

INITIAL DECISION AND ORDER RE: RESPONDENT'S MOTION TO DISMISS

AMBROSE, et al.,

Complainant,

vs.

THE UNIVERSITY OF NORTHERN COLORADO,

Respondent.

This matter is before the Administrative Law Judge on Respondent's Motion to Dismiss, Complainant's Response to Respondent's Motion to Dismiss and Respondent's Reply thereto. The ALJ, having reviewed the pleadings, file and relevant case law and being sufficiently advised thereof, enters the following order:

PROCEDURAL HISTORY

Originally there were ten Complainants to this action. Based upon various requests to withdraw their appeals, five of the original ten Complainants' appeals have been dismissed with prejudice. The five remaining Complainants are Juli Bond, Terry Clayton, Norman Miller, Avis Werdel and Linda Wonenberg. The Respondent filed its Motion to Dismiss on September 21, 2001. After requesting an extension of time, out of time, Complainants timely filed their response on October 5, 2001. Respondent filed its reply on October 12, 2001. On September 19, 2001, the parties jointly filed Stipulations of Fact.

STANDARD OF REVIEW

Respondent moves for dismissal of this action arguing (1) lack of jurisdiction over the subject matter; (2) failure to state a claim upon which relief can be granted; and (3) lack of standing. The first two arguments are affirmative defenses which may be asserted pursuant to C.R.C.P. 12(b). If a C.R.C.P. 12(b) motion asserts the defense of dismissal for failure to state a claim upon which relief can be granted and matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. C.R.C.P. 12(b). Attached to both parties' pleadings on this Motion to Dismiss were numerous documents and affidavits. Therefore, the standard of review applied in this instance is a summary judgment standard.

Summary judgment is appropriate if the pleadings, answers to interrogatories, and admissions on file, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(a) and *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992). The non-moving party is entitled to all favorable inferences that may be drawn from the evidence, and all doubts must be resolved against the moving party. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992). Once the moving party has met its initial burden of production, the burden shifts to the non-moving party to establish that a triable issue of fact exists. *Mancuso v. United Bank of Pueblo*, 818 P.2d 732 (Colo. 1991). A genuine issue cannot be raised simply by means of argument. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970). When opposing a summary judgment motion, a party must counter the moving party's statements of fact by affidavit or other evidence which sets forth specific facts demonstrating the existence of a triable issue of fact. *Artes-Roy v. City of Aspen*, 856 P.2d 823 (Colo. 1993). An affirmative showing of specific facts, uncontradicted by any counter affidavits, leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists. *Terrell v. Walter E. Heller & Co.*, 165 Colo. 463, 467, 439 P.2d 989, 991 (1968).

FINDINGS OF FACT

The Findings of Fact are based upon the Respondent's attachments to its Motion to Dismiss, including the joint Stipulations of Fact filed by the parties with the Board on September 19, 2001, the Complainants' responses to interrogatories by the Respondent and the Complainants' Notices of Appeal. The Findings of Fact are also based upon the undisputed facts alleged by the Respondent and/or the Complainants in their pleadings on the Motion to Dismiss.

1. In the fall of 2000, the University of Northern Colorado ("UNC") retained the services of Campus Bookstore Consulting ("CBC") to analyze the University's Bookstore operation.
2. CBC compiled an analysis of the UNC Bookstore operations. This analysis is dated March 21, 2001.
3. CBC identified eight Strategic Initiatives that would have to be implemented in order for the Bookstore to achieve its potential. The eight initiatives were:
 - a. Hire a bookstore Director to replace the Director who retired in January 2001.
 - b. Renovate the facility.
 - c. Improve use of existing technology.
 - d. Reduce the personnel expenses expressed as a percentage of total sales.
 - e. Develop and implement a program to maintain and/or increase the Bookstore's textbook market share.

- f. Reduce clothing inventory.
 - g. Improve marketing and promotional programs.
 - h. Improve the general book program.
4. UNC proceeded through the state purchasing process and issued a request for proposals (“RFP”). Proposals were submitted by Barnes and Noble, The Book Shop, Inc. and Follett Higher Education Group.
 5. As part of the RFP process the University empanelled an RFP Committee to review the proposals. The RFP Committee consisted of Dr. Warren Buss, Professor of Biological Sciences; Mark Davidson, Student Trustee, Student Representative Council; Dr. Robert J. Hetzel, Assistant Vice President for Auxiliary Services; Dr. Ronna L. Sanchez, Director of the University Center; and Ms. Cindy Vetter, Director of UNC Card & Student Business Services.
 6. On May 17, 2001, the contract was awarded to Barnes and Noble.
 7. Complainants Wonenberg, Werdel and Miller have been reassigned to different areas of the UNC Division of Auxiliary Services and their positions remain the same.
 8. Complainant Clayton resigned from her position at UNC, and accepted a position with Colorado State University.
 9. Those Complainants who were reassigned now have lower level duties than those duties they held prior to their reassignments.
 10. No UNC Bookstore employees’ current base pay, status or tenure was affected by the reassignment or the contracting out of bookstore operations.
 11. By letter dated June 20, 2001, Joi Simpson, Personal Services Program Administrator, Department of Personnel, informed Kay Norton, UNC Vice President/General Counsel, that the request to contract out the UNC Bookstore was approved by the Department of Personnel, pursuant to §24-50-503, C.R.S.
 12. On or about July 16, 2001, Barnes and Noble assumed responsibility for the operation of the bookstore.
 13. The specific action appealed in this matter is the contracting of services at the University of Northern Colorado Bookstore and resulting reorganization.

DISCUSSION

Lack of Subject Matter Jurisdiction

The Respondent argues that because the Complainants' pay, status or tenure were unaffected, the Board does not have subject matter jurisdiction. The Complainants argue that the only reason for handling the reassignment of their positions in the manner in which Respondent handled them was to deprive Complainants of their rights to challenge the change in duties to the Board. Because of this possible deprivation of rights, Complainants argue that the Board has jurisdiction to review the reassignment of their positions.

Under the state personnel system a certified employee has a right to a mandatory hearing if his or her pay, status or tenure is affected. §24-50-125(5), C.R.S. and Board Rule R-8-52, 4 CCR 801. Any actions which do not have a right to a mandatory hearing, are reviewed under the Board's discretionary hearing process. Board Rule R-8-45, 4 CCR 801. Under that process the Complainants, through the preliminary review process, would need to show that there was a valid issue that merited a hearing. Board Rule R-8-49, 4 CCR 801. The Board would rule on whether or not a hearing should be granted. Board Rule R-8-50, 4 CCR 801.

The Complainants argue that this action is dissimilar to *May v. Dept. of Human Services*, 1 P.3d 159, in which the Colorado Supreme Court held as legal the contracting out of services previously provided by certified state employees. In *May*, the services were contracted out to the Department of Higher Education, Metropolitan State College of Denver. The certified state employees who previously provided those services were provided with a choice of either voluntarily terminating their employment in the state personnel system by joining the staff of Metropolitan State College or being reassigned within their agency and remaining in the state personnel system. Complainants argue that this case and *May* are dissimilar because *May* was not a case about the privatization of services previously provided by certified state employees and the Supreme Court's analysis is predicated upon this fact. However, the *May* court's concern with privatization was that the state employees would be exposed to the "dangers" of private employment, that they would no longer have the protections of the civil service system including competitive tests of competence, protections from arbitrary and oppressive treatment and due process procedures before disciplinary action or termination. *May*, 1 P.3d at 167. None of those concerns are present in this action.

The *May* court distinguished the facts in the *May* case from those facts in other cases where there was a concern about the contracting out of state services, including *Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993); *Colorado Ass'n of Public Employees v. Department of Highways*, 809 P.2d 988 (Colo. 1991); and *Colorado Ass'n of Public Employees v. Board of Regents*, 804 P.2d 138 (Colo. 1990). In each of those cases, the *May* court pointed out, employees were involuntarily forced out of the civil service system. The *May* court went on to state that those cases were not applicable to

the facts in the *May* case because none of the *May* complainants were involuntarily forced out of the civil service system and that each of them was given the option of remaining within the classified system with no adverse impact on pay, status, seniority, or benefits. The analysis in the *May* case is applicable to this matter.

The Complainants' positions were all transferred to other locations on campus. Complainants moved with their positions and were given new duties. Complainants' new duties were at a lower level than their previous duties but their positions' classifications all remained the same. As stipulated by the parties, none of the Complainants suffered an adverse impact on their pay, status and tenure. Change in pay, status or tenure are triggering factors for the Board's mandatory hearing process. Without a change in one of these three areas, the Board does not, in this action, have subject matter jurisdiction under its mandatory hearing process.

The Complainants have argued that they have, by virtue of the manner in which their reassignments were handled, suffered a deprivation of their rights to challenge the Respondent's actions. They argue that the reassignments were a pretext for depriving them of their rights. Given the above analysis regarding the mandatory hearing process, the Complainants' avenue for challenging the Respondent's actions to the Board is through the Board's discretionary review process. Board Rule R-8-45, 4 CCR 801. Complainants are correct in their arguments that appointing authorities may not engage in actions designed to deny certified employees of their rights within the state personnel system. However, there has been no showing by the Complainants in this action that such deprivation occurred and that they were denied access to the discretionary review process. Denial of summary judgment may not be based upon allegations but only upon a showing by affidavit or other evidence that there exists a triable issue of fact. *Artes-Roy v. City of Aspen*, 856 P.2d 823 (Colo. 1993). Based upon the facts presented in the motion and the response to that motion, the Complainants have not been denied access to challenge the Respondent's action through the discretionary review process. Rather the Complainants, to date, have chosen not to engage in the discretionary review process, including the various procedures, such as the grievance process, which proceed requesting a discretionary Board hearing. That process should not be circumvented in this matter. The Complainants' action is not ripe, under the Board's discretionary hearing process, for a hearing.

The Board lacks subject matter jurisdiction over this matter under its mandatory hearing process and the Complainants' action is not ripe for a hearing under the Board's discretionary review process. Based upon this ruling, Respondent's arguments, based upon standing and failure to state a claim upon which relief may be granted, are moot.

ORDER

Based upon the foregoing analysis, the Respondent's Motion to Dismiss is **granted**. The Complainants' action is dismissed without prejudice, each party to pay its own costs and fees. The hearing set for **November 26 and 27, 2001** is **vacated**.

Dated this 19th day
of November, 2001, at
Denver, Colorado

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln, 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. 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 the Board does not receive a written notice of appeal 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 SERVICE

This is to certify that on the _____ day of November, 2001, I placed true copies of the foregoing **RESPONDENT'S MOTION TO DISMISS** in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall, Esq.
Colorado Association of Public Employees
1145 Bannock
Denver, Colorado 80204

and by courier to:

Carol M. Caesar
Assistant Attorney General
Department of Law
Employment Law Section
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Denver, CO 80203

Gabriela Chavez