

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 14-10

DECISION

IN THE MATTER OF THE APPEAL OF:

JAMES RONALD SMITH, Appellant,

vs.

DEPARTMENT OF EXCISE AND LICENSE, ALARMS PERMIT DIVISION,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, James Smith, appeals what he deems was his wrongful dismissal from employment with the Department of Excise and License (the Agency). The Agency claims it simply accepted Smith's voluntary resignation. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on May 7, 2010. The Agency was represented by Robert Nespore, Assistant city Attorney, while the Appellant represented himself. Appellant offered no exhibits. Agency exhibits 1, 2, and 4 were admitted. Witness Pat Tweedy testified for Smith, who also testified on his own behalf. Witnesses Gwendolyn Hill, and Penny May testified for the Agency. For reasons stated below, I find Smith's resignation was involuntary, and therefore the Agency's action in improperly dismissing him must be REVERSED.

II. ISSUES

The initial issue to decide in this appeal was whether Appellant resigned voluntarily. If so, the resignation must stand, since there was no adverse agency action to appeal. If the resignation was involuntary, then the Agency improperly dismissed Smith and the dismissal must be reversed.

III. FINDINGS OF FACT

The Appellant was employed for nine years at the Agency. At the time of his resignation, his duties included making determinations whether alarm permit applications submitted by members of the public met the City's requirements for issuance of an alarm permit. At the time of his resignation, Smith's supervisor was Gwendolyn Hill. Hill became Smith's supervisor in April 2008, about one year before his resignation. Their relationship was contentious. She required

Smith to meet with her in closed-door sessions at least four times, and she counseled him many other times. The pattern was always the same. Hill disagreed with Smith's changing information on applications submitted by applicants for alarm permits. She instructed him not to change information on submitted forms. Smith became upset. She instructed him to follow her into her office and an argument would ensue. Hill disciplined Smith on prior occasions for what she deemed were outbursts during such meetings.

Hill also has a contentious relationship with other employees in her unit. She issued a written reprimand to her entire unit for "dropping the ball on quite a few things" after "countless verbal reprimands." [Hill testimony]. Another employee gave a two week written notice after finding employment elsewhere, but stormed out only three days into her two-week notice, declaring "I don't need this shit," after a confrontation with Hill over the employee's absences. Hill suspended another employee in her unit for one week. That employee had also been part of Hill's "mass write-up" [Hill testimony]. The employee never returned and eventually submitted a resignation about one week before hearing in this case. [Hill testimony].

In the days immediately prior to February 26, 2010, Hill and Smith had an ongoing disagreement over whether the location of an alarm permit applicant was within the City and County of Denver. The dispute boiled over on February 26 when, after Hill saw the same application still active, instructed Smith to return it as outside city limits. A new dispute ensued and Smith erupted "I quit." Hill accepted the resignation. Smith almost immediately recanted, telling Hill he needed his job. Hill reminded Smith not to "threaten me" with resignation, then allowed Smith to withdraw his resignation. The situs dispute re-erupted when they left the closed-door session, and it continued into the office of the Director, Penny May, where Smith again uttered "I quit." May, who was apprised of the prior resignation and retraction, stated she accepted the latest resignation and instructed Hill to accompany Smith to his desk to gather his essentials, then to escort him out of the building. This appeal followed timely on March 10, 2010.

IV. ANALYSIS

A. Jurisdiction

Smith did not file a grievance of the Agency's acceptance of his alleged resignation, but filed a direct appeal to the Hearings Office, which has limited jurisdiction. Only those causes of action listed in Career Service Rule 19-10 A. 1. are subject to direct appeal jurisdiction by the Hearings Office, and resignation is not one of them. Smith must first establish his "resignation" was involuntary, and therefore bring his appeal within the jurisdiction of the Hearings Office as an adverse action under CSR 19-A.1. for wrongful dismissal.

B. Burden and Standard of Proof

Since resignations are presumed to be voluntary, [63 AmJur, 2nd Ed. Public Officers and Employees §157 (2010)], the burden is on Smith to prove that his resignation was not voluntary. The standard by which he must prove his claims is by a preponderance of the evidence.

It appears the following exchange on February 26, 2010, as recalled by Hill, was not substantially disputed by Smith.

This was the second time I received this [application] back in the mail and I could not understand why... I asked Ron to come back to the vacant office which was the old office of the Deputy Director who's no longer there... as we're walking, Smith claims 'what now?'... I asked him 'Ron, why are you telling this lady that this address is within the City and County of Denver when it clearly is not...Ron wanted to argue with me, and I tried to keep him focused on what was at hand by showing him the [documents] I'd received.' He then became very quiet. I kept asking Ron 'so do you have an explanation as to why you're telling this alarm company that this address is in Denver when it's clearly not?' He became very quiet, he looked at me, jumped up and said 'I quit.'

I sat there. I was kinda stunned because I had warned him about threatening me with quitting before. And I just looked at him and finally I said 'I accept.' He then sat there for the two to three minutes and then decided that he wanted to retract his statement. I replied 'Ron, what makes you think I want to accept your retraction?' He was like, 'well, because I need my job.' O.K. He sat there. I talked to Ron about threatening me with quitting, and that the next time he did it, I would accept it, 'you are very well aware of that.' He agreed. I said 'O.K., let's get back to work. I'm willing to give you a second chance. Let's get back to work.' As we're leaving the office, the closed-door office, and he's walking towards his cubicle and I'm behind him, he starts mouthing off, and explaining to me that I don't know what I'm doing, Nancy showed him how to verify [?], and if I would only let him show me what he did then I would be O.K. [with his findings]. Well he starts getting very angry and irate. At that point I asked him to come into Penny May's office. We were probably not even five feet from her office...

As I closed the door, Ron right away started telling Penny how horrible of a supervisor I am, how much he hates being under my direction, how hostile I am, and I let him rant and rave just like she did. Finally it's like, I pull out a chair and I'm 'Ron, have a seat.' So

he sits down, and Penny let him finish. Then she asked 'so, O.K., what's the real issue?' I then pull out all the paperwork I had presented to Ron showing him and her what was going on and how it all came about. As Penny's looking at it, she asked him a question. He kept trying to go around her question. Finally she says 'Ron, here in your handwriting, you state you don't know what you were thinking, this is not in the City and County of Denver, so why would you tell this lady that it is?'

Ron says nothing. He pushed his chair back, he stood up, announced to Penny May "I quit." She then replied 'I accept.' And that was that.

[Hill testimony].

In response, Smith testified he did not intend to resign and that he spoke in a moment of frustration. He disputed that he told Mays he quit, and added he tried to retract his earlier resignation to Hill in Mays' office but was rebuffed by May who told him "once you resign we can hold it against you." You're here only by the graces of my office." He also stated his frustration grew each time he was called into a closed-door meeting by Hill. [Appellant testimony].

While Hill and Smith focused on who was right about the situs of a property, that is not the issue to decide here. Smith's evidence established subject matter jurisdiction over this case with his pre-hearing filings and evidence at hearing that his resignation was prompted by emotional distress, and his retraction was first accepted then rejected. Nothing more is required for jurisdiction. See *n.1 at 1231-1251*.

This appeal turns on making reasonable conclusions about the voluntariness of Appellant's resignation, based upon the totality of the circumstances. Where an employee's actions surrounding his alleged resignation is susceptible to different interpretations as to his intent, the agency may not conclude the employee resigned voluntarily. In re Augustine, CSB 05-09 (9/30/09). In that regard: (1) Smith's expression of intent to resign on February 26 was apparently not his first, since Hill told him she had warned him previously about his "threats" to quit. Obviously, the Agency did not accept his earlier outbursts as conclusive evidence of his intent to resign. (2) On February 26, 2010, when Smith uttered his frustration with Hill in the form of a resignation, and again he withdrew his resignation. The withdrawal was accepted by his supervisor, Hill. (3) Only minutes later Smith again stated he quit, but this time his statement was immediately seized upon by the Agency, contrary to its previous responses. Where Smith had a history of uttering "I quit," and the Agency had a history of overlooking the utterance by allowing him to recant, then the Agency should have known there was reason to doubt Smith's intent. See *n.1 Broida at p. 1237*. "The Plaintiff's resignation, which was promptly withdrawn,

[then repeated in this case], but which had been tendered under emotional stress, whether brought on by pressure of duty or resentment toward a superior, or whatever the cause, should not be held to constitute an irrevocable act or one of which she can be relieved only by the consent of the agency." N.1, Broida, at p.1240. Based upon the forgoing, Smith's resignation was involuntary, so that the Agency's acceptance of his alleged resignation constitutes an improper dismissal without process under the Career Service Rules.¹

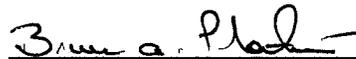
CONCLUSIONS

First, an appointing authority may accept even an impulsive iteration of "I quit" where the employee's intent is clear and final. There arises a problem of proof, however, if the employee attempts to renounce the impulsive expression. The employee's intent becomes ambiguous and it is no longer reasonable for the agency to maintain that the employee voluntarily resigned. In re Augustine, CSB 05-09, 2 (9/30/09). Second, the appointing authority may not seize upon an employee's impulsive resignation by a "gottcha" expression of acceptance, as a substitute for the disciplinary process, if the underlying issue is an employee's inappropriate behavior.

VI. ORDER

The Agency's dismissal of the Appellant is REVERSED.

DONE June 4, 2010.



Bruce A. Plotkin
Hearing Officer
Career Service Board

¹ In an involuntary resignation case, the merits of the claim and jurisdiction are intimately connected: if it established that a resignation is involuntary, not only is jurisdiction established, but the employee wins on the merits and is entitled to reinstatement. "There is, strictly speaking, no hearing on the merits, the hearing is on jurisdiction." GUIDE TO MSPB LAW & PRACTICE, Broida (2001) at p. 1231 (pertinent portions attached).