

DECISION

IN THE MATTER OF THE APPEAL OF:

ROBERT F. AUGUSTINE, Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Robert Augustine, appeals his separation from employment on January 16, 2009. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 3, 2009. The Appellant was present and was represented by Michael O'Malley, Esq. the Agency was represented by Robert A. Nespor, Assistant City Attorney. Agency's exhibits 1-8 and Appellant's exhibits A-C, and E-G were admitted. The following witnesses testified for the Agency: Ed Bagwell, Bill Miles, and Reza Kazamian. The Appellant testified on his own behalf with no additional witnesses. For reasons stated below, the Agency's acceptance of the Appellant's January 16, 2009 phone call as his resignation is **AFFIRMED**.

II. ISSUES

The sole issue presented for this appeal was the voluntariness of the Appellant's resignation. The Appellant claims he did not resign by his phone call on January 16, 2009, while the Agency claims the phone call and circumstances surrounding it made it reasonable for the Agency to accept his phone call as a resignation. If the Appellant proved it was unreasonable for the Agency to interpret his phone call as a resignation, then his resignation was involuntary, and must be reversed. Otherwise, the resignation must be affirmed.

In a separate appeal, Robert Augustine v. Department of Public Works, CSA 24-09, the Appellant challenges his termination from employment for alleged threats resulting in violations of the Career Service Rules and an Executive Order. While some of the facts in that case are relevant to the present case, the propriety of the Agency's action in that case is rendered moot by the findings in the instant case.

III. FINDINGS

The Appellant was employed as a chemist for the Agency. On January 16, 2009, at about 6:12 a.m., the Appellant left the following telephone message for his immediate supervisor, Terry Eggerichs:

Good morning, Doc. This is Bob Augustine. I will not be into work today. You will be contacted some time later today by either my Teamsters' representative or my lawyer. Thank you for the opportunity to work with you. See you in court. Bye.

Eggerichs played the message for Reza Kazemian, Director of Operations. Both determined the Appellant had resigned. The same day, the Agency sent the Appellant a letter acknowledging his call as a resignation and accepting it.

The same day, January 16, Bill Miles, the Director of Human Resources, received a call from Ed Bagwell, union representative for Teamsters Local 17, of which the Appellant was a member. Miles told Bagwell about the Appellant's phone call and separation letter by the Agency. He also informed Bagwell the Appellant had recently left a letter in plain view on his desk which read

If you're snooping around my desk, Get the FUCK outta my shit, or it will result in dire consequences.

[Exhibit 6].

Bagwell then disclosed that the Appellant made the following statement to him (Bagwell) concerning the circumstances surrounding the note.

If this situation doesn't get fixed, I am going to kill someone.

A co-worker informed the Appellant the Agency issued a letter accepting the Appellant's resignation. The Appellant immediately called Kazemian and left a voice mail insisting he had not resigned. [Exhibit 5, Exhibit 7 @ 2nd message on CD]. He followed up that message with two separate letters, both dated January 19. In both letters the Appellant explained he was absent from work under doctor's advice and would provide evidence of the same. [Exhibit E].

After receiving the Appellant's voice mail and letters, the Agency sent a return letter to the Appellant on January 23. The letter provided the Appellant with an opportunity to meet with Agency officials on January 28 to determine if the Agency would rescind its earlier letter which accepted the Appellant's resignation. The letter also served as a contemplation of discipline, inviting the Appellant to explain why discipline should not be assessed for his alleged threats of violence in the workplace. [Exhibit 3].

The Appellant acknowledged receiving the Agency's letter before the January 28 meeting, but did not appear for it. He did not request a postponement of the meeting, and he did not provide any medical documentation for his absence on January 16 or for his subsequent absences.

On February 2, 2009, the Agency sent a letter to the Appellant affirming its earlier decision to accept the Appellant's resignation. This appeal was filed January 26, 2009.

IV. ANALYSIS

The Appellant bears the burden to prove his resignation was not voluntary. In re Qualls, CSA 71-08 (12/5/08). An employee's expression of a present intent to resign must be definite and unequivocal. If it is ambiguous, the agency is not entitled to rely upon it. When in doubt, the agency should contact the employee for a clarification of an ambiguous resignation. Guide to MSPB Law & Practice, p.1262 (Broida, 2000).

The Appellant claimed the following evidence proves it was unreasonable for the Agency to have assumed his January 16 phone message was a resignation: he was ill the morning of January 16, and was seeking medical attention, so his call was intended as a request for sick leave; the fact that he called in at 6:00 a.m. indicates he was giving his two-hour advanced notice, required for sick leave; as soon as a co-worker told him about the Agency's letter, the Appellant called Kazemian to correct any possible misinterpretation that his earlier call was a resignation; he continued to contact the Agency via email to clarify his intent.

The Agency responded the following evidence was clearly indicative of the Appellant's intent to resign: the language of the Appellant's message clearly expresses no present intent to return to work, to wit: "[t]hank you for the opportunity to work with you. See you in court" [Kazamian testimony]; the letters presented by the Appellant, [Exhibits E, F], which allege he had medical condition are inconsistent with his January 16 telephone message [Miles testimony]; he failed to request sick leave or vacation time on January 16, making it unlikely his intent on January 16 was to take sick leave. [Miles cross-exam];

Both the Agency's and the Appellant's interpretations of the Appellant's expression on January 16 are reasonable; however, once the Agency received the Appellant's subsequent contrary phone calls and emails, it clearly could no longer deem the resignation was voluntary. The Agency therefore acted properly in permitting the Appellant to attend a meeting to provide a clear and unambiguous reason why the Agency should rescind its letter. When the Appellant acknowledged the invitation to convince the Agency why it should rescind its acceptance of the Appellant's resignation, but the Appellant failed to appear, the Agency was entitled to presume the Appellant did not wish to provide a reason for the Agency to change its position.

The Appellant argued at hearing that it would have been pointless to attend the meeting since the Agency had already made up its mind, but this speculation is just that, and does not excuse the Appellant's absence from the January 28 meeting.

The Appellant also argued he was not himself at the time. "My mental state was just a little bit ragged at that point." [Appellant testimony]. However, without medical documentation providing evidence of his inability to comprehend the effect of his actions, the Agency was not bound to change its position. In addition, the Appellant acknowledged he corrected his intent with respect to resignation only after consulting with legal counsel. [Appellant cross-exam].

The Appellant's argument that, since the Agency no longer considered him an employee, it was pointless to return to work, is without merit, since the argument assumes the propriety of the Agency's actions, contrary to the obvious contrary assumption in filing an appeal.

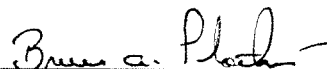
Finally, the Appellant claimed he was medically unable to report to work. Without providing medical documentation, his claim that he was medically unable to report to work does not obligate the Agency to change its position.

In sum, the Agency was not justified in its initial conclusion, that the Appellant's January 16, 2009 phone call was a clear and unambiguous resignation. However, the Agency acted properly by inviting the Appellant to attend a meeting on January 28 to clarify his intent sufficiently for the Agency to rescind its separation letter. The voluntariness of a resignation is based upon whether the totality of the circumstances supports the conclusion that the employee was effectively deprived of free choice in the matter. [Broida, *supra*]. While the Appellant may have initially been deprived of free choice by the Agency's acceptance letter, his failure to appear at the January 28 meeting entitled the Agency to ratify its earlier findings. The Appellant's subsequent explanations are without merit.

V. ORDERS

1. For reasons stated immediately above, the Agency's acceptance of the Appellant's resignation on January 16, 2009 is **AFFIRMED**.
2. The Agency's re-hiring of the Appellant on March 2, 2009 is rendered moot by this Decision.¹
3. The Agency's termination of the Appellant's employment on March 11, 2009 is rendered moot by this Decision.
4. The Appellant's appeal of his March 11, 2009 termination, In re Augustine, CSA 24-09, is rendered moot by this Decision. Consequently the pending Order to Show Cause in that case is also moot.

DONE April 28, 2009.



Bruce A. Plotkin
Career Service Hearing Officer

¹ Without ruling on the merits of the Agency's termination of the Appellant, the Agency's re-hiring of the Appellant on March 2 in order to place him on investigatory leave, then terminating his employment, was a reasonable attempt to mitigate its damages in the event this Decision reversed the Agency's acceptance of the Appellant's resignation. A reversal would have obligated the Agency to pay back wages and benefits from January 16, 2009 to the date of this Decision.