

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANDRE SMITH,

Complainant,

vs.

REGENTS OF UNIVERSITY OF COLORADO AT DENVER, AURARIA HIGHER
EDUCATION CENTER,

Respondent.

This matter came on for hearing on January 21, 2003, before Administrative Law Judge Mary S. McClatchey. Mark Schwane, Esquire, represented Complainant. Assistant Attorney General Hollyce Farrell represented Respondent.

On March 26, 2003, after issuance of the Initial Decision, Respondent filed a motion for clarification seeking a ruling on its request for attorney fees. That ruling appears at the end of this Amended Initial Decision.

MATTER APPEALED

Andre Smith ("Complainant" or "Smith") appeals the abolition of his position through layoff. He claims that his position was subject to neither lack of work nor lack of funds, and that the decision to eliminate his position was arbitrary and capricious. For the reasons set forth herein, Respondent's action is affirmed.

PROCEDURAL MATTERS

This case previously involved two complainants. Prior to hearing, Justin McPeck withdrew his appeal.

ISSUES

1. Whether the action of Respondent was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

1. In June 1998, Smith was hired as the Chief Engineer in the Media Center at University of Colorado at Denver ("UCD"). The Media Center serves UCD, Metro State College of Denver ("Metro"), and Community College of Denver ("CCD").
2. The Media Center consists of a production facility with two television studios, distance education classrooms (utilized for teaching students off-site), and a repair shop. The Center also provides technological services and equipment for 206 classrooms throughout campus, and for special events.
3. At the time of hire, Smith had a stellar background, including positions at the Johnson Space Center in Texas, Edwards Air Force Base, and a number of commercial television studios.

The Media Center - Upgrade

4. In the late 1990's, the Colorado General Assembly passed three separate capital construction appropriations bills totaling \$14 million, for the purpose of upgrading all Media Center facilities to state-of-the-art condition.
5. The Media Center upgrades were organized into two primary projects:
 - Information Technology Initiative ("ITI"), involving the digitalizing of one of the television production studios, rendering it a state-of-the-art facility on par with commercial TV studios such as Channel 9; updating the Distance Education classrooms by installing state-of-the-art technology, allowing delivery of courses via satellite uplink to locations anywhere in the world; and
 - Classroom Improvement Project ("CIP"), in which the 206 classrooms campus-wide were equipped with new technology, including VCR's, DVD's, audio equipment, overhead connectors, internet service, etc., and under which all classrooms were networked.
6. As Chief Engineer, Smith coordinated, managed, and generally oversaw these massive upgrades to the Media Center. His stewardship was invaluable to the upgrading of the Media Center.

April 2002 Restructuring of the Media Center

7. In April 2002, the Media Center was restructured and transferred administratively from UCD to Auraria Higher Education Center ("AHEC"). At that time, the upgrading of the Media Center was nearly complete. Specifically, the digital TV studio was complete; the two Distance Education classroom upgrades were complete; and the 206 classroom upgrades were in the final stages of installation.

8. By October 2002, the installation of all remaining new equipment in the classrooms was complete.
9. At the time the Media Center was restructured, its annual budget was cut from \$1.6 million to \$1.1 million. Media Center staff was reduced from thirty-five to twenty-three. The twelve laid-off employees have appealed their terminations and their consolidated case is pending before another State Personnel Board Administrative Law Judge.
10. Smith was not laid off at the time of the April 2002 restructuring of the Media Center. However, in the course of the restructuring, his job was reallocated to a lower classification, from Electronics Engineer III to II. Smith did not appeal, and he remained Chief Engineer of the Media Center.
11. At the time of the restructuring of the Media Center, Smith and other Media Center staff took on some additional responsibilities previously performed by the laid-off employees. Specifically, Smith took on the responsibilities of the Media Equipment Specialist. No evidence was presented concerning the additional duties this entailed.
12. The upgrading of the Media Center was completed in October 2002. Since that time, there remains a significant amount of work to sustain the Center at its current, state-of-the-art level. Necessary ongoing maintenance includes: coordination of existing, new, and emerging technologies to assure compatibility; troubleshooting the inevitable kinks and problems that new equipment generates; equipment maintenance; repairs; and training of faculty and students to use the equipment correctly (and to prevent damage through misuse).

Fiscal Structure of AHEC; Fiscal Problems in 2002

13. AHEC's mission is to provide support services to three institutions of higher education: UCD, Metro, and CCD (referred to collectively herein as "the three institutions"). AHEC receives approximately 80% of its general operating budget from these three institutions.
14. Every Spring, the Chief Financial Officer for AHEC meets with representatives of the three institutions to determine specifically what services AHEC will deliver to them, and in turn how much those services will cost. It is a negotiated process. In the Spring of 2002, with a weakened economy in the wake of the September 11, 2001 terrorist attacks, those negotiations occurred in a political climate of anticipated budget cuts for state agencies.
15. In March 2002, AHEC froze all vacant positions in anticipation of potential budget cuts in the upcoming fiscal year, Fiscal Year 2002-03 (July 1, 2002 through June 30, 2003) ("FY 03").

16. In April 2002, AHEC distributed a layoff matrix to all classified employees, in anticipation of potential layoffs.
17. In June 2002, Colorado Governor Bill Owens issued an Executive Order directing "all agencies of state government to assist in meeting the constitutional requirements of a balanced budget." The Executive Order noted that that "Office of State Planning and Budgeting's June 2002 revenue forecast shows that in fiscal year 2002-03 the State of Colorado will need to reduce General Fund expenditures by \$335.5 million given the appropriations level set by the General Assembly." This Executive Order remained in effect until October 1, 2002.
18. In the late summer of 2002, Dean Wolf, Executive Vice President for Administration and Chief Executive Officer of AHEC, informed his division directors that AHEC should anticipate a 5% to 15% cut in funding in that current fiscal year, FY 03.
19. In September 2002, Governor Owens issued a second Executive Order, noting that the revised budget forecast, based primarily on lower income tax and sales tax forecasts, necessitated a \$550 million reduction in General Fund expenditures in FY 03. This Executive Order extended the previous one through December 31, 2002.
20. In October 2002, the Chief Financial Officers of AHEC and its three funding institutions met to address budget cuts. It was determined that AHEC would receive 15% less than its budgeted amount for FY 03 from the three institutions. This reduction was based primarily on the fact that each of the three institutions faced a 15% reduction in its general operating budget. However, the institutions also receive revenue from tuition and other sources.
21. AHEC determined that it would cut its operating budget expenditures by 15%, or approximately \$1.4 million. AHEC also receives revenue from tuition and other sources.
22. Over 70% of AHEC's operating budget consists of personnel costs.
23. In October 2002, Wolf determined that AHEC could meet its \$1.4 million reduction in spending in four ways: first, by freezing all vacant positions, which it had done in March 2002, resulting in \$600,000 in vacancy savings in FY 03; second, by reducing its operating budgets, such as freezing travel dollars, periodical subscriptions, etc.; third, by reducing its reserve accounts by between \$300,000 and 400,000; and fourth, by instituting layoffs.
24. Wolf concluded that he needed to reduce salary expenditures in FY 03 by \$500,000, including unemployment benefits costs.
25. In October 2002, Wolf discussed the need for layoffs with his division directors. He

directed them to examine the priorities of each division and to identify any positions that could be cut, with the least impact on AHEC's basic mission of supporting the education of students. Wolf's directive was to evaluate whether the division's priorities could be met if one or more positions were cut.

26. Dick Feuerborn, Director of the Division of Facilities Planning and Use at AHEC, was Smith's appointing authority. Feuerborn had initiated the Information Technology Initiative and Classroom Improvement Project, having written the program plans, obtained appropriations, and overseen implementation to assure the projects met their stated goals. He had worked closely with Smith over the past few years in overseeing the projects' implementation.
27. Feuerborn viewed Smith's job as being primarily that of project manager. He felt that since the Media Center upgrades had been completed, the need for Smith's project management had diminished. He anticipated no new capital construction projects coming to AHEC due to the fiscal situation. He determined that Smith did not have "much on his plate," except oversight of system maintenance performed by his two supervisees, and committee work. His overall perspective, therefore, was that Smith's position was the one in his Division contributing the least to AHEC's mission. While Feuerborn held Smith in high esteem, he nonetheless felt that the Division could live without him.
28. Feuerborn did not consult with Smith's direct supervisor, Randy Tatro, Director of the Media Center, in making his decision to abolish Smith's position. He did not think it necessary, since he had worked so closely with Smith over the past few years.
29. On October 21, 2002, Feuerborn sent a memo to Wolf suggesting that Smith's position be eliminated, along with a vacant one. He stated that his intention was to eliminate the positions effective December 31, 2002.
30. Wolf discussed Feuerborn's memo with him, expressing approval of his recommendation. Wolf knew Smith. He had no questions about Smith's loyalty, initiative, or quality of work. Wolf understood Smith's duties to encompass primarily oversight over installation of classroom improvement equipment and handling problems that arose after that installation. Wolf agreed that Smith's position should be eliminated based on the following considerations: the classroom improvement project had been completed; no other major projects were ongoing that required the installation of media equipment on campus; and the loss of Smith's position would pose the least damage to the goal and mission of the Media Center and hence AHEC.
31. Wolf described the decision to lay off Smith as "painful" at hearing.
32. On October 25, 2002, Wolf issued a memorandum to all AHEC classified and

exempt staff, addressing the fiscal situation and layoffs. He stated the following:

- a. AHEC was facing a \$1.4 million budget reduction in fiscal year 2002-03;
 - b. AHEC would face FY 04 with the same \$1.4 million reduction;
 - c. The lack of funding for construction and controlled maintenance projects would lead to a reduction in the workload in several areas;
 - d. To meet the reduction, AHEC would "eliminate all but the most necessary operating reserves and continue to freeze vacant positions";
 - e. Since 75% of AHEC's budget goes to employee salaries, positions would be cut, based upon the following priorities: health and life/safety and essential education support;
 - f. Based on those priorities, AHEC would be cutting 23 currently filled positions.
33. As of January 2003, AHEC had received full payments from the three institutions during the first two quarters of FY 03. The \$1.5 million reduction in payments will be spread out between the last two quarterly payments.

Allocation of Smith's Duties

34. On December 18, 2002, Tatroe, Smith's direct supervisor, sent an email to Cynthia Hier, Human Resources Director at AHEC, regarding "Allocation of Andre Smith's Duties." The email stated in part that Smith's job responsibilities centered around four areas:
1. seeking out new clients for media center services and providing consultation on new media-oriented projects on campus;
 2. ensuring accurate and timely information is received from the technical staff for the inventory and repair databases;
 3. serving on campus-based committees related to media technology; and
 4. other projects as assigned.

It further states,

"Andre [Smith] supervised two people and I now supervise them. As for #1, this was part of the reason his position was abolished --we do not anticipate an increase in new clients nor new projects due to the recent budget cuts. As for #2, I have taken over this responsibility (the database infrastructure was already in place and the remaining piece was to manage the information flow). As for #3, I will serve on the committees. As for #4, I will assign projects to the remaining technical staff as the need arises. I don't anticipate

any new projects, again, because of the budget cuts."

35. Smith supervised two employees. Roger Shaltry possessed the same level of technical expertise as Smith, and had in fact been offered the chief engineer position but declined it; Shaltry was responsible for day-to-day technology, television production, and distance education functions. Gibbons was responsible for the day-to-day maintenance and repair of equipment on campus and in the classrooms. Smith's duties in relation to Shaltry and Gibbons were primarily consultative in nature.
36. Shaltry and Gibbons possess the knowledge, skills and expertise to handle the Media Center work. Since they were already overworked at the time of Smith's departure, it remains to be seen how well the Media Center will function in Smith's absence.
37. Smith made an outstanding contribution to the Media Center, and to the committees on which he served. The Media Center will not be the same without him. In view of Randy Tatroe's lack of engineering expertise, Tatro will not make as substantive a contribution to the committees on which he now serves in Smith's stead.
38. Examples of Smith's stellar performance include the following:
 - Smith arranged with Toshiba for the Media Center to become a certified warranty repair center. The Media Center now generates revenue by making repairs on its own and other educational institutions' Toshiba equipment;
 - he designed and engineered an upgrade of the distribution facility at the Media Center, so that it can now send a message to play a specific tape in a specific classroom at a specific time;
 - he engineered and installed bravada camera systems linked to student microphones, so that when a student presses a button on the microphone, the camera moves to that student.
39. Smith was a star at AHEC. He cherished and thrived in his job. He will be sorely missed.

DISCUSSION

I. Burden of Proof.

Respondent conceded that it has the burden of proof in this case at the outset of hearing. In fact, because layoffs constitute administrative, not disciplinary, adverse employment actions, they do not implicate the constitutional protections afforded certified employees who are disciplined for cause. *See Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994)(agency bears burden to prove factual basis for disciplinary action taken); *Harris v. State Bd. of Agriculture*, 968 P.2d 148 (Colo.App. 1998); *Hughes v. Dept. of Higher Education*, 934 P.2d 891 (Colo. App. 1997).

Complainant bears the burden of proving that Respondent's decision to abolish his position was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. Solely for purposes of efficiency, the undersigned permitted Respondent to present its case first.

Under the Colorado State Personnel System Act, section 24-50-101 *et seq*, C.R.S., reductions in force ("RIF") may occur for any one of three reasons, outlined at section 24-50-124, C.R.S.:

"When certified employees are separated from state service due to lack of work, lack of funds, or reorganization, they shall be separated or demoted according to procedures established by rule. Such procedure shall require that consideration be given to performance evaluations of the employees and seniority within the total state service. Such employees shall have retention rights"

II. Lack of Funds.

Complainant first argues that AHEC did not experience a lack of funds. He contends that since the three institutions were still paying AHEC the full amount of their quarterly payments at the time of layoff, the lack of funds was speculative. Hence, the layoff was premature. Complainant appears to assert that an institution must have already suffered the fiscal loss at the time of layoff in order for a bona fide "lack of funds" to exist.

This argument is rejected for several reasons. First, the evidence was compelling, based primarily on the two Executive Orders, that the budget shortfall was a certainty, not a remote possibility. If an agency lack of funds were proven to be purely speculative, then an employee might successfully challenge a claim of "lack of funds." Such is not the case here.

Second, from a policy perspective, if Complainant's argument were to prevail, agencies would be effectively precluded from proactively addressing and planning ahead for fiscal crises. Moreover, if agencies were to wait until the actual loss of revenue occurs, it would force a greater numbers of layoffs. By initiating layoffs prior to the Spring of 2002, AHEC was able to spread the finite amount it had to save over a greater period of time, resulting in a lower amount of mandated savings per month.

Complainant also questioned the need for a 15% cut in AHEC's budget by the three institutions. This is an interesting issue, in view of the fact that the 15% decrease in general

funds of the three institutions did not constitute 15% of their overall budgets: they also received funding from tuition and other sources. However, since the three institutions were not named as parties to this action, it is beyond the scope of this case for the Board to examine the legitimacy of their decision to cut AHEC by 15%.

Complainant further asserts that while AHEC suffered a budget cut of 15% in general fund moneys from the three institutions, that cut was taken out of only 80% of its overall budget (since general fund moneys constitute 80% of AHEC's revenues). Fifteen percent of 80% equals 12% of AHEC's entire budget. Smith reasonably questions the need for a 15% across the board cut, where it appears that perhaps a 12% cut was closer to the actual loss in revenue. This argument may have some weight; however, there are no findings of fact on this issue herein, because the evidence was insufficiently developed at hearing. While a number of budgetary documents were stipulated into evidence, none of AHEC's witnesses were questioned about them. It would have been beneficial to know precisely how and why AHEC arrived at the 15% cut; and how much the true net effect of the cuts was on AHEC. In the absence of such fundamental information, there is no evidence upon which to set aside a layoff based on a 15% budget cut.

III. Lack of Work.

Complainant also asserts that there was no "lack of work" related to Smith's layoff. Indeed, the layoff letter AHEC issued to Smith cited only "lack of funds." While this letter alone is not dispositive on the issue, it does underscore the fact that the primary motivating factor in the abolition of Smith's position was lack of funds.

Exhibit 8, the email referenced in Finding of Fact # 34, and the testimony of Respondent's witnesses, demonstrate persuasively that because the Media Center upgrading was complete, and because major project work had ended, some of Smith's duties could be absorbed by others, primarily Shaltry, Gibbons, and Tatro, Media Center Director. However, the evidence leaves no question that but for the fiscal crisis, Smith would have had plenty of work to do, the Media Center would have continued to thrive under his stewardship, and he would not have been laid off. AHEC failed to prove that he was laid off due to lack of work.

III. Failure to Adequately Investigate

Lastly, Complainant asserts that Feuerborn acted in an arbitrary and capricious manner in failing to adequately investigate whether AHEC could truly function in Smith's absence. For instance, he failed to consult with Smith's direct supervisor, Randy Tatro, Director of the Media Center, before deciding that Smith's position could and should be abolished. Smith further points out that Feuerborn was not involved with Smith's performance on a day-to-day basis, and only saw him approximately once every three weeks.

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it

is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Complainant has failed to demonstrate that Respondent acted in a manner that was arbitrary and capricious. Feuerborn was in a strong position to understand Smith's contribution to the Media Center. Feuerborn created the ITI and CIP project proposals, sheparded them through the legislative appropriations process, and then worked closely with Smith over a period of years to implement the massive \$14 million upgrades. At hearing, Feuerborn was very clear that the loss of Smith was a tragic but necessary one, made possible only by virtue of the fact that the upgrading was complete, no other major projects were impending, and other staff could perform the tasks necessary to maintain the Center's updated facilities. Thus, while the loss of Smith was an enormous one, the decision to abolish his position was a reasonable one under the circumstances.

IV. Attorney Fees.

Respondent requests attorney fees under section 24-50-125.5, C.R.S. That provision states that attorney fees shall be awarded when there is a finding that the personnel action, or the appeal thereof, was "instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless."

Respondent argues that Complainant presented no evidence that Respondent conducted the layoff improperly, or that a lack of funds or lack of work existed. Board Rule R-8-38, 4 CCR 801 (2002)(in effect at the time of Complainant's appeal) defines a groundless action or appeal as one "in which it is found that despite having a valid legal theory, a party fails to offer or produce **any** competent evidence to support such an action or defense." (Emphasis in original).

Complainant proved by a preponderance of the evidence that no lack of work existed concerning his position. Further, Complainant made valid arguments and presented some supporting evidence, concerning the alleged lack of funds. Therefore, his appeal of the layoff was not groundless.

Board Rule R-8-38 defines a frivolous action or appeal as one in which "no rational argument based on the evidence or the law is presented." As stated, Complainant presented rational arguments and supporting evidence at hearing. His appeal was not frivolous. Accordingly, an award of attorney fees and costs is not warranted in this case.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
2. Respondent is not entitled to an award of attorney fees and costs.

INITIAL DECISION

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
April, 2003, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1400
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. The notice of appeal must be received by the Board no later than the 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) 894-#2136.

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 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 April, 2003, I placed true copies of the foregoing **AMENDED INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Mark A. Schwane
Colorado Federation of Public Employees
1580 Logan Street, Suite 310
Denver, Colorado 80203

and in the interagency mail, addressed as follows:

Hollyce Farrell
Assistant Attorney General
Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
