

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95D001C

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS L. MAY, FRANK VALLERO, JOHN WHARRIER,
and the COLORADO ASSOCIATION OF PUBLIC EMPLOYEES,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
LOOKOUT MOUNTAIN YOUTH SERVICES CENTER,
DEPARTMENT OF HIGHER EDUCATION,
METROPOLITAN STATE COLLEGE OF DENVER,

Respondent.

Hearing in this matter was convened on February 13, 1995, and concluded on July 25, 1995, to consider the issue of the Complainant's, Colorado Association of Public Employees' (CAPE), standing to represent the interest of its members in the petition for declaratory relief. Complainants' appeared at hearing through Vonda Hall, attorney for CAPE. Respondent, Department of Human Services, appeared through Stacy R. Worthington, Assistant Attorney General. Respondent, Department of Higher Education, appeared through Rumaldo Armijo, Assistant Attorney General.

Complainants, Thomas May, Frank Vallero and John Wharrier, testified in their own behalf and called the following individuals to testify at hearing: Susan Law; Jerald Adamek; Michael Puzzoto; Georgiana Landry; and Sandra Jones.

Respondent, Department of Higher Education, called William Weiner and Respondent, Department of Human Services, called Sandra Jones to testify at hearing.

Complainants' exhibits A through C1, D and E3-9 were admitted into evidence without objection. Complainants' exhibits C2, C4, C6 and F were admitted into evidence over objection. Complainants' exhibit E1 was offered into evidence and later withdrawn. Complainants' exhibit E2 was marked but was not offered.

Respondents did not offer exhibits into evidence at hearing.

PROCEDURAL MATTERS

On August 8, 1994, Complainant, CAPE, petitioned the State Personnel Board (Board) for declaratory relief to terminate controversies and remove the uncertainties regarding applicable

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statutory and constitutional provisions between Complainants and Respondents. On August 22, 1994, Complainants, Thomas May, Frank Vallero and John Wharrier, petitioned the Board for a discretionary hearing to review a step four grievance decision. On September 8, 1994, an order was entered consolidating the petition for hearing with the petition for declaratory relief.

On November 15, 1994, the Board met and considered the pleadings and orders comprising the record in these consolidated cases. In an order dated November 18, 1994, the Board directed the Administrative Law Judge to conduct an evidentiary hearing to determine whether declaratory relief is appropriate and whether CAPE has standing to pursue this action.

On February 15, 1995, at the parties' request this matter was bifurcated to allow the issue of CAPE's standing to be considered separately. Following consideration of this issue, a hearing will be held to consider the substantive issues raised by the petitions. Evidence was received on the standing issue at hearing on July 24 and 25, 1995.

MATTER APPEALED

This matter is before the ALJ on the limited issue whether CAPE has standing to represent the interest of its members in this action.

ISSUE

Whether CAPE has standing to represent the interests of its members in this action.

FINDINGS OF FACT

1. CAPE is a not for profit Colorado corporation whose objectives are the following:
 - a. To serve the people of Colorado and the employees of the State and its subdivisions by promoting efficiency in governmental service and the application of the merit principle of employment of public employees.
 - b. To represent public employees in their employment relations with the State and its subdivisions concerning wages, hours, working conditions, grievances or other matters of concern relating thereto.
 - c. To represent retired public employees in their relations with the State and its subdivisions concerning retirement benefits and other matters of concern.

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- d. To promote and assist in maintaining the benefits, rights, and welfare of public employees.
- e. To provide beneficial services to members.
- f. To do any and all acts in the furtherance of the purposes and objectives stated above.¹

2. CAPE's membership is made up of State classified employees. CAPE also has members who are retired employees of the State classified system. Exempt employees may also become members of CAPE. Members of CAPE pay dues through a payroll deduction program.

3. CAPE's by-laws provide that only employees of the State classified system or employees retired from the system may serve on the Board of Directors. In practice, any CAPE member may serve on the Board of Directors.

4. Complainants, Thomas May (May), Frank Vallero (Vallero) and John Wharrier (Wharrier), are State classified employees of the Department of Human Services (DHS). They are members of CAPE. May has been a CAPE member for 32 years, Vallero for 35 years and Wharrier for eight years.

5. Lookout Mountain School (LMS) is a State facility which houses juveniles in State custody who have been adjudicated delinquent. The juveniles range in age from 12 to 21 years of age. The State is responsible for providing educational services to these youth.

6. Prior to August, 1994, educational services were provided at LMS by teachers who were State classified employees. These services were generally provided during the traditional school hours of 9:00 a.m. to 3:30 p.m.

7. May has been an employee of the Office of Youth Services, DHS, since September, 1962. He was assigned to work at LMS as a math teacher for 25 years.

8. Vallero has been employed by the Office of Youth Services, DHS, for 34 years. He was assigned to work at LMS as a social studies teacher for 33 years.

9. Wharrier has been employed by the Office of Youth Services, DHS, for 10 and 1/2 years. He was assigned to work as a teacher at LMS for nine and one half years teaching math, language arts and emotionally disabled students.

¹ Complainants' Exhibits B, CAPE's Articles of Incorporation.

10. In the Spring of 1994, Jerald Adamek, the director of the Office of Youth Service, began discussions with Metro State College (MSC) to utilize the expertise of their staff to provide educational services at LMS. It was Adamek's belief that the quality of educational services provide at LMS through teachers in the State classified system was unacceptable. Juveniles inadequately educated during their incarceration at LMS had a high recidivism rate.

11. The staff at LMS were advised during the summer of 1994 that there would be changes occurring in the delivery of educational services at LMS. MSC agreed to create a laboratory school (the lab school) at LMS. MSC agreed to provide teachers hired on contract to serve the lab school.

12. The incumbents of the State classified teaching positions at LMS were advised that they could apply for the contract positions at MSC. The incumbents were further advised that any employee who was not offered, did not apply for or failed to accept contract employment at MSC would not be permitted to remain employed in a teaching position at LMS. Adamek advised the LMS teachers that the remaining teachers would be transferred to an Office of Youth Services detention facilities where they would be assigned to teach health modules during an evening shift.

13. MSC created 18 contract teaching positions. The Complainants, May, Wharrier and Vallero, along with other State classified teachers at LMS, applied for the contract positions. Nine of the eighteen teachers selected by MSC were previously State classified teachers at LMS. The remaining nine teaching positions at the lab school were filled by individuals who were not previously employed in the State classified system at LMS as teachers.

14. Of the nine formerly State classified teachers who had been employed at LMS and were selected for the contract positions at the lab school, three of them are CAPE members. The remaining 15 contract teachers employed at the lab school are not CAPE members.

15. The State classified teachers were not given notice of appeal rights. Nor were they advised of any retention rights.

16. In August, 1994, May, Wharrier and Vallero were not selected for teaching positions at the lab school. They were reassigned. May teaches a health module at the Adams County Youth Detention Center in Brighton, CO. Wharrier has been reassigned to review the files of youths adjudicated as delinquent for educational placement. Vallero is assigned to work as a facilitator for health modules for the Office of Youth Services at Montview School.

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17. Georgianna Landry and Susan Law are two of the nine teachers employed by MSC on contract who previously were State classified employees teaching at LMS. They are CAPE members.

18. As a result of their decision to accept the contract positions, Landry and Law lost significant amounts of sick leave that they accrued as State classified employees. Their new positions on contract lack job security, since they work under one year contracts which may or may not be renewed each year.

19. Landry and Law felt compelled to accept the employment offered by MSC at the lab school because they wanted to continue in their capacities as teachers. The alternative offered to them of working evenings at a detention facility in a health module was unacceptable.

20. Landry, Law, May, Wharrier and Vallero want the teaching positions at LMS returned to the State classified system.

DISCUSSION

Complainants have the burden to establish that CAPE has standing to represent the interests of their members in this action. Board rule 1-6-3(B); Board Order, dated November 18, 1994. An association may maintain an action on behalf of its members if (1) its members would otherwise have the right to sue in their own right, (2) the interests sought to be protected are germane to the association's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individuals members in the litigation. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977); Warth v. Seldin, 422 U.S. 490 (1975); Villa Sierra Condominium v. Field Corp., 787 P.2d 661 (Colo. App. 1990); Connestoga Pines Homeowners' Ass'n v. Black, 689 P.2d 1176 (Colo. App. 1984). While an association may generally obtain declaratory or injunctive relief without joining its members, any litigation designed to obtain damages on their behalf would normally require the members' presence. Warth v. Seldin, supra.

CAPE contends that the evidence presented at hearing established that it meets all three prongs of the standing test. CAPE maintains that it is clear that its members have the right to sue in their own right in this action. CAPE argues that DHS' action in removing the State classified teachers from LMS and MSC's action in creating exempt teaching positions were actions which could have been appealed by CAPE members.

CAPE argues that its articles of incorporation spell out objectives which are furthered by their assertion of their members' claim in this action. CAPE maintains that it has a long history of protecting its members' interests in lawsuits which

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challenge the erosion of the State classified system. CAPE further maintains that this action is consistent with its objectives.

CAPE finally argues that it seeks declaratory relief in the form of an order declaring the rights of the parties with regard to the actions taken by DHS and MSC in August, 1994. It maintains that the action taken violates the Colorado Constitution, Article XII, because Respondent exempted position performing duties commonly and historically performed by State classified personnel. It is asserted that the declaratory relief that it seeks will affect the positions which were exempted, distinct from the incumbents that may hold those positions.

Respondents contend that CAPE failed to establish that it has standing. It maintains that CAPE members do not have the right to bring an action in their own rights. Respondents argue that DYS had the right to reassign duties to employees and to assign employee work locations. Respondents argue that the State classified employees who were teachers at LMS, and remain employed by DHS, lost no pay, status or tenure, they were simply reassigned and their duties were changed.

Respondents further contend that the former LMS teachers who accepted contract employment with MSC have no right to pursue an action against Respondents. It is argued that they voluntarily left State employment, accepted contract employment with MSC and have no claim that could be asserted on their behalf by CAPE. Thus, Respondents contend that CAPE fails to pass the first prong of the standing test.

Respondents next argue that the interests sought to be protected are not germane to the organization. Respondents contend that all CAPE members want their rights protected by CAPE. It is argued that the interests asserted by CAPE are in conflict with its members' interest. Respondents argue that CAPE members who accepted the contract positions have different interests than those who remained employed in the classified system and were reassigned. Respondents contend that the declaratory relief sought by Complainants would result in a determination that the contract positions created by MSC are unconstitutional. If such a conclusion were reached, it is argued that it would not be in the best interest of the CAPE members who accepted employment at the lab school.

Finally, Respondent argues that the claims asserted and relief sought in this case requires the participation of the individuals members in this litigation. Respondents again argue that the interest of CAPE members differs depending upon whether they are employed by MSC or are in the State classified system. Since the members circumstances differ, it is argued that their individual

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participation in this litigation is required and their interest cannot be represented by CAPE.

The prerequisites for standing are satisfied here. The teachers who are members of CAPE would under these facts have standing to sue in their own right. See, Bardsley et. al. v. Department of Public Safety, 870 P.2d 641 (Colo. App. 1994). The interest that CAPE seeks to protect is clearly consistent with its stated objectives in its articles of incorporation and is consistent with its practices throughout its existent.

The decision made to create 18 exempt positions at MSC was not done in consultation with the affected employees. Likewise, in this lawsuit, where the issues raised pertain to the propriety of exempting the teaching positions at the lab school, the approval of or the participation of the affected employees is not required in order for CAPE to pursue this action.

CAPE seeks to have rights declared with regard to the teaching positions. The fact that individual incumbents of those positions may be affected by an order entered in this matter does not undermine the distinction between the position and the incumbent of the position. CAPE may seek declaratory relief with regard to what has happened to those position without the individual employees who hold those positions being made a party to this litigation. This case is similar to the Denver Classroom Teachers Association v. Denver School District #1, 738 P.2d 414, 415 (1987), case. And, no individualized proof is required necessitating the participation of all the affected CAPE members as parties to this litigation.

CONCLUSION OF LAW

CAPE has standing to represent the interest of its member in this action seeking declaratory relief.

ORDER

This matter will proceed to further hearing on the issues raised by Complainants in their petitions.

DATED this 8th day of
September, 1995, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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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 and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). 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), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. 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).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. The estimated cost to prepare the record on appeal in this case with a transcript is \$1242.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment 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. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

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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 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

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 R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. 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.

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CERTIFICATE OF MAILING

This is to certify that on this 8th day of September, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

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