

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 71-08

DECISION

IN THE MATTER OF THE APPEAL OF:

SCOTT R. QUALLS,
Appellant,

vs.

DEPARTMENT OF PARKS AND RECREATION,
and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Scott Qualls, appeals his resignation and dismissal from the Denver Zoo (Agency) on September 8, 2008. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on November 25, 2008. The Agency was represented by Robert A. Wolf, Assistant City Attorney, while the Appellant was represented by Michael O'Malley, Esq. Agency exhibits 1-3, and Appellant's A-D were admitted. The Appellant testified on his own behalf and also presented the following witnesses: Tom Weaver; Michael Qualls; Rick Haeffner; Charles Radcliffe; and Leslye Bilyeu. The Agency did not present any additional witness.

The hearing was bifurcated. The first issue to resolve was whether the Appellant resigned voluntarily. If he resigned voluntarily, then the Agency took no adverse action over which I have jurisdiction, and I must dismiss the appeal. If the Appellant resigned under duress, coercion, deceit, or was otherwise unduly influenced into resigning by someone in his chain of command, then I would consider the Appellant's resignation as null and, only then, consider the second issue: whether the Agency properly dismissed the Appellant, pursuant to Career Service Rule (CSR) 14-51 d), for having abandoned his position by failing to call or report to work for three or more consecutive days.

The Appellant bears the burden to prove, by a preponderance of the evidence, that his resignation was not voluntary. If he succeeds, the burden would shift to the Agency to prove it properly dismissed the Appellant pursuant to CSR 14-51 d).

II. ISSUES

The following issues were presented for appeal:

- A. whether the Agency unduly influenced the Appellant's resignation;
- B. whether the Agency dismissed the Appellant for cause: abandonment of position.

III. FINDINGS

The Appellant was employed by the Denver Zoo for 15 years as a facilities maintenance technician. The Appellant is an alcoholic, although, prior to the incidents leading to this appeal, there was no suggestion that his work performance was affected by his drinking. He had a written reprimand about nine months ago, for failing to call or appear at work.

On September 1, 2008, a cascading series of events began which led to this appeal. The Appellant was home for the Labor Day holiday. He was drunk, began to argue with his 17 year-old daughter, and shoved her.

The following day, September 2, he was due at work. He called his immediate supervisor, Charles Radcliffe. The Appellant said his life was in shambles and he would not be at work. He called Radcliffe again later the same day. The Appellant's voice was slurred, and he rambled about his life, said he was going away for two days and wanted to take sick leave for the two days. Radcliffe replied he would conditionally approve two days sick leave subject to the Appellant providing a doctor's letter upon his return in order to justify his absence medically. The Appellant never provided the medical letter.

The next day, September 3, the Appellant was arrested for the incident at home two days earlier, and was charged with misdemeanor wrongs to minors. That case is set for trial December 19, 2008. When he was jailed, the Appellant had no money in his possession, so he was unable to post bond for his release. His family declined to post bond as a matter of "tough love." The Appellant called collect to work, but the charges were not accepted. He did not appear at his scheduled work on September 3, 4, 5, 8, 9, or 10, nor did he call in directly any of those days, aside from his attempted collect call on September 3.

On September 4, a lawyer called Radcliffe, stating specifically that he did not represent the Appellant. He asked if Radcliffe would be willing to bail the Appellant out of jail.

On September 5, the Appellant called his mother to ask her to call his supervisor to explain why he couldn't call directly. She did not do so, but forwarded the information to the Appellant's brother in Iowa.

The following day, September 6, the Appellant's brother in Iowa, Michael, made

separate calls to Radcliffe and to the appellant's second-level supervisor, Rick Haeffner. Michael was unable to tell them when his brother would be back at work. Haeffner told Michael if his brother failed to appear at work he would probably lose his job.

On September 10, Michael arranged to post bond for the Appellant's release. The Appellant was not allowed to return home, except for a single trip, escorted by police, to procure some essentials, so he called his friend and co-worker, Tom Weaver, for assistance and advice. Weaver allowed the Appellant to stay at his home. Weaver called Haeffner and Radcliffe, both of whom suggested he advise the Appellant to resign. Weaver passed on the suggestion to the Appellant, and added a cautionary note that the Appellant should resign before he gets fired, although neither supervisor suggested to Weaver that the Appellant was being dismissed.

In the mean time, on September 8, Haeffner discussed what to do about the Appellant with Leslye Bilyeu, director of human resources at the zoo. They agreed a letter of job abandonment was appropriate. Bilyeu mailed a letter of dismissal for job abandonment the next day, September 9, to the Appellant's home address. [Exhibit 2].

On September 11, the Appellant called directly to the zoo for the first time since September 2. He spoke with both Radcliffe and Haeffner in separate calls. Later that day, he came in to sign a letter of resignation [Exhibit 1]. At Bilyeu's suggestion, Haeffner asked the Appellant if he would be willing to change the effective date of his resignation from the present day, September 11, back to September 8, marking the third day of his absence. The Appellant agreed and made the change on his resignation letter [Exhibit 1]. The Appellant was clear-headed at the time he signed his resignation, thanked Haeffner for all he'd done, and left amicably. At the time he resigned, the Appellant was unaware the Agency had sent a letter of dismissal, [Exhibit 2], two days earlier. He received the letter only after his resignation.

In summary, the Appellant did not report for his assigned shifts on September 2, 3, 4, 5, 8, 9, and 10, 2008. His absences on September 2 and 3 were granted as sick leave on the condition that he present a doctor's letter in support thereof. The Appellant did not provide a doctor's letter. None of the seven absences was excused. Non-family members called the Appellant's supervisors on September 4, and September 10. A family member called on September 6. None of these callers asked for leave. The Appellant was unaware the Agency had sent a letter of dismissal when he signed his resignation.

IV. ANALYSIS

This case required a bifurcation of the hearing. With respect to the issue of the voluntariness of his resignation, the Appellant bears the burden to prove the Agency unduly influenced his resignation. More specifically, did the Agency engage in duress, coercion or deceit to induce the Appellant's resignation? Essman v Dept. of

Transportation, 71 MSPR 107, 109 (1996). If the Appellant fails to meet this burden, then his resignation was voluntary, dismissal of the appeal is required, and the issue of dismissal for job abandonment becomes moot. If the Appellant meets his burden on the first issue, the case would proceed to the issue whether the Appellant abandoned his position, and if so, whether the Agency was justified in dismissing him from employment.

The Appellant bases his undue influence claim on the following allegations: he was forced or badgered into resigning; the Agency failed to advise him of his rights before his resignation; and the Agency failed to advise him it had sent a letter of dismissal prior to his resignation.

1. Whether Appellant was forced or badgered into resigning. The Appellant claimed the following was evidence that his resignation was the result of being forced or badgered into resigning by the Agency.

a. The Appellant stated Radcliffe ordered him to resign. Radcliffe disputed this claim, and neither witness was more credible than the other on this point.

b. The Appellant claimed he was badgered to resign by Haeffner when he called the zoo on September 2-3. This claim is not credible, as Haeffner was out of the state on vacation on the date the Appellant called the zoo. Also, the Appellant later admitted he did not speak with Haeffner until after the Appellant had already signed his resignation letter on September 12. [Appellant cross-exam].

c. The Appellant testified he was badgered into resigning by his immediate supervisor, Radcliffe, based upon two pieces of evidence: that Radcliffe telephoned on September 11 to tell the Appellant he must return his eco pass when he comes in to resign, and by stating the Appellant must come to the zoo to fill out a letter of resignation. [Appellant cross-exam]. Even taken alone, this is unpersuasive evidence of an agency action that affected the voluntariness of the Appellant's resignation. In addition, however, Radcliffe replied he did not order the Appellant to resign, but merely notified the Appellant that his attempted telephone resignation was impermissible, so that he would have to come into work in order to resign. The Appellant's claim is not more credible than that of Radcliffe.

d. The Appellant also claimed Tom Weaver pressured him to resign, but Weaver is a co-worker who is not in the Appellant's chain of command, and therefore had no authority to represent an Agency order to the Appellant. Moreover, Weaver credibly testified he never told the Appellant he had no choice but to resign. Instead, Weaver stated Radcliffe and Haeffner only recommended that Weaver tell the Appellant as a friend that he would be better off to resign. Weaver stated neither supervisor told him the Appellant was being dismissed. [Weaver testimony]. Since the Appellant did not dispute that Weaver remained a friend through hearing and therefore would have no reason to testify falsely against his friend, I find Weaver's testimony more persuasive than that of the Appellant, since Weaver had no reason to testify falsely against his friend, but the Appellant had a motive – to get his job back – in

representing that his friend told him he must resign.

e. The Appellant reasoned his phone call to work on September 2, and his attempted collect call from jail on September 3 constitute evidence he did not wish to resign. While that may be true, the issue at this juncture is **whether** the Agency acted to unduly influence the Appellant rather than the Appellant's intention. Whether the Appellant attempted to call, or had others call on his behalf relates to the subsequent issue of whether he provided prior notice of his absences from work, but his attempted call and calls by others do not constitute **proof**, by a preponderance of the evidence, that his resignation on September 11 was not voluntary.

Under the totality of the circumstances, as described above, the Appellant did not prove, by a preponderance of the evidence, that he was forced or badgered into resigning.

2. Whether Appellant was advised of his right to representation or appeal before he resigned, and if so whether that omission was undue influence over his resignation;

The Appellant claimed the Agency's failure to advise him of his right to counsel and his right to hearing under the Career Service Rules unduly influenced his resignation. He reasons that if he had known these rights he would not have resigned. An agency is not obligated to advise an employee of a right to representation and hearing at the time an employee resigns.

3. Whether the Appellant was advised about the Agency's termination letter at the time he signed his resignation, and if not, whether such omission constitutes undue influence over his resignation;

The Agency did not dispute that the Appellant was unaware a dismissal letter had been sent to him before he signed his letter of resignation on September 11, 2008. It appears the Appellant's argument is "if I had known I was being fired, I would not have resigned, therefore the Agency unduly influenced my decision to resign." The issue, however, is whether, at the time he resigned, the Appellant was unduly influenced into resigning by something the Agency did to remove his free-will. Since the Appellant was unaware of the dismissal letter at the time he resigned, then the letter could not have affected the voluntariness of his resignation, i.e., his free will.

If the Appellant is arguing that the Agency nefariously concealed that it dismissed him without due process under the Career Service rules, the evidence for such claim was too vague to be persuasive.

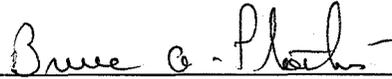
¹ There is some indication the Appellant intended such an argument. *See, e.g.* Appellant's opening statement. Opening statements are not evidence, however. If the Agency intended such a cover-up, the Appellant's evidence was not preponderantly persuasive. Haeffner and Radcliffe's denials that there was anything mischievous about their failure to tell the Appellant about the dismissal letter, were equally as persuasive as the Appellant's inferred assertion, since the Appellant failed to advance any evidence his supervisors had ill-intent.

The Appellant failed to prove, by a preponderance of the evidence, any of the bases for his claim that the Agency unduly influenced his resignation. The Appellant's dismissal rendered the Agency's dismissal moot. Consequently I do not address the propriety of the Agency's dismissal of the Appellant for job abandonment.

VI. ORDER

The Appellant's appeal is DISMISSED WITH PREJUDICE.

DONE December 4, 2008.



Bruce A. Plotkin
Hearing Officer
Career Service Board

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