assistant Attorney General Grace E. Chisholm, Esq. Respondent's advisory witness was Sally Bouwman, Human Resources (HR) Deputy Chief.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing are attached in an Appendix.

MATTER APPEALED

Complainant, a certified employee, appeals Respondent's administrative discharge. Complainant argues that Respondent discriminated against him on the basis of disability and that Respondent's administrative discharge was arbitrary, capricious, or contrary to rule or law. Complainant seeks reinstatement to a prior position as a State Trooper serving as a Peer Support & Wellness Coordinator. Respondent denies Complainant's claims and argues that its administrative discharge of Complainant should be affirmed.

At the conclusion of Complainant's case on February 14, 2024, Respondent made a motion for directed verdict. After conferring with the parties, the ALJ ordered the parties to submit written arguments to allow Complainant more time to process and respond to Respondent's Motion. After receiving and reviewing the parties' written arguments, the ALJ granted Respondent's Motion for Partial Directed Verdict and dismissed Complainant's disability discrimination claim. On March 12, 2024, the evidentiary hearing continued on the issue of whether Respondent's administrative discharge of Complainant complied with Administrative Procedure 5-6.

For the reasons discussed below, Respondent's administrative discharge of

Complainant is **reversed**.

ISSUES TO BE DETERMINED

Was Respondent's administrative discharge of Complainant arbitrary, capricious, or contrary to rule or law? If so, what is the appropriate remedy?

FINDINGS OF FACT

Background

1. The Colorado State Patrol (CSP or Respondent) hired Complainant as a State Trooper on January 7, 2008. After completing training, Respondent assigned Complainant to Troop 4C, based in Vail, Colorado.
2. On May 8, 2014, while on duty, Complainant assisted a motorist who was stopped by the side of the road. The motorist shot Complainant four times, hitting his femoral artery.
3. Complainant's injuries required multiple surgeries and extensive physical therapy. After two years and two months, Complainant returned to active duty as a State Trooper.
4. On or about September 18, 2019, Respondent promoted Complainant to Trooper III. (Stipulated)
5. On or about January 1, 2021, Complainant voluntarily demoted from Trooper III to Trooper I. (Stipulated) Respondent placed Complainant into a newly created position of Peer Support & Wellness Coordinator.

Disciplinary Demotion

6. On November 22, 2021, a permanent restraining order was issued against Complainant by a state court in Case No. C0192021C030284. (Stipulated)
7. The permanent restraining order prohibited Complainant from possessing a firearm and required him to relinquish any firearms pursuant to C.R.S. § 13-14-105.5. (Stipulated)
8. On March 28, 2022, Major Rollins disciplinarily demoted Complainant from Trooper I to Police Communications Intern. (Stipulated) After successfully completing six months of training, Complainant would become a dispatcher.
9. Complainant's new Appointing Authority was Jeff Davis, Respondent's Public Safety Communications Director.

10. On April 7, 2022, Complainant appealed his demotion in State Personnel Board Case No. 2022B070. (Stipulated)
11. On May 23, 2022, Complainant filed an unopposed motion to dismiss his appeal with prejudice in State Personnel Board Case No. 2022B070. (Stipulated)
12. On May 24, 2022, the State Personnel Board dismissed Case No. 2022B070 with prejudice. (Stipulated)

Complainant's Leave

13. On April 5, 2022, Complainant submitted a claim for short term disability (STD). His treating physician, Dr. Jason Crawford, listed his current restrictions as follows: "Driving long distances, Sprinting, Running, Lateral Agility, Physical Altercations."
14. On April 8, 2022, Dr. Crawford completed a Certification of Employee's Serious Health Condition under the Family Medical Leave Act (FMLA) stating that Complainant was unable to perform "All Job Duties" of a "Peer Support & Wellness Coordinator."
15. Complainant's STD claim was approved beginning May 4, 2022.
16. On July 6, 2022, Complainant submitted a Fitness-to-Return Certification from Dr. Crawford, stating that Complainant was unable to return to work for an additional 2-3 months, as Complainant needed "complete rest from work, including administrative tasks."
17. Complainant's STD benefits expired on September 30, 2022. Upon the expiration of his short term disability benefits, Complainant applied for, and received, long term disability (LTD) benefits.
18. On October 22, 2022, Roberta Mooney, Human Resources (HR) Compliance Section Supervisor, emailed David Thomas, Employee Benefits Director for the Department of Personnel and Administration (DPA):

I wanted to reach out and just check in on whether there has been any info found on the question we have regarding Eugene Hofacker who is now on LTD, unable to return to his position, but with significant annual and sick leave banks. We're looking to understand the path forward and communicate that to Mr. Hofacker as soon as possible. Thanks for your help with this one!
19. Mr. Thomas responded that he was "waiting on a response from UNUM."

20. On November 8, 2022, Ms. Mooney sent another query to Mr. Thomas:

Wanted to check back in on this because we really need some assistance on how to move forward with this case. The essential question is when is it appropriate to separate. I believe Erica was going to ask Monica. Please let me know if a meeting to discuss further would be helpful.

21. Mr. Thomas responded that a “forum” planned for November 9, 2023 should provide helpful guidance.

22. On November 29, 2022, Ms. Mooney emailed Mr. Thomas:

Thanks again for the invite to the forum. We still need to know how to move forward on this particular case. The key question is, when do we plan for separation?

I believe Erica was going to ask Monica about how this is handled when an employee is on PERA disability, will not be returning to work, and still has significant time in the leave bank.

Would it make sense for us to follow up with Monica? Or, should we set up a time to meet?

Thank you for all your help with these complex topics!

23. On December 14, 2023, Ms. Mooney emailed Mr. Thomas:

I don't believe I have heard back on this. This particular case really needs some attention and we need your guidance on how to proceed.

Specifically, we are looking to understand when/how to separate in this scenario where the employee is on LWOP due to Long Term Disability and therefore not using leave but has significant balances in their leave bank.

24. In her December 14, 2022 email, Ms. Mooney stated that Complainant had the following leave balances: 478:11 hours of Annual Leave, 136 hours of FML, 40 hours of SFML and 167:17 hours of Sick Leave.

25. Ms. Mooney had a meeting with Mr. Thomas and Erica Hunter, DPA's Statewide Leave and Disability Manager, in late December 2022. At that meeting, Mr. Thomas and Ms. Hunter advised Ms. Mooney that Complainant's annual leave could be paid out upon Complainant's termination; however, Complainant's sick leave could only be paid out if Complainant was eligible for

retirement.

Respondent's Overpayment to Complainant

26. Fiscal Rule 9-5, Section 2.1 defines an "Overpayment" as "any payment that results from overstating the rate of pay, overstating the hours worked, understating the employee deductions, or any other payments to which the employee is not entitled."
27. Fiscal Rule 9-5, Section 3.1 and Fiscal Rule 10-1, Section 6.1 require State Agencies to collect debts owed to them.
28. On January 30, 2023, Payroll/Benefits Manager Sally Bouwman sent Complainant a letter explaining that Respondent erroneously continued to pay Complainant wages and benefits after Complainant began receiving STD benefits on May 4, 2022. Complainant received STD benefits directly from Unum, the STD administrator. While Complainant was on STD and receiving payments from Unum, Respondent should have placed Complainant on "leave without pay" status. Instead, Respondent overpaid Complainant wages and benefits in the amount of \$10,078.02.
29. In her January 30, 2023 letter, Ms. Bouwman explained how Respondent's error was corrected:

During the process of applying STD 'leave without pay' to your timesheet, your accrued sick and annual leave was restored back to your leave buckets for use. In accordance with State Personnel Board Rules, employees may opt to "Make-whole" their pay when on STD using their accrued leave. The leave is used to pay the employee the difference between their STD benefit from UNUM and their state base monthly salary.

...if you opt to make-whole, there is 535.28 hours of leave available to you which would be applied to the wage overpayment and benefits contributions owed. The value of leave needed is 465.83 hours, so there would be some hours remaining for make-whole after repayment.
30. Ms. Bouwman asked Complainant to let her know whether Complainant wished to use the "make-whole" option or arrange a payment plan for the overpayment of wages and benefits.
31. Complainant was confused and angered by Ms. Bouwman's letter. Complainant did not respond to Ms. Bouwman's letter and did not choose the make-whole option.

Administrative Discharge

32. On April 17, 2023, an unsigned letter was sent to “State Service Professional Trainer Eugene Hofacker,” stating:

You have exhausted all protected leave. Your current leave status is as follows:

- Short term disability benefits expired on September 30, 2022.
- You exhausted any protected leave provided to you under the Family Medical Leave Act on April 4, 2023.
- You are not approved for Leave Without Pay.

33. The April 17, 2023 letter instructed Complainant to report to work and “provide a fitness-to-return certificate before returning to work.” The letter warned Complainant: “Failure to provide a fitness-to-return certificate may result in an administrative discharge as defined in SPB Rule 5-6.” This unsigned letter was “cc’d” to Director Davis.

34. On April 19, 2023, Complainant emailed Director Davis: “I will not be returning to work at this time due to my condition nor will I be resigning.”

35. On April 28, 2023, Director Davis administratively discharged Complainant pursuant to Board Rule 5-6. In a letter informing Complainant of his administrative discharge, Director Davis stated: “As a certified employee who is administratively discharged, you are entitled to be reconsidered for reinstatement when you have recovered and are able to return to work.”

36. Director Davis’ April 28, 2023 letter informed Complainant of his appeal rights and provided contact information for information about Complainant’s PERA retirement account.

37. Upon Complainant’s termination, Complainant’s annual leave was applied to reduce the balance of the wage overpayment and benefits contributions owed to Respondent.

38. Complainant filed a timely appeal of the administrative discharge.

39. At the time of the evidentiary hearing, Complainant remained unable to return to work and continued to receive long term disability benefits.

ANALYSIS

A. RESPONDENT'S ADMINISTRATIVE DISCHARGE WAS CONTRARY TO ADMINISTRATIVE PROCEDURE 5-6.

The Personnel Director's Administrative Procedures outline two types of paid leave earned by state employees: annual leave (Administrative Procedure 5-4) and sick leave (Administrative Procedure 5-5). Administrative Procedure 5-6 provides:

If an employee has exhausted all credited paid leave and is unable to return to work, unpaid leave may be granted or the employee may be administratively discharged by written notice following a good faith effort to communicate with the employee. Administrative discharge applies only to exhaustion of leave.

- A. The notice of administrative discharge shall inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.
- B. An employee cannot be administratively separated if FML, state family medical leave, or short term disability leave (includes the thirty (30) day waiting period) apply, or if the employee is a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship.
- C. A certified employee who has been discharged under this rule and subsequently recovers has reinstatement privileges.

The first sentence of Administrative Procedure 5-6 states that an employee may be administratively discharged "[i]f an employee has exhausted all credited paid leave and is unable to return to work." The next sentence emphasizes: "Administrative discharge applies only to exhaustion of leave." The preponderance of the evidence in the record establishes that, while Complainant was unable to return to work at the time of his administrative discharge, Complainant's credited paid leave was not exhausted.

Several exhibits stipulated into evidence establish that, at the time Complainant was administratively discharged, he had significant annual and sick leave banks. In a letter dated January 30, 2023, Ms. Bouwman informed Complainant that he had "535.28 hours of leave available." Ms. Bouwman suggested that Complainant could use that available leave to offset an erroneous overpayment of wages and benefits by Respondent. Complainant never agreed to use that accrued leave to offset the overpayment.

Because Complainant was unable to return to work, Ms. Mooney had questions about how Complainant might be administratively discharged when Complainant had not yet exhausted his credited paid leave, as required by Administrative Procedure 5-6. Beginning in October 2022, Ms. Mooney sought guidance about this issue from Mr.

Thomas via several emailed queries. Ms. Mooney met with Mr. Thomas and Ms. Hunter in late December 2022. At that meeting, Mr. Thomas and Ms. Hunter advised Ms. Mooney that Complainant's annual leave could be paid out upon Complainant's termination; however, Complainant's sick leave could only be paid out if Complainant was eligible for retirement. See Administrative Procedure 5-7.

Ms. Bouwman testified that, at the time Complainant was administratively discharged, Complainant's accrued annual leave was exhausted by applying it to offset the erroneous overpayment of wages and benefits by Respondent. Ms. Bouwman's testimony contradicted the information contained in the administrative discharge letter Director Davis sent to Complainant on April 28, 2023.

In the administrative discharge letter, Director Davis makes no mention of Complainant's credited annual and sick leave. Instead, Director Davis states that Complainant "exhausted any protected leave provided to you under the Family Medical Leave Act on April 4, 2023." Director Davis further states that Complainant remains "indebted to the State of Colorado in the amount of \$10,078.02." Thus, at the time of Complainant's administrative discharge, no accrued leave had been applied to offset the erroneous overpayment of wages and benefits by Respondent. If any of Complainant's accrued leave was used as an offset of this debt, it occurred after Respondent's termination of Complainant's employment. Even if Respondent properly exhausted Complainant's credited annual leave, Respondent could not have exhausted Complainant's credited sick leave. See Administrative Procedure 5-7. During her testimony, Ms. Bouwman confirmed that Complainant's sick leave was still available after his administrative discharge and would be available to Complainant if he were reinstated.

The ALJ finds that the preponderance of the evidence in the record establishes that, at the time of his administrative discharge, Complainant's credited paid leave was not exhausted. Because this crucial requirement was not met prior to Respondent's administrative discharge of Complainant, the administrative discharge was contrary to Administrative Procedure 5-6.

B. THE APPROPRIATE REMEDY

Pursuant to § 24-50-103(6), C.R.S., an appointing authority's action that is contrary to rule or law may be reversed or modified. Administrative Procedure 1-11 provides: "All appointing authorities ... are accountable for compliance with these rules and all applicable laws..."

As discussed above, Respondent's administrative discharge of Complainant prior to exhausting all of Complainant's credited paid leave was contrary to Administrative Procedure 5-6. Because Respondent's administrative discharge of Complainant violated Administrative Procedure 5-6, Respondent's administrative discharge of Complainant should be reversed. Complainant should be reinstated to the position he held at the time of his administrative discharge: Communications Intern. Any credited paid leave applied by Respondent to offset the erroneous overpayment of wages and benefits by Respondent should be returned to Complainant's leave banks.

Administrative Procedure 5-1 states: "Employees are required to work their established work schedules unless on approved leave." Upon his reinstatement, Complainant should submit a fitness-to-return certificate pursuant to Administrative Procedure 5-32. If Complainant is unable to return to work at the time Complainant is reinstated, Administrative Procedure 5-2 states: "Paid leave is to be exhausted before an employee is placed on unpaid leave..." Therefore, Complainant should use his credited paid leave until that leave is exhausted. Upon exhaustion of Complainant's credited paid leave, Respondent may revisit the issue of Complainant's employment status under Administrative Procedure 5-6.

CONCLUSIONS OF LAW

Respondent's administrative discharge of Complainant prior to exhaustion of all of Complainant's credited paid leave was contrary to Administrative Procedure 5-6. Therefore, Respondent's administrative discharge of Complainant should be reversed.

ORDER

For the above reasons, Respondent's administrative discharge of Complainant is **reversed**. Complainant shall be reinstated to the position he held at the time of his administrative discharge: Communications Intern. Any credited paid leave applied by Respondent to offset the erroneous overpayment of wages and benefits by Respondent shall be returned to Complainant's leave banks.

Upon his reinstatement, Complainant must submit a fitness-to-return certificate pursuant to Administrative Procedure 5-32. If Complainant is unable to return to work at the time Complainant is reinstated, Complainant must use his credited paid leave until that leave is exhausted, pursuant to Administrative Procedure 5-2.

Upon exhaustion of Complainant's credited paid leave, Respondent may revisit the issue of Complainant's employment status pursuant to Administrative Procedure 5-6. If Respondent decides to administratively discharge Complainant, Respondent must strictly comply with all the requirements of Administrative Procedure 5-6.

Dated this 2nd day
Of May, 2024, at
Denver, Colorado.

/s/ [REDACTED]
Susan J. Tyburski
Senior Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of May, 2024, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Eugene Hofacker
[REDACTED]

Jack D. Patten, III, Esq.
Second Assistant Attorney General
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[REDACTED]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: A1, A7, U, V, W, X. The following additional exhibits were admitted into evidence without objection: A2, Z.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 1-6, 8, 11-21, 24-27, 29-32, 35-37, 40, 41, 45, 46, 47, 50, 51, 52, 59. The following additional exhibits were admitted into evidence without objection: Exhibits 7, 9, 10, 22, 23, 28, 33, 34, 38, 42, 43, 48, 53, 54, 56, 57, 60, 61, 62, 64. The following additional exhibits were admitted into evidence over objection: Exhibit 49, 63.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Eugene F. Hofacker III, Complainant
Jeffrey Davis, former Communications Director
Sally Bouwman, HR Deputy Chief (former Payroll & Benefits Manager)
Roberta Mooney, former HR Compliance Section Supervisor

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. 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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.
4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. Board Rule 8-53(C). 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. 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. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is served 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 8-54.

ORAL ARGUMENT ON APPEAL TO THE BOARD

In general, no oral argument is permitted. Board Rule 8-55(C).

MOTION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).