

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 99G068

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID SMITH,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
REGENTS OF THE UNIVERSITY OF COLORADO,
UNIVERSITY OF COLORADO AT BOULDER,

and

CORADO STATE PERSONNEL DIRECTOR,

Respondents.

This four-day hearing came before Administrative Law Judge Mary S. McClatchey on March 17, April 14, and July 6 and 7, 2000. Complainant appeared pro se. Respondent University of Colorado at Boulder ("University") was represented by Thomas R. Trager, Associate University Counsel, Office of the University Counsel, and Respondent State Personnel Director ("Director") was represented by David Kaye, First Assistant Attorney General, Office of the Colorado Attorney General.

PRELIMINARY MATTERS

Witnesses.

Complainant called himself, Sheila Smith, General Professional II, Academic Advising Center, College of Arts and Sciences for the University (supervisor of training of advisors), Mindy Wilding, a classified Academic Advisor in the Colorado of Arts and Sciences, and Janet Hard, a classified Academic Adivisor in the College of Arts and Sciences.

Respondents called Dr. Peter Spear, Dean of the College of Arts and Sciences, Dr. Philip DiStefano, Vice Chancellor of Academic Affairs for the University, Dr. Alan Lester,

Instructor and Academic Advisor in the Department of Geological Sciences, College of Arts and Sciences, Dr. Nancy Deans, former exempt Professional Academic Advisor in the Chemistry and Bio-chemistry Department, Don L. Fowler, Occupational Specialist, Human Resource Services, Department of Personnel, and Elizabeth Guertin, Director of Advising, College of Arts and Sciences.

Exhibits.

Complainant submitted his exhibits with numbers instead of letters. The undersigned ALJ has substituted letters for his numbers, in order to avoid confusion. Complainant's Exhibits B - G, I through P, and S and T were admitted by stipulation or without objection. Complainant's Exhibits A, H, and R were offered but not admitted. Exhibit Q was withdrawn and not offered.

Respondent's Exhibits 1 - 27, 33, 35, 36, 37, and 39 were admitted by stipulation or without objection. Respondent's Exhibit 40 was admitted over objection. Exhibit 38 was offered but not admitted. Respondent did not offer Exhibitd 16, 28 - 32, or 34.

Procedural Matters.

Joinder of Director.

Motion to dismiss. Standing, jurisdiction, etc.

At the close of Complainant's case, Respondents moved for dismissal under Rule 41(b)(1), C.R.C.P., and for clarification of the issues of the hearing, both orally and by written motion. Complainant filed a response and Respondents filed a reply. On May 12, 2000, the ALJ entered an Order Granting in Part and Denying in Part the Respondents' Motion to Dismiss, or in the Alternative, for Clarification. The Order dismissed that portion of Complainant's case challenging the master's degree requirement for the new exempt positions. The Order denied the motion to dismiss the remainder of Complainant's appeal challenging the creation of new exempt advisor positions that appeared identical to the pre-existing classified advisor positions. The Order found that the evidence submitted by Complainant had demonstrated that the positions were substantially similar, and it therefore could have been violative of the state constitution, the mandatory exemption statute, and the Director's Guidelines governing exemption decisions to have one position be both classified and exempt. The Order further noted that no evidence had yet been submitted concerning application of those Guidelines to this case. In granting the motion for clarification, the Order discussed many of the legal issues of concern to the Board. See May 12, 2000 Order, incorporated herein by reference. On June 21, 2000, Respondents filed a motion for reconsideration of the May 12 Order, which was denied on July 3, 2000.

MATTER APPEALED

Complainant appeals the University's request for and the Director's approval of exemptions for new professional exempt professional academic advisor positions in the College of Arts and Sciences at the University. For the reasons set for below, respondents' actions are **affirmed**.

ISSUES

1. Whether the request for and approval of exempt professional academic advisor positions with a master's degree requirement in the College of Arts and Sciences was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

1. Complainant has been employed at the University as a classified academic advisor for over thirteen years. While the job title and classification of his position have changed over time, he has held the essentially same position during his tenure.

2. After a period of years, Complainant was promoted from General Professional I to General Professional II, and he supervised five other academic advisors at one time. In February of 1999, Complainant left A & S to take a classified advising position in the College of Engineering.

2. The classified advisor positions at A & S require a bachelor's degree only. Complainant holds a bachelor's degree. He has taken a few masters level courses, but has not advanced significantly towards a master's degree. A few of the classified advisors in A & S do hold master's degrees. The majority of them do not.

"Technical" Advising

3. Historically, at the University there has been a "centralized" advising system, under which there were four to seven "core advisors", classified employees with a bachelor's degree minimum qualification, who performed primarily technical advising. "Technical advising" consists primarily of informing students of the precise course requirements that must be fulfilled in order to fulfill core curriculum requirements, obtain transfer credits, and to obtain graduation certification.

4. Once a student declared a major, the student had a second technical advisor located in the major department, who assisted in advising the student on meeting the requirements of fulfilling a major. The advisor role in the major departments was sometimes fulfilled by clerical staff.

5. There appears to have been little or no communication or coordination of services between the “core advisors” and those advisors in the major departments.

6. Historically, if a student had an issue regarding a substantive problem in a course, the technical advisors, be they “core” advisors or those in the major department, would be unable to assist the student with that problem, and would have to refer the student to either the course professor or a faculty advisor in the major department. In addition, if students had questions relating to how a prerequisite course serves to prepare the student for the next course, classified advisors would not have the substantive expertise to answer those questions, and would again refer the student elsewhere. If a student had questions relating to what courses to take in a given major to prepare them for a specific track within a professional field (such as being a research biologist versus being a biology teacher) after graduation, the classified advisors were unable to answer those questions, and would have to refer the student to a professor or faculty advisor in that major area of study. When students had questions relating to course content, technical advisors provided written course descriptions obtained from the professors.

Reorganization and Decentralization of Advising in the College of Arts and Sciences

3. During the academic year 1995/96, the University of Colorado Student Union on the Boulder campus conducted a survey of academic advising on campus, and published its results on February 1, 1996, entitled, Report on the Quality of Advising Within the University of Colorado at Boulder. This survey indicated widespread dissatisfaction with counseling services among students. Among the students’ concerns regarding A & S were the following: students felt they never received direction; students with undeclared majors, called “open option” students, often had no contact at all with advisors and received no advising; the high ratio of students to advisors; inconsistency of advisors, meaning that students often met with many different advisors resulting in conflicting information, and lack of communication between those numerous advisors (major, college-wide, post-graduate, open-option advisors); insufficient contact with advisors prior to senior year, resulting in inadequate graduation planning; having to wait for weeks prior to obtaining an appointment with advisors; inadequate career advising; and lack of troubleshooting for potential problems.

4. The report made several recommendations for A & S (which comprises 70-72% of all students at the Boulder campus), including increasing communication between all advisors until such time as a single advisor is capable of dealing with all of a student’s advising needs; increasing the number of advisors; implementing a program that keeps advisors as well as students updated about career options and opportunities; and initiating continuous and consistent contact with all students to assure they receive advising, rather than requiring students to “figure it out for themselves.”

5. A & S Dean Peter Spear was retained by and arrived on the Boulder campus in the summer of 1996. In response to the Report on advising, he established an Advising Task Force. Its mission was to study the advising issue further both at the University and to

research best practices at other institutions. The task force consisted of students, administrators, advising staff, and faculty. It met weekly, and took approximately one year to perform its mission, publishing its final Recommendations on June 14, 1997. Then-Associate Vice Chancellor for Undergraduate Education Philip DiStefano was co-chair of the task force.

6. The Advising Task Force made a number of recommendations for significant changes, including a determination that training of advisor personnel was essential, that the best way to serve students was to decentralize advising by assigning each student only one advisor who would remain with the student from orientation until graduation, and that a new office of Academic Advising and Assistance Center should be created in A & S. The task force recommended an immediate appointment of an interim director, and commencement of a national search for a permanent director.

6. In 1998, the decentralization of advising was implemented, resulting in “one stop shopping” for students, organized by department. Since that time, upon arrival at C.U., each A & S student is provided one advisor (in their major department if they have declared a major), who advises them on all college requirements. Once undeclared majors declare a major, or if a student changes majors, a new advisor would be assigned.

7. After a national search, Dean Spears hired Elizabeth Guertin as the Director of A & S’s Academic Advising and Assistance Center. She arrived in mid-June, 1998, and commenced employment on July 1, 1998. Ms. Guertin, who holds a masters degree in English Literature, has performed academic advising since 1981, and since 1988 has designed and administered undergraduate academic advising programs at two separate institutions of higher education. Ms. Guertin has been active at the regional and national levels in NACADA, the National Association of College Advisors and ? since the early 1980’s, and helped draft that organization’s ethical standards for academic advisors. She was certified as an expert in academic advising on a national level.

8. Guertin structured her advising programs in her previous positions such that the technical advising duties were performed primarily by clerical staff in the bursar’s or recorder’s office, and by computer. The bulk of the actual advising work with the undergraduate students was performed by advisors who were required to hold a master’s degree or higher, so that they could perform all functions of “developmental advising.”

Developmental Advising

9. Development advising focuses on helping students identify their strengths, goals, and interests, and to apply their goals and interests to the design of an individualized educational program. Developmental advising has as its ideological premise cognitive development theory, in which the advisor works with a basic understanding of the cognitive, intellectual, and social changes students go through as they progress from being freshmen to upperclassmen.

9. Guertin is a strong believer in “developmental advising.” Her experience as an advisor, as a trainer, as a supervisor and evaluator of advisors, as an administrator of advising programs, as an evaluator of how developmental advising can increase retention of freshmen and transfer students, and as an active member of NACADA, convinced her that high quality developmental advising requires a master’s degree. In fact, the NACADA standards for Academic Advising require that professional academic advisors must have as a minimum a master’s degree in counseling or in an academic field related to the area of advising responsibility.

10. The master’s degree is essential to achieving the goals of developmental academic advising, which, under the NACADA standards, are to assist students in:

- clarification of life goals,
- development of suitable educational plans,
- selection of appropriate courses and other educational experiences,
- evaluation of progress being made toward established goals,
- use of institutional support services,
- development of decision-making skills,
- reinforcement of student self-direction,
- reevaluation of life goals and educational plans.

11. Advisors that hold masters degrees in a student’s chosen field are able to provide invaluable assistance to students that those advisors with a bachelor’s degree are not able to provide. This is due to the unique experience of obtaining a master’s degree, including having taught many of the courses their advisees are now taking, conducting research, perhaps publishing research, writing a thesis, and observing undergraduate students undergo intellectual, social, and cognitive development as they progress from year one through year four. Advisors holding masters degrees can provide essential assistance to students in academic difficulty: if they have taught the course, they can assist in a substantive way, by suggesting different approaches to tackling difficult subject matter. In addition, having taught undergraduate students, they can provide advice on how the student can best approach their professor. Advisors holding masters degrees hold more credibility for students by virtue of their experience. Further, advisors holding masters degrees have a high degree of respect and comraderie among faculty. They therefore have access to information about what research projects and special educational opportunities are available to students, and they understand the content of those opportunities well enough to explain it to students for whom such projects might be a good fit.

12. Masters level advisors are uniquely qualified to explain to students different professional opportunities available to students after graduation, and how to craft their educational program to achieve such focused goals. Master’s level advisors have a unique knowledge of what career options are available with certain degrees. Bachelor’s level advisors do not have this information because they have never been in a position to apply for positions requiring the advanced degree. This information is critical to explaining career

paths to students.

Masters level advisors, having taught many of the courses their advisees are taking, are uniquely qualified to explain course content, how different courses relate to each other (particularly regarding prerequisite work), how different course work prepares students for different tracks in a given field, and how undergraduate research work can assist students for preparation for either graduate school or professional employment.

Masters level advisors have a unique ability to assess a student's high school course content, or transfer course content, for applicability at the University. One of Respondent's witnesses testified that his advanced educational training enabled him to assess a student's talents in a given subject, to discuss the student's talents with the professor, and in so doing to secure the professor's exemption from a prerequisite requirement. This type of experience has multiple benefits to the student: self confidence about his ability to deal with 'the system;' reinforcement of student self-direction regarding his educational program; trust and rapport with the advisor; and obvious progress toward established educational goals. Further, the student has not wasted his time and money on an unnecessary course.

Another witness of Respondent testified that his substantive knowledge in the field of geology enabled him to be familiar with the research projects the faculty were involved in, and to match students' talents and interests with those professors. A bachelor's level advisor without that level of substantive knowledge to assess a student's abilities and understand the nature of research projects would not be able to provide this type of assistance. Such assistance achieves the missions of academic advising outlined in paragraph X above.

Masters level advisors whose advanced degree is not in the chosen major of the advisee can still utilize the advanced educational training in providing better developmental advising. They have been through further stages of cognitive and intellectual development than those with a bachelor's degree; they have conducted research, written a thesis, and have taught undergraduates, all of which experiences enable them to better provide developmental advising. They can assist students prepare to conduct research, understand what research consists of, understand the realities of graduate student life (the hours, the commitment, the level of work), they can provide informed advice on how to approach faculty and graduate teaching assistants.

While the classified technical advisors at the University are undoubtedly able to and do provide some level of developmental advising by virtue of their experience in dealing with so many undergraduates over a period of years, by recognizing the developmental stages the students go through, and by reading materials on developmental advising, the lack of a master's degree limits the nature, quality, and content of developmental advising they can provide.

The Exemption Decision.

Based on the knowledge that a master's degree was a prerequisite to meeting the University's goals for advising, Guertin set out to fulfill the mandate of the Advising Task Force by hiring many new advisors with a master's degree.

Guertin reviewed the PDQ's of the classified advisor positions, and found that the emphasis was on technical advising, not on the educational or developmental aspects of advising.

She also was informed about the state law that mandates that experience may be substituted for education when considering candidates for state classified employment. Colorado Revised Statutes section 24-50-112(3)(b), states,

Applicants [for classified employment in the State of Colorado] shall not be rejected solely because they do not have the education required in the class specifications except where education is a prerequisite for a profession or is mandated by federal law. Where education is not a prerequisite or a federal mandate, applicants' experience shall be considered.

Education is not a prerequisite for the profession of academic advising, since there is no licensure requirement for entry into the profession for which a master's degree is a mandate. Therefore, if Guertin sought to require a master's degree for professional advisors, she could not achieve this goal through the classified system. Individuals with experience in advising, but who do not hold a master's degree, would have been eligible for the new advising positions.

Guertin also consulted with the Department of Personnel on the creation of the new advising positions. She learned that the General Professional classification which encompassed all classified advisors was so broad as to include accountants and other positions completely unrelated to advising. Due to the broad nature of this classification, the University advisors were all susceptible to being bumped by GP classified employees with seniority, that were not qualified for the advising position. This was extremely troubling to Guertin, as she concluded that it would therefore be impossible to establish a strong program of developmental advising within the confines of the classified system.

Guertin discussed whether exemption of new positions would affect pay, status or tenure of existing classified advisors, and established that it would not.

After consulting all available information, Guertin concluded that the only way to assure that the new advisors possess a master's degree is to exempt them from the classified system. She therefore submitted a request to create professional exempt academic advisor positions to Dean Spear, who approved it and in turn passed on the request, in writing, on August 13, 1998, to Philip DiStefano, Vice Chancellor for Academic Affairs.

The letter requested to "create the exempt title of Professional Academic Advisor in the College [of A & S]." His letter stated, in part,

“During the academic year 1996/97, [we] convened a task force to determine the means by which the University of Colorado could provide improved academic advising on the Boulder Campus for all students. It is in response to their recommendations (see attached) that the College wants to provide professional and highly qualified advisors as outlined in the Standards for Academic Advising published by NACADA (see attached). These standards call for professional advisors to have a Master’s degree or above in accord with the academic background necessary to master cognitive development theory and to apply this to the advisement of college students. Requiring professional advisors to have an advanced degree and either college teaching or advising experience also ensures that advisors have the academic background and the knowledge of higher education to provide students with an appropriate understanding of the scope, nature, and purpose of a liberal education. This is essential if we are to implement a strong developmental advising program as recommended by the Task Force.”

The letter continued, stating,

“The Classified System will not readily support these credentials and places nearly all of the emphasis on clerical tasks associated with advising rather than on the development and education of the whole student which is the focus of developmental advising.

Moreover, the elimination of the Student Services class title, which has in the past been used for advising positions, and its merger into the much longer General Professional class title makes the new advising positions much more vulnerable to the practice commonly referred to as ‘bumping.’ This change is due to be implemented September 1 and could very quickly undermine both the quality and the stability of the advising program we are building. For all these reasons, we recommend establishing the new professional advisor positions as professional exempt positions. We anticipate needing up to 38 advisor positions when the Academic Advising Center is fully staffed. We request that this title be created and used exclusively for professional academic advisors in the Center and the academic departments.”

Vice Chancellor DiStefano approved the exemption request. He had co-chaired the Advising Task Force established by Dean Spear, and was intimately familiar with the advising program needs at the University.¹

¹ Dean DiStefano was certified in an expert inbased on his years of experience advising students there as a professor in the Department of .>>>. Commencing in >... , as well as . .

On November 16, 1999, the University submitted seven Exemption Request Forms, along with Job Descriptions for the Professional Academic Advisor position in the College of Arts and Sciences to Don Fowler, Exemptions Coordinator and Occupational Specialist, Human Resources Services Section, Office of the State Personnel Director, Department of General Support Services. Folwer oversees the exemptions program for the State of Colorado.

The job descriptions attached to the exemption request contains a minimum qualification of a completed master's degree from an accredited institution and either one year or more of college level teaching experience or one year or more of college academic advising experience, strong communication and organizational skills, experience workint with students and parents. Ninety percent of the position responsibilities consist of primarily developmental advising tasks, such as: assisting students in clarifyign their values and in understanding their abilities, interests, limitations, and goals and helping students relate these to decisions about academic programs and careers; assisting students in understanding the nature and content of the major they have chosen or are exploring; teaching students decision-making stkills, how to refine goals and objectives, and understanding the consequences of choosing different courses of action; and monitoring students' academic performance, directing strong performers to more challenging educational opportunities, and intervening with students in academic difficulty.

Fowler approved the exemption requests for the Professional Academic Advisor positions. In A & S. He based this approval on application of the exemption statute and the Director's Guidelines for Exemption of Positions in Educational Institutions and Departments (Exhibit 18).

The exemption statute, section 24-50-135, C.R.S. (1999), provides, "Exemptions from personnel system.

Guertin views the new professional exempt advisor positions as being significantly different from the classified technical advisors who hold a bachelor's degree. It is found that the two positions are different in many significant ways, due in large part to the functions that master's level advisors can provide which bachelor's level advisors cannot, as outlined above.

Reduced to its essential elements, the dean's exemption request was premised on three rationales:

1. The state personnel system will not accommodate a master's degree requirement for advisors (for reasons not yet disclosed in the record);

2. The state personnel system places nearly all of the emphasis on clerical tasks and not on development and education of the whole student which is the focus of developmental advising (for reasons not yet disclosed in the record);

3. The recent elimination of the Student Services class title for advisors, and its merger into the General Professional (“GP”) class, makes the advising positions vulnerable to bumping, or transferring in by individuals from throughout the personnel system (for reasons undisclosed in the record).

With respect to the second rationale, it is again noted that the interim advising director reported to the dean in his year-end 1997-98 report that he had written “job descriptions for the new Student Services Specialist Intern and I positions to “reflect the expectation that academic advisors will provide developmental and technical advising.” Complainant’s Exhibit 2, page 4. It therefore appears that the personnel system was able to accommodate developmental as well as technical advising. Appointing authorities certainly have the authority to define jobs. See Rule R-1-6.

DISCUSSION

The ALJ at the Preliminary Recommendation stage concluded that Complainant was entitled to a hearing on the following issue:

“Why is it necessary to have a professional exempt position requiring a master’s degree to function along with a classified position requiring a bachelor’s degree for the same duties?”

The gravamen of Complainant’s claim is that C.U. has created new exempt advisor positions in the College of Arts and Sciences that are in all practical respects identical to the current classified advisor positions (“General Professional II” positions). He states that this violates the fundamentals of the state classified personnel system, is unfair to himself and the other classified advisors who would like the opportunity to transfer into higher level advisor positions as a vehicle for professional advancement, and that the exempt status deprives the new advisors of the protections of the classified system. Complainant further argues that once he raised this issue with the University, it informed him that it had relied on the Director in determining that the exemption decision was appropriate. He further states that when he next raised the issue with the Director’s Office, that office advised him that it had relied on the University’s application of its own standards in approving the exemption decision. Therefore, Complainant feels he was given the run-around, and has never been provided a bona fide reason grounded in rule or law for why the exemption decision was proper.

- After Complainant brought these two job descriptions to the attention of the Director, his office staff “investigate[d] this situation” The Director concluded that his staff had “verified the information you provided that shows there are two seemingly identical positions being filled, one a classified position, the other an exempt position.” Respondent’s Exhibit 21.

- The Director informed Complainant at that time that “Most of your university’s management positions can be and are exempted from the system, even though we may have classified classes that could be used. The Legislature left the choice up to the appointing authorities in the colleges and universities to exempt or not. Most choose to exempt those positions allowed under the criteria.”

- Both exempt and classified advisors receive exactly the same initial training to learn the job, as well as the same ongoing training during weekly meetings. Sheila Smith, GPII, Training Coordinator - Technical Advising, conducts all training of advisors, and there is no difference in the training she provides to classified and exempt advisors. The initial training she provides to all advisors covers primarily technical advising duties such as graduation certification, basic college policies, requirements (such as meeting core curriculum and major requirements) and procedures, various college curricula and requirements, and policies for exemptions. There is no distinction made in her PDQ between her oversight of exempt and classified advisors (Exhibit 35);

- All exempt and classified advisors perform the same required technical advising tasks; they must produce and maintain the same paperwork, keep the same records, track the same records, etc.; they have the same student appointment requirements;

- Classified advisors have trained and continue to train exempt advisors to perform the advising job;

- At the present time, in the Department of English, there are two advisors, one exempt, one classified. They have divided up the students between these two advisors alphabetically: one has A - L, the other has M - Z.

- In its oral argument in support of its motion for directed verdict, the University conceded that “both classified and exempt staff do technical advising” and that the adviser training conducted by Sheila Smith is the only training received by both exempt and classified advising staff.

The University argues that its long-term vision of the exempt position is encompassed in the PDQ’s, and that while the duties performed at this time might be arguably the same, as the exempt advisors grow into their positions, the University’s vision will be realized. That vision consists essentially of students being able to rely on advisors more for academic assistance and information relating to professional opportunities in their chosen fields, instead of turning exclusively to their course professors for such assistance.

The PDQ of classified advisor Janet Hand includes many of the functions the University argues will be performed exclusively by the exempt advisors. For instance, under the Duty Statement describing 85% of her duties, one of her functions is to “Advise

students of possibilities of internships, graduating with honors, graduate school options and career possibilities.” Exhibit 37, Page 3. Another section states, “the Advisor analyzes previous academic work, the student’s intentions and goals and makes decisions about the best course of action for each individual student.” The Duty Statement describing 75% of classified advisor Mindy Wilding’s duties (Anthropology Department advisor) includes, “Teach students decision making skills.” Exhibit 36, Page 3. Although Wilding’s PDQ does not require her to do so, she does assist students in understanding the academic content of courses (based on professors’ written descriptions thereof). It is also noted that some classified advisors hold masters degrees. Complainant’s Exhibit 2, Page 1.

Complainant also argues that the requirement of a masters degree for academic advisors violates the exemption statute because this education level is not “comparable to that required for a faculty member.” Section 24-50-135, C.R.S.

Respondents first argue that as a factual matter, the new exempt positions are different from the current classified advisor positions. They further contend that the new positions were appropriately exempted in accordance with the standards set forth in Section 24-50-135, C.R.S.

1. Requirement of the Master’s Degree. Complainant argues that the University violated the exemption statute by creating new exempt advisor positions in the College of Arts and Sciences (“A & S”) that require a masters degree. Section 24-50-135(1)(c), C.R.S., provides:

“Administrators employed in educational institutions and departments . . . shall include the following, who shall be exempt from the state personnel system:

(a) Heads of administrative units and their professional staff assistants who relate directly to the educational function of an educational institution and whose qualifications include training and experience comparable to that required for a faculty member.”

Complainant contends that a masters degree is not “comparable to that required for a faculty member,” since many A & S faculty hold only a bachelor’s degree.

According to Complainant’s Exhibit 20, a list of all A & S faculty, only eleven out of the well over nine hundred faculty listed have obtained less than a master’s degree. The overwhelming majority of A & S faculty have PhD’s.

The Board has viewed all evidence in the record on this issue. The only evidence concerning education levels of A & S faculty members demonstrates conclusively that the master's level requirement of advisors is "comparable to that required for a faculty member." The master's degree requirement is therefore not violative of Section 24-50-135(1)(c), C.R.S. The motion to dismiss this issue from the appeal is granted.

2. The Exemption Decision

Complainant argues that the exempt and classified advisor positions are essentially the same, and that it is a violation of the state classified personnel system to create a new exempt position that is identical to an existing classified position.

A. Are the exempt and classified advisor positions essentially the same?

The threshold issue in determining whether the exemption decision was proper is whether the exempt and classified advisor positions are substantially the same. To establish that two positions are substantially the same, a classified employee must demonstrate that they share "substantially the same duties and responsibilities." It is unnecessary to establish that the two positions require the performance of "all of the [same] services". Bardsley v. Dept. of Public Safety, 870 P.2d 641, 647-648 (Colo. App. 1994), (citing People ex rel. Kelly v. Milliken, 74 Colo. 456, 223 P. 40 (1923) and Tising v. State Personnel Board, 825 P.2d 1011, 1014 (Colo. 1991)).

The evidence thus far has demonstrated the following:

What law applies.

The Colorado Constitution provides that "the personnel system of the state shall comprise all appointive public officers and employees of the state, except . . ." those specifically enumerated therein, including "faculty members of educational institutions and departments not reformatory or charitable in character, and such administrators thereof as may be exempt by law. . . ." Colo. Const. art. XII, Section 13(2). (Emphasis added.)

The General Assembly has enacted Section 24-50-135, C.R.S., in response to this constitutional delegation of authority. It provides,

"24-50-135. Exemptions from personnel system. (1) Administrators employed in educational institutions and departments not charitable or reformatory in character shall include the following, who shall be exempt from the state personnel system: . .

(c) Heads of administrative units and their professional staff assistants who relate

directly to the educational function of an educational institution and whose qualifications include training and experience comparable to that required for a faculty member; . . .

(2) The state personnel director, in consultation with the officers of such educational institutions or departments, shall determine which administrative positions, under the definitions enumerated above, are exempt from the state personnel system, subject to an appeal to the board.”

In 1977, the Director of Personnel generated “Guidelines for Exemption of Positions in Educational Institutions and Departments,” (hereinafter, “Guidelines”) Respondent’s Exhibit 18. These Guidelines define Section 24-50-135(1)(c)’s phrase, “relating to the educational function” as follows:

“professional level duties in one or more of the following areas:

- (1) Continuing, adult, special or extension education programs;
- (2) Instructional or educational media;
- (3) Professional counseling;
- (4) Student activity sponsors or advisors;
- (5) Research and sponsored programs (for those professional staff who have authority to shape program outcomes);
- (6) Library services;
- (7) Student personnel services;
- (8) Professional staff with instructional responsibility in a clinical (medical, legal, etc.) or health care setting.

Qualification for these positions is defined as being consistent with the qualifications required of faculty members by the respective governing boards.

Heads of administrative units related to the educational function coordinate, manage and direct a function directly related to one or more of the designated educational functions. Supervision of professional staff assistants is not a requirement, provided program responsibility is the essential assignment, and the work is predominantly intellectual and varied in nature and requires the consistent exercise of discretion and judgment.

Professional staff assistants include those positions in such units who perform advanced work in a field of science or learning directly related to one or more of the specified educational functions, including those positions which deal with the non-classroom portion of a student’s educational experience, and the work is predominantly intellectual and varied in nature, requiring the consistent exercise of discretion and judgment.” Respondent’s Exhibit 18. (Emphasis in original)

The Exemption Request Forms.

In its Exemption Request Forms for the eight new advisor positions submitted to the Director, the University checked boxes for factors 2, 3, and 7 from the Guidelines above, and attached the PDQ's of the positions. (Respondent's Exhibits 7 - 13).

Factor #2. Regarding factor 2, "instructional or educational media," there is no evidence in the record defining this term, or indicating how it applies to the new exempt advisor positions.

Factor #3. There is also no evidence in the record yet defining "Professional counseling" in the context of the Guidelines, or indicating whether it applies to the new exempt advisor positions. Is academic advising "professional counseling"? Is "developmental advising" "professional counseling"? The record at this point does not disclose the answer. If it is, while the A & S dean argued in his exemption request letter that "development advising" is a new function that can only be performed outside the personnel system by masters level advisors, Exhibit 2 demonstrates that classified advisors' job descriptions were written in 1998 to reflect their performance of developmental advisor duties.

The evidence thus far appears to show that advisors have always performed some "developmental counseling." Complainant's PDQ, and the testimony at hearing, confirm that while the classified and exempt academic advisor positions are largely technical, the job also imposes significant "developmental" advising burdens on the advisors. According to Sheila Smith, trainer of all advisors in A & S, the most important credential for being a college level advisor is a commitment to working with kids at that developmental stage. Further, she addresses developmental issues such as maturation and assuming responsibility in her training for both classified and exempt advisors.

Factor #7. Lastly, regarding factor 7, "student personnel services," there is no evidence indicating what is meant by this category, or whether it appropriately applies to the new exempt advisor positions.

There is insufficient evidence in the record to conclude that the University and the Director appropriately applied these factors in making the exemption decision. Respondent is therefore not entitled to judgment.

In response to Respondent's request for clarification concerning issues presented, the following issues are of concern to the Board in this case:

1. If Section 24-50-135 is mandatory, as the word "shall" demonstrates and as is conceded by Respondent University in Paragraph 3 of its motion to dismiss, then how can the same position be both exempt and classified, as Respondents argue. See Respondent's Exhibits 21 and 23. Given the mandatory nature of Section 24-50-135, are

not the Director's Guidelines also mandatory? Assuming the Guidelines are mandatory, how can the Director apply them to arrive at two completely different outcomes? Don't standards, by definition, indicate that one outcome is the correct one? Why wouldn't two conflicting applications of a standard by definition be arbitrary?

2. The Director indicated his position in Exhibit 23 that "the statutes contain no prohibition against exempting a position previously classified." How does a mandatory statute give the Director discretion to exempt a position previously classified?

3. Given the constitutional presumption that all state positions are classified, how can a formerly classified position be deemed to be exempt without violating the civil service amendment and the privatization cases cited above, Horrell, CAPE v. Highways, etc. CAPE v. Highways held that since the civil service amendment failed to delineate standards by which positions could be removed from the personnel system, the legislature could not do so without promulgating standards for that process. Why would that holding not apply here as well? Neither Section 24-50-135 nor the Guidelines provide standards under which positions previously classified may be deemed to be exempt. What, if any, standards were applied here?

4. Turning back to the A & S dean's letter requesting the exemptions, Respondent's Exhibit 3, while no evidence has been introduced by Respondent explaining the three rationales presented therein, it appears that the basic, bottom-line reason for the exemption request was simply to avoid having to comply with the requirements and burdens imposed on the University by the state classified system. Is this a permissible reason to create and approve an exempt position? Did the dean ignore the Guidelines, which could constitute arbitrary and capricious failure to consider mandatory factors?

DISCUSSION

The Board cannot reverse or modify an action of an appointing authority unless it finds the action to have been arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. (1999); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

1. Did Complainant commit the acts for which she was disciplined?

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

ORDER

The actions of Respondents are affirmed. This case is dismissed with prejudice.

DATED this _____ day of
August, 2000, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
State Personnel Board
1120 Lincoln Street, Suite 1420
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of August, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Dave Smith

and via interoffice mail to:

David Kaye
First Assistant Attorney General
State Services Section
Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
