SUMMARY
February 24, 2022

2022COA25

No. 20CA1344, *McCauley v. Department of Revenue* — Colorado Constitution — Article XII — State Personnel System; State Personnel System Act

A division of the court of appeals considers whether, in the absence of a controlling State Personnel Board rule, a state-certified employee has a right to withdraw a notice of voluntary resignation before the resignation becomes effective. The division concludes that state-certified employees enjoy the right only to the extent it is permitted by a Board rule. Although Colorado Constitution article XII, section 13(8) provides that state-certified employees have a property interest in continued employment, any property interest ceases to exist when an employee chooses to waive it by voluntarily resigning. As a result, in this case, the employer was under no

requirement to accept a state-certified employee's withdrawal of voluntary resignation.

COLORADO COURT OF APPEALS **2022COA25**

Court of Appeals No. 20CA1344
State Personnel Board Case No. 2014B061

Doris McCauley,

Complainant-Appellee and Cross-Appellant,

v.

Colorado Department of Revenue, Division of Motor Vehicles, Driver's License Section,

Respondent-Appellant and Cross-Appellee,

and

State Personnel Board,

Appellee.

ORDER AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE GRAHAM*
Navarro and Freyre, JJ., concur

Announced February 24, 2022

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 Respondent, Colorado Department of Revenue, Division of Motor Vehicles, Driver's License Section (Department), appeals the order of the State Personnel Board (Board) affirming the determination of an administrative law judge (ALJ) that the Department's refusal to accept the withdrawal of resignation of complainant, Doris McCauley, was contrary to rule or law.

¶ 2 On cross-appeal, McCauley argues that the Board correctly ruled on the withdrawal issue but erroneously reversed the ALJ's award of attorney fees.

¶ 3 We agree with the Department on both the withdrawal and attorney fees issues. Therefore, we affirm in part, reverse in part, and remand so the ALJ can amend the decision that awarded McCauley reinstatement, back pay, and lost benefits.

I. Facts and Procedural History

¶ 4 In February 2014, McCauley, then a state-certified employee of the Department, submitted a notice of voluntary resignation to the Department because she had found another job. After researching the new job, McCauley determined that its benefits were less desirable than those offered by the Department, so she sought to withdraw her notice of voluntary resignation.

¶ 5 Relying on an outdated version of Board Rule 7-5, which McCauley had located in the Department's employee handbook on the Department's website, she believed she had two business days to withdraw her resignation. The repealed Department of Personnel and Administration Rule 7-5, 4 Code Colo. Regs. 801-1 (2012) provided:

> An employee who has submitted a notice of resignation at least 10 working days before its effective date may withdraw a resignation by the close of two business days after giving notice of resignation. The day that notice of resignation is given shall not be counted. . . . The appointing authority must approve a timely withdrawal of resignation. Approval of a request to withdraw a resignation when that request is made more than two business days after the notice of resignation is within the discretion of the appointing authority.

¶ 6 McCauley was unaware, however, that Rule 7-5 was repealed almost a year earlier, in March 2013, and there was no longer any rule in effect that controlled whether an employee was permitted to withdraw a resignation. Although the handbook said that "subsequent revisions" to Board rules could cause "conflicting statements" with the handbook, it does not appear from the record that McCauley did any additional research to determine whether

this outdated version of Rule 7-5 was still in effect in February 2014.

¶ 7 McCauley attempted to withdraw her resignation within the two-day period that had been provided by the repealed Rule 7-5. Recognizing that Rule 7-5 had been repealed, and in the absence of any controlling rule, the Department declined to accept McCauley's withdrawal of resignation.[1]

¶ 8 McCauley timely appealed the Department's refusal to accept her withdrawal to the Board, and it was referred to ALJ DeForest. The Department filed a motion for summary judgment, arguing that after the repeal of Rule 7-5, employees no longer had any right to withdraw a resignation. Attached to that motion were affidavits from Department of Personnel and Administration staff who had engaged in the process to eliminate Rule 7-5. Those affidavits attested to the affiant's position that the elimination of Rule 7-5

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[1] Although McCauley alludes to the concept of estoppel, she makes only passing references to it in her briefs. These allusions to estoppel are so conclusory and undeveloped that we won't address them on the merits. *See, e.g.*, *Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC*, 2020 COA 34, ¶ 44 (declining to address issue where the appellant did not provide "any coherent, developed argument on the point"), *aff'd*, 2021 CO 56.

also eliminated an employee's right to withdraw a voluntary resignation. ALJ DeForest denied the motion for summary judgment, determining that Rule 7-5 did not *create* a right to withdraw a notice of resignation but instead *limited* a right of withdrawal that she concluded was inherent in Colorado Constitution article XII, section 13(8).

¶ 9 After the denial of the motion for summary judgment, the parties proceeded to an evidentiary hearing.[2] ALJ Tyburski issued an amended initial decision, finding in favor of McCauley. ALJ Tyburski agreed with ALJ DeForest's analysis and concluded that Rule 7-5 operated as a limit on the constitutional right to withdraw a resignation, and that in the absence of a rule, an employee may withdraw a resignation any time before it becomes effective.

¶ 10 She also determined that the Department's refusal to accept the withdrawal of resignation violated Rule 7-1, which requires an appointing authority to "communicate, or make a good-faith effort to communicate, with an employee before conducting any

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[2] After ALJ DeForest issued the order denying summary judgment, the case was transferred to ALJ Sanchez. Later on, the case was transferred to ALJ Tyburski, who presided over the evidentiary hearing.

involuntary separation." Dep't of Pers. & Admin. Rule 7-1, 4 Code Colo. Regs. 801-1 (2014). Indeed, she concluded that by refusing to allow the withdrawal, the Department had "involuntarily separated" McCauley from employment, apparently in order to fit McCauley's resignation within the provisions of Rule 7-4, which require active negotiation between the employer and the employee where a resignation is forced or coerced. Dep't of Pers. & Admin. Rule 7-4, 4 Code Colo. Regs. 801-1 (2014).

¶ 11 Finally, ALJ Tyburski awarded McCauley attorney fees from the date that the order denying summary judgment was served on the Department, reasoning that, at that point, the Department was aware that its position was contrary to rule or law. Therefore, the ALJ concluded that the Department was "stubbornly litigious" for insisting on an evidentiary hearing even though it had no new evidence to support its position that the repeal of Rule 7-5 allowed it to reject McCauley's withdrawal of resignation. *See* § 24–50–125.5, C.R.S. 2021; Dep't of Pers. & Admin. Rule 8-33, 4 Code Colo. Regs. 801-1 (2014).

¶ 12 The amended initial decision reinstated McCauley's employment and awarded her damages in the form of back pay and

benefits less any income she earned from the date of her separation from employment to the date of her reinstatement.

¶ 13 The Department appealed the ALJ's amended initial decision. The Board issued an order that affirmed the conclusion of law that said the Department's refusal to accept McCauley's withdrawal of resignation was contrary to rule or law, but it reversed the award of attorney fees.

¶ 14 McCauley then appealed the Board's reversal of attorney fees. A division of this court determined that the amended initial decision was not a final appealable order because it did not state a specific sum of back pay and benefits that McCauley should be awarded. *See McCauley v. Dep't of Revenue*, (Colo. App. No. 17CA0921, Mar. 28, 2019) (not published pursuant to C.A.R. 35(e)). It issued a mandate vacating the Board's order and remanding the case to the Board with instructions to further remand to the ALJ to determine the amount of the award.

¶ 15 In January 2020, ALJ Tyburski held a conference and awarded McCauley about $78,000 in back pay and lost benefits through the date of January 23, 2020. The Board adopted these damages.

¶ 16 We affirm the Board's April 19, 2017, order with respect to attorney fees but reverse as to the Board's conclusion that the Department's refusal to accept McCauley's withdrawal of resignation was contrary to rule or law.

II. Rule 7-5 Created a Right to Withdraw a Resignation Before it Became Effective

¶ 17 According to the Department, former Rule 7-5 was the sole source of law that allowed an employee to withdraw a resignation before it became effective. Meanwhile, the Board and McCauley contend that Rule 7-5 was instead a limitation of that right, so in the absence of a rule, the Colorado Constitution affords employees the unfettered opportunity to withdraw a resignation up until the point it becomes effective.

¶ 18 We give deference to an agency's interpretation of its rules unless the rules clearly compel a contrary result, *see Chase v. Colo. Oil & Gas Conservation Comm'n*, 2012 COA 94, ¶ 23, but review constitutional provisions de novo, *Gessler v. Colo. Common Cause*, 2014 CO 44, ¶ 7. Because there was no rule on point at the time McCauley sought to withdraw her resignation, ALJ Tyburski interpreted the Colorado Constitution as creating an unfettered

right to withdraw a resignation up until the point the resignation becomes effective. We conclude that ALJ Tyburski erred in applying a constitutional interpretation that was unfounded, and in the absence of a constitutional provision, statute, or Board rule, the Department was not compelled to accept McCauley's withdrawal of resignation. In addition, we conclude that ALJ Tyburski wrongly applied Rule 7-1 because there was no factual basis for concluding that the Department involuntarily separated McCauley from employment.

¶ 19 The state personnel system is established by article XII, sections 13, 14, and 15 of the Colorado Constitution and is legislatively defined by title 24, article 50 of the Colorado Revised Statutes. Because it was never intended that the constitution would set forth all the features of the state personnel system, Colorado Constitution article XII, section 14 created the Board, whose job is to adopt, amend, and repeal rules to implement the personnel system. *Colo. Ass'n of Pub. Emps. v. Dep't of Highways*, 809 P.2d 988, 993 (Colo. 1991).

¶ 20 We look first to the constitution for guidance on whether former Rule 7-5 created or limited the right to withdraw a

resignation. Colorado Constitution article XII, section 13(8) states that certified employees[3] in the "personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." This provision means that an employee has a property interest in continued employment and may be disciplined and discharged only for just cause. *Dep't of Insts. v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Because of this property interest in continued employment, due process requires that certified employees be entitled to a hearing that affords them the opportunity to be heard prior to termination. *Id.* at 707-08.

¶ 21 Although the constitution creates a comprehensive framework to ensure that a certified employee is only terminated from the state personnel system for just cause, neither the constitution nor the statute addressing resignation, *see* § 24-50-126, C.R.S. 2021, contains any provisions related to an employee's right to withdraw a voluntary resignation before it becomes effective. ALJ Tyburski based her conclusions in part upon the concept that Department

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[3] An employee is certified upon satisfactorily completing a probationary period established by the State Personnel Board, not to exceed twelve months. Colo. Const. art. XII, § 13(10).

employees are not "at will" employees and that their property interest in employment somehow transcends both voluntary and involuntary separation. We are unable to conflate the two concepts. That an employee has a property interest in employment has no bearing upon whether the employee may voluntarily resign her employment. Any property interest in employment lapses once the employee's voluntary resignation becomes effective. While the property interest necessarily exists during the extent of employment, it ceases to exist when the employee releases it. Therefore, we disagree with the ALJ's conclusion that a right to withdraw a resignation is found in Colorado Constitution article XII, section 13(8).

¶ 22 In the absence of a constitutional provision, we are guided by general contract principles to determine whether the Department was required to accept McCauley's withdrawal of resignation. As a starting point, "voluntary resignation is an unconditional event, the legal significance and finality of which are not altered by the interval between the employee's notice and his or her departure from the job." *Cf. Cunliffe v. Indus. Claim Appeals Off.*, 51 P.3d 1088, 1089 (Colo. App. 2002). Given the option to accept an

employee's attempt to withdraw a resignation, the employer is not required to do so. *Id.*; *see also Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1211 (10th Cir. 2007).

¶ 23 Although the Board argues that *Cunliffe* and *Brammer-Hoelter* are inapposite because they involve at-will employment, we disagree. Certainly, in the context of termination, the distinction between at-will and state certified employment matters. In at-will employment, an employee may be terminated at any time, without cause. Black's Law Dictionary 664-65 (11th ed. 2019). However, as we explained, in the state personnel system, a certified employee may only be terminated for just cause and only if she has had the opportunity for a hearing. *Kinchen*, 886 P.2d at 707-08. While these principles protect a state certified employee in the context of termination, they are wholly separate from an employee's voluntary decision to tender a resignation.

¶ 24 In that same vein, we are not convinced by the Board's argument that an employee's property interest in continued employment suggests that an employee can withdraw a resignation at any point up until the resignation becomes effective. The property interest in continued employment is relevant when an

employee faces disciplinary charges because it ensures that the employee receive due process before the state agency makes a decision about termination. *Id.* at 708. When an employee voluntarily resigns, however, the employee waives that property right — by making the decision to resign, there is no longer a need for the employee to be heard because the separation from employment is based upon the employee's waiver. If a property interest in continued employment meant that an employee could withdraw a resignation at any point before that resignation becomes effective, notices of resignation would be rendered meaningless. Because ALJ Tyburski misapplied the constitution, and contract principles did not require the Department to accept McCauley's resignation, we disagree that the Department's refusal to accept McCauley's withdrawal of resignation was contrary to rule or law.

III. Rule 7-1 is Inapplicable to McCauley's Voluntary Resignation

¶ 25 We are similarly unpersuaded by the ALJ's conclusion that the Department's refusal to accept the withdrawal of resignation amounted to involuntary separation, thus invoking the provisions of Board Rules 7-1 and 7-4. Rule 7-1 provides in pertinent part that the employer must communicate with the employee before

conducting any involuntary separation. Dep't of Pers. & Admin. Rule 7-1, 4 Code Colo. Regs. 801-1 (2014). Under Rule 7-4, an employee may believe that she has been involuntarily terminated through force or coercion. Dep't of Pers. & Admin. Rule 7-4, 4 Code Colo. Regs. 801-1 (2014).

¶ 26 According to ALJ Tyburski, the Department violated Rule 7-1 because no one attempted to communicate with McCauley or ascertain whether there was a need for her continued employment. It is also apparent that McCauley may have believed she was forced to resign. But these factors are irrelevant because the record before us does not demonstrate that McCauley was forcefully terminated or coerced to tender her voluntary resignation. And concluding that a refusal to accept the withdrawal somehow automatically resulted in force or coercion is reminiscent of the *post hoc ergo propter hoc* fallacy: that since event X followed event Y, event X must have been caused by event Y. Here, we cannot agree that McCauley's voluntary resignation was caused by the Department's refusal to accept her attempted withdrawal.

¶ 27 In light of our ruling that ALJ Tyburski misapplied Rule 7-1, we necessarily reverse the award of $78,014.52 in damages and the reinstatement order.

IV. Attorney Fees

¶ 28 In the amended initial decision, ALJ Tyburski awarded McCauley attorney fees under section 24–50–125.5(1), which permits the award of those fees if 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." An action is in "bad faith, malicious, or . . . a means of harassment" if the appeal was "stubbornly litigious, or disrespectful of the truth." Dep't of Pers. & Admin. Rule 8-33(B), 4 Code Colo. Regs. 801-1 (2014). ALJ Tyburski concluded that the Department was stubbornly litigious for proceeding to an evidentiary hearing even though it had no additional evidence to support its position that the repeal of Rule 7-5 allowed it to reject McCauley's withdrawal of resignation. The Board reversed the award of attorney fees, which on cross-appeal McCauley argues was erroneous. Because we agree with the Department's position, we do not find that it was "stubbornly litigious" for proceeding to an

evidentiary hearing. But even if we had not reached this conclusion, we would nonetheless affirm the Board's reversal of attorney fees.

¶ 29 Whether attorney fees are warranted under section 24–50–125.5 is a conclusion of ultimate fact, which means it involves mixed questions of law and fact. *Hartley v. Dep't of Corr.*, 937 P.2d 913, 914 (Colo. App. 1997); *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1245 (Colo. 2001). When the Board reviews an ALJ's conclusion of ultimate fact, it may substitute its own judgment so long as there is a reasonable basis in law. *Colo. Dep't of Hum. Servs. v. Maggard*, 248 P.3d 708, 712 (Colo. 2011).

¶ 30 The standards set forth in section 24–4–106(7), C.R.S. 2021, govern judicial review of the Board's decision. Under section 24–4–106(7), an appellate court may reverse an administrative agency if it finds that the agency acted arbitrarily or capriciously, made a decision that is unsupported by the record, erroneously interpreted the law, or exceeded its authority. When the challenge is to the Board's resolution of a conclusion of ultimate fact, a reviewing court must determine whether the record contains sufficient evidence showing a reasonable basis in law for the Board's conclusion.

Maggard, 248 P.3d at 712. If the reviewing court finds that sufficient evidence supports the Board's conclusion, then the Board's action is not an abuse of discretion, and the court may not reverse it. *Id.*

¶ 31 Based on our review of the record in this case, there is sufficient evidence to support the Board's decision to reverse the award of attorney fees. First, after the ALJ denied the motion for summary judgment, McCauley had not yet withdrawn her claim for retaliation, and the order denying summary judgment did not address the issue of retaliation. Second, there was an ongoing dispute over whether the Board had authority to award McCauley front pay instead of reinstatement. Third, and most importantly, even ALJ Tyburski noted that an evidentiary hearing was necessary to provide "both parties due process."

¶ 32 To the extent McCauley has argued for attorney fees on appeal, we deny that request because the Department's appeal is meritorious. And in any event, to recover attorney fees, C.A.R. 39.1 requires that the moving party explain the "legal and factual basis" for such an award. Because McCauley has offered no legal or factual basis as to why she should be awarded appellate fees, her

request is denied on that basis as well. *See Ward v. Dep't of Nat. Res.*, 216 P.3d 84, 98 (Colo. App. 2008).

V. Conclusion

¶ 33 The order is affirmed in part and reversed in part. We remand to the Board to remand to the ALJ, so she can amend the judgment awarding reinstatement, back pay, and lost benefits.

JUDGE NAVARRO and JUDGE FREYRE concur.