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OCT 31 2012

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Marvin F. Kittrell, Chief Judge

Case No. 08-ALJ-30-0061-AP

Kenneth Lee Holbert, Jr., Petitioner,

v.

South Carolina State Board for Technical and
Comprehensive Education, Respondent.

REPLY

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Counsel for Petitioner

ARGUMENT

- I. RESPONDENT'S ARGUMENT OVERLOOKS THE FACT THAT HOLBERT WAS REPEATEDLY GIVEN CONFLICTING AND INCORRECT INFORMATION AND THAT CANN NEVER INTENDED TO ALLOW HOLBERT TO RETURN.

While Respondent has focused on a portion of Human Resource Director Cann's testimony wherein Cann stated that he would have accepted a doctor's release for Holbert's return to work, the record as a whole shows this simply not to be the case. There is substantial evidence in record showing that from the date of Holbert's original return to work on January 3, 2007 through to January 12, 2007, Holbert received conflicting instructions from Cann regarding Holbert's potential for returning to work. While the Respondents argue that Holbert gave excuses to stay out of work, the record shows that Cann failed to give Holbert adequate information as to the potential for Holbert to return to work on light or limited duty. It was largely due to the hostile reaction from Cann that Holbert might be limited due to numbness that he was still suffering from that ultimately caused Holbert to return to his doctor to obtain a second note requiring that he not return to work at all.

Contrary to the Respondent's policy, Holbert was denied any

meaningful opportunity or information concerning a return to light duty. Cann not only told Holbert that he couldn't come back if suffering from continued numbness in his hand, but actually threatened that he would sue Holbert's doctor if Holbert was released and couldn't do his job. Clearly light duty was never offered or even discussed as a potential for Holbert until January 11, 2007. Of course by then, it was simply too late for Holbert to obtain the necessary paperwork to be processed for a return on a light duty basis. See ROA 134-135.

The record shows that Cann had sufficient information to return Holbert to work, and had even verified the authenticity of the Holbert's releases with Holbert's physician. ROA 423. Despite this, Cann still refused to allow Holbert's return, even under light or limited duty. While the Respondent's argument places a great amount of reliance on its "lady up front" argument, it is clear that Holbert obtained the second release as a direct result of Cann's threats. Each however were completely valid releases. And each were fully authenticated in writing by Holbert's treating physician at the Respondent's request. ROA 119-121. Holbert was willing and able to return to work but was prevented from doing so as a direct

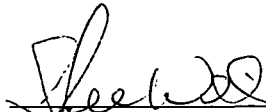
result of Cann's misinformation and intimidation.

Cann's statements about Holbert not being able to do his job if his hands were going numb, and that Cann would sue Holbert's doctor, show clearly that Cann had no intention of allowing Holbert to return to work, even on light duty. ROA 134-135. As a result, Holbert was never properly advised of, or offered, a light or limited duty return to work. ROA 185-186. This was completely contrary to Respondent's own policy. ROA 134-135.

The record shows Holbert's timely notice to the Agency that he had obtained a return-to-work release from his physician and was ready, able and willing to return to work prior to the expiration of his leave. (ROA. 117; 162). On January 11, 2007, Holbert informed the Agency that he intended to return to work on January 12, 2007 and, that he had been released by his physician to do so. Doing so would have made Holbert's return timely and the Respondent would have had no valid basis on which to terminate Holbert's employment. Through intimidating statements and a failure to properly advise Holbert, Cann manipulated the situation causing Holbert to delay his actual return to the work place past January 12, 2007. (SROA. R. 36-37; 46). In light of Cann's actions, Holbert's attempt

to return to work should therefore be considered timely.

Respectfully submitted,



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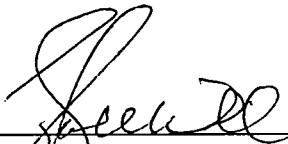
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CERTIFICATE OF SERVICE

I certify that on the 30th day of October, 2012, I served the Petitioner's Reply on the Respondent by delivering copies into the U.S. Mail, postage prepaid, addressed to the Respondent's counsel of record as follows:

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