

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B056(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS AURAND and CATHY L.Z. SMITH,

Complainants,

vs.

DEPARTMENT OF HIGHER EDUCATION,
STATE BOARD OF AGRICULTURE,
COLORADO STATE UNIVERSITY,

Respondent.

This matter came on for hearing before Administrative Law Judge Mary S. McClatchey on February 3, 2000. The Department of Higher Education, State Board of Agriculture, Colorado State University ("Respondent" or "CSU") was represented by Stacy L. Worthington, Assistant Attorney General, Office of the Colorado Attorney General. Complainants Thomas Aurand ("Aurand") and Cathy L. Z. Smith ("Smith") appeared and represented themselves.

PROCEDURAL MATTERS.

Respondent's motion to consolidate the appeals of Complainants was granted, and the cases were consolidated under Case Number 2000B056(C).

Witnesses.

Aurand was the only witness on his own behalf. Smith was the only witness on her own behalf.

Respondent called Denice Justus, Data Specialist in the Human Resource Services Office, CSU, and William B. Liley, Jr., Director of the Human Resource Services Department, CSU.

Exhibits.

Aurand's Exhibits A, B, C, D, E (through the signatures line, excluding all hand

written material below the signatures line), G, J, L, M, N, O, P, Q, R, S, and W were admitted by stipulation. Aurand's Exhibit X was admitted without objection.

Smith's Exhibits B, C, D, E, F, H, I, J, K, L, N, O, S, T, and U were admitted by stipulation. Exhibits V and W were admitted over objection.

Respondent's Exhibits 2, 3, 4, 5, 6, 26, 29, 35, 36, 37, and 38 were admitted by stipulation. Respondent's Exhibit 7 was admitted with the stipulation that it contains only pages on Complainants, and does not represent the reports Smith actually received, which included all employees in the department of electrical and computer engineering.

MATTERS APPEALED

Complainants appeal the Respondent's administrative decisions to deny them payment of back wages earned but not paid due to a clerical error of Respondent. Respondent has paid Complainants back wages for the period of August 1997 through July of 1999. Complainants request payment for the remainder of the period of underpayment: for Aurand, November 1993 through July of 1997; for Smith, August 1994 through July 1997. For the reasons set forth below, Respondent's actions are rescinded.

ISSUES

1. Whether the actions of the appointing authority were arbitrary, capricious, or contrary to rule or law.
2. Whether either party is entitled to an award of attorney fees.

STIPULATED FACTS

1. During the period November 1993 through July of 1997, Aurand was underpaid in the amount of \$28, 228.
2. During the period August 1994 through July 1997, Smith was underpaid in the amount of \$10,344.
3. Respondent has paid Aurand \$24,702 as compensation for underpayment for the period August 1997 through July of 1999.
4. Respondent has paid Smith \$9452 as compensation for underpayment for the period August 1997 through July of 1999.

FINDINGS OF FACT

THOMAS AURAND.

1. In June of 1993, Aurand's position was reclassified to a higher level position, that of Electronics Engineer II. As a result, in November of 1993, Aurand's grade and step moved up from grade 87, step 7, to grade 100, step 3.

2. Aurand's new step level, 3, entitled him to annual step increases and concurrent 5% salary increases, on his anniversary date.

3. Despite the fact that his position changed in June, Aurand's new anniversary date became November.

4. Due to a clerical error by the CSU clerical staff, Aurand's new anniversary date and step level were not inputted into the payroll computer system. No step and salary increases are given to an employee unless the proper anniversary date and step are in the payroll computer program. Therefore, Aurand was never given any of his annual step and salary increases during the entire period from November 1993 through July of 1999, when the error was discovered.

5. During the period November 1993 through July 1999, Aurand did receive annual salary survey increases every year in July.¹ In his first year after the promotion, 1994, he received two such increases. The first was in May, a 2.2% increase. The second was in July, a 2.7% increase.

6. Aurand saw that every year in July his pay increased.

7. Aurand did not know that his anniversary date was November, and was never informed of this. He never inquired as to whether his anniversary date had changed after his reclassification in June of 1993. He first learned of it after discovering the error on his paycheck in 1999.

¹ Specifically, in July 1994 he moved to Grade 102, step 3; in July 1995, he moved to grade 103, step 3; in July 1996, he moved to grade 104, step 3; in July 1997, he moved to grade 105, step 3; in July 1998, he moved to grade 107, step 3, in July 1999, he moved to grade 109, step 3.)

8. Aurand did not check his paychecks each November to assure that his annual step raises had occurred.

9. As a result, he therefore never noticed that he did not receive his annual step raises.

10. As of November 1993, Aurand had received approximately 180 paychecks from the state, and none of them had contained an error. In addition, he had never heard of any other classified employee having an error on his or her paycheck.

11. Aurand depended upon CSU to properly process his annual step raises. He expected that his step would change automatically and appropriately, as it had in the past.

12. Aurand expected that in 1996, at the time his step was to reach level 6, he would remain at level 6 for the requisite five-year period. He therefore did not expect annual step raises from 1996 through 2000.

13. On July 30, 1999, Aurand received an e-mail at work that stated in part: "Current job and salary information has been updated to the HRS web pages." The e-mail listed the HRS home page address, and stated that current grade and step information was available there.

14. When Aurand read the e-mail on August 2, 1999, he immediately referenced the HRS home page on his computer, and learned that his current grade and step were not correct, since the monthly salary amount did not match that on his paycheck. He learned that he was being significantly underpaid in a monthly amount exceeding \$1100, gross.

15. At the time he discovered he was being underpaid, Aurand's grade was 109, and his step was 3. His grade was correct, but his step should have been 7. Aurand's current monthly salary rate was \$5116; it should have been \$6218.

16. Aurand immediately went to see Vicky Meyer in the Human Resources ("HR") office at CSU. Meyer checked on his job and salary status, and learned that he was in the payroll computer program as an Electronics Engineer I, instead of a II.

17. Meyer contacted the HR Services Department, who confirmed that through a clerical mistake, Aurand was in the payroll computer at a step 3 instead of a step 7.

18. The reason Aurand was supposed to be a step 7 without having first spent five years at step 6 is that he had already spent five years in step 6 earlier in his classified career. Pursuant to this little-known rule, he was to bump from step 5 directly to step 7.

19. Respondent immediately corrected the problem and began paying Aurand at the appropriate salary level. In addition, it calculated the amount of underpayment for the entire period of November 1993 through July 1999.

20. On August 26, 1999, Kathy Nall, of CSU HR Services, sent a memo to Aurand, explaining the following:

University policy limits back pay awards and reimbursements to the University due to overpayment to the employee to a period of two years from the date of discovering the error. . . The appropriate two year back pay period in this instance is from August 1, 1997 through July 31, 1999.

I have attached a schedule prepared by the University's Payroll section, which reflects the gross amount of underpayment during the period noted. Also attached is a proposed calculation of the gross amount less applicable retirement and income tax amounts.

21. The amount of underpayment to be repaid to Aurand for the two year period August 1, 1997 through July 31, 1999 was \$24,702. CSU paid it to Aurand.

22. Aurand requested a copy of the two year reimbursement policy ("the policy") from Meyer, and she provided a copy of the Minutes of the CSU Executive Budget Committee ("EBC") Meeting from December 20, 1994, and referred him to item 2 entitled, "Library Shift Differential."

23. The EBC Minutes contain the following heading, centered, at the top of the page:

"Summary Minutes of EBC Meeting - December 20, 1994

Note: Action/Decision Items Highlighted in **underline bold**
(Emphasis in original)

24. The content of the policy upon which CSU relies here consists of the following:

"Library Shift Differential. The University discovered a technical error in how shift differentials were being applied to some library employees. This technical error resulted in some staff receiving only a portion (as opposed to all) of their shift at a higher rate. It is not known how long this technical error has impacted the library employees. **It was agreed we needed to move forward immediately to correct this error, and that we would go back up to two (2) years for employees to provide them payment for this error.** Joan Chambers and Bill Liley work together, and with legal counsel as appropriate, to fully develop a plan to correct this error."
(Emphasis in original)

25. On August 31, 1999, Aurand wrote a letter to William B. Liley, Director of the HR Services department at CSU. He reviewed the history of his job reclassification, the reasons why he failed to notice that he was not receiving his annual increases in pay, and his efforts to correct the situation with Meyer.

26. He stated,

“The combination of expecting that my anniversary date was June 1 and expecting that I should have spent 5 years at step 6 led me to believe that I should not be looking for nor getting step raises on November 1. Employee’s grade and step information is not presented to State Classified Employees in any paper work which they normally receive either with their check, with their annual statement of benefits, nor with the change of information/address forms from the college. It was easy to overlook the small step changes back in 1994 and 1995 because I saw the grade changes in my monthly salary statements at about the time when I expected the step changes. “

27. He further notified Liley:

It is my opinion that Human Resources Services has incorrectly applied this decision [the policy] to my situation, that it is an overly broad interpretation of that decision which itself does not correctly address the under-payment issue, and that it violates provisions of the State Employee Handbook. The 1999 State Employee Handbook in Part II. Your Compensation, Section A. Your Pay, Subsection 8. Reimbursing the State for Overpayment, clearly and unequivocally states, **“The state, on the other hand, is responsible for any underpayment.”** . . . This is in contrast to the rest of the subsection which also clearly states that, **“An employee’s maximum liability for repayment, if an error goes undetected for more than two years, is for the total amount overpaid for the first two years in which an employee was overpaid.”** . . . I believe that the handbook and the [fiscal] rules require the University and the State to pay the total amount of the under-payment of my salary for the entire period of the under-payment.” (Emphasis in Aurand’s letter.)

28. Aurand also stated:

As a past recipient of an Outstanding Achievement Award and a consistent recipient of outstanding employee evaluations I am pleased and proud to serve the University and the citizens of Colorado. I believe the University has the responsibility to treat its staff fairly and with the dignity and respect we have earned.

29. Aurand requested from Liley: payment in full of all salary earned but not paid from November 1993 through July 31, 1999, reasonable interest to compensate him for the loss of use of the money, PERA benefits for the entire period of underpayment, and income tax consulting fees in order to limit his tax exposure because of the delayed payment.

30. Liley consulted CSU leaders, including Gerry Bomotti, Vice President of Administrative Services for CSU, and the State Attorney General’s office for guidance on how to proceed with Aurand’s requests.

31. On September 20, 1999, Aurand wrote Liley another letter, referring to State Personnel Board Case Number 95B138, Follett v. CSU, in which the ALJ found, and the Board affirmed, that CSU's application of the policy was "arbitrary, capricious, and contrary to law." Aurand noted that Liley was the only witness for CSU in that case, so he knew he was familiar with it.

32. Aurand argued that re-application of the rule in his case, in light of the Follett decision, "must be equally 'arbitrary, capricious and contrary to law.'" He requested an immediate payment of all unpaid salary and restitution.

33. On October 26, 1999, Liley wrote Aurand of his final decision. Bomotti also signed the letter. The decision was to affirm payment for the two year period, and to deny any reimbursement prior to July 31, 1997 and any other relief requested. The letter clarified that the University had already remitted its and Aurand's contributions to PERA for the two year period for which repayment had been made. He also provided information on tax deferred investment options available and a referral to the benefits office for assistance on tax related issues.

34. Liley's denial letter included the following reasons for the decision:

A) In Follett, the Board had "acknowledged the legitimacy of the University's policy limiting back pay awards to two years but noted that the two year period ". . . should not begin to run until the employee knew or reasonably should have known, of the error.'" Liley then applied that standard to Aurand's case;

B) Aurand had received notice in June 1993 that his new step level was 3, thereby entitling him to annual step raises;

C) Aurand had undergone numerous pay changes in his over twenty-year classified career involving both grade (salary survey) and step (anniversary) changes, thereby rendering it appropriate for him to be familiar with these two pay change components;

D) The State Classified Handbook contains information concerning step increase policies and the chart of grades and steps;

E) Stateline, the Department of Personnel monthly publication, contains information on salary survey results, delays in implementation thereof, and other related pay matters.

CATHY SMITH

35. On June 14, 1994, Smith was promoted to the position of Accounting Technician III at CSU, resulting in a move up from grade 63, step 7, to grade 73, step 4.

She thereby became eligible for annual step raises.

36. Based on the June date of her promotion, Smith believed her anniversary date was July. In fact, for reasons irrelevant to this proceeding, it was August. Smith was never informed it was August. She learned that her anniversary date was August after the discovery of the underpayment.

37. Smith received annual salary survey raises, resulting in annual July raises of varying levels. Smith therefore noticed that she was receiving annual July increases on her presumed anniversary date.²

38. Smith's first salary survey raise was, by coincidence, almost precisely 5%. It was \$112.00, whereas an exact 5% raise would have been \$111.60.

39. Smith never checked her pay stubs to assure that she received annual step raises in addition to her salary survey increases.

40. Smith expected to reach Step 6 in 1996, and to stay there for five years, as Aurand did.

41. In August 1999, Aurand informed Smith that CSU had committed a clerical error at the time of his 1993 reclassification, resulting in six years of underpayment.

42. Smith immediately checked the accuracy of the pay level of other employees and herself. She discovered that she too had been subject to the exact same type of clerical error when she was promoted in June of 1994. She immediately informed CSU of this.

43. CSU immediately placed Smith at the appropriate grade and step level, moving her from grade 278, step 4, at a \$2892 monthly salary, to grade 278, step 7, at a \$3000 monthly salary.

44. Smith sent Liley a letter on September 1, 1999, explaining that she had believed her anniversary date to be July (based on the June starting date of her current position). She referred Liley to same State Personnel Director's employee handbook language that Aurand did, and requested all back salary since September 1994, a reasonable rate of interest, PERA contributions comporting therewith, and tax consulting

² In July 1995, she moved to a grade 75, step 4; in July 1996, she moved to a grade 76, step 4; in July 1997, she moved to grade 77, step 4; in July 1998, she moved to a grade 78, step 4.

fees to minimize her tax exposure due to the delayed payment.

45. Smith also stated:

Based on this information, and supported by the fact that I have received 'outstanding' employee evaluations in each of my years of service . . . [at CSU] and have also been a recipient of the Outstanding Achievement Award (1996) and a similar Award of Excellence 'in Recognition of Outstanding Achievement and Professionalism' from the College of Engineering (1998), I believe that I have earned and am entitled to the compensation mandated by the State Classified Personnel System."

46. CSU's staff, including Nall and Liley, sent Smith the same basic correspondence it sent Aurand regarding its policy limiting repayment of underpaid wages to two years.

47. CSU paid Smith the amount of unpaid wages due her for the period August 1, 1997 through July 31, 1999, \$9452.

48. In his October 26, 1999 letter to Smith, Liley set forth these reasons for not paying her the remainder of the wages improperly withheld:

A) She had experienced numerous step increases prior to the 1994 promotion, thereby rendering it appropriate for her to be familiar with the pay change rules;

B) The State Classified Handbook contains information concerning step increase policies and the chart of grades and steps;

C) Stateline, the Department of Personnel monthly publication, contains information on salary survey results, delays in implementation thereof, and other related pay matters;

D) Since assuming her position, her PDQ responsibilities included the following:

- insuring "compliance with university hiring policies and governing regulations in the employment of personnel by verifying employment eligibility, determining proper job classifications and pay rates through familiarity with university policy and procedures. Direct and supervise calculation and data entry of hourly payroll information"

- "investigat[ing] financial transaction processing errors and initiat[ing] corrective actions consistent with university financial policies,"

- "assur[ing] sound management by monitoring accounts, verifying time and effort and determining proper funding distributions."

E) Smith's PDQ notes that her position requires utilization of the Human Resources Manual; Human Resource Management System, which contains "complete information on the state job classifications, pay policies and the rates of pay appropriate to each.

F) Smith was a recipient of the monthly management reports for her department, which showed all employees' incorrect step, grade, and anniversary date, including her own.

49. Based on these PDQ responsibilities of "validating salaries and accounts," Liley concluded that it was even more appropriate to hold her responsible for detecting the error in her own salary early.

50. Regarding the language in Smith's PDQ relating to "determining proper job classifications and pay rates through familiarity with university policy and procedures," and directing and supervising "calculation and data entry of hourly payroll information," Smith did not perform these tasks in relation to any classified employees. She did so only in relation to exempt faculty, administrative professional, graduate student, work study, and non-work study student employees.

51. With respect to Smith's monthly receipt of the management report containing all department employees' grade and step and monthly salary information, Smith did not utilize that document to check specific classified employees' grade and step or salary information. She never had occasion in the course of her employment, nor was it a required task of her employment, to utilize that document to check her own grade, step, and salary information. Smith did use the document to track the allocation of salaries of classified employees as a group.

52. Smith's job relating to the salaries of those employed in her department was primarily to assure that nonclassified employees were being paid from the correct funding sources. For instance, graduate assistants often worked on more than one research project; each project was funded by a different source. It was Smith's job to review the monthly management reports to assure that these employees were being paid out of the correct research project account. Smith also used the document to track changes she had initiated.

53. According to Denice Justus, Data Specialist at CSU's Human Resources Office, who has been responsible for handling pay data on CSU employees since 1986, there is only one prior instance of an error similar to the errors on Aurand and Smith's pay. That error was caught one or two months after it occurred, and immediately corrected.

54. Justus has never advised any CSU employee that their step might not be computed correctly.

55. According to Liley, in applying the policy here, the university balanced

fairness to the employees against CSU's obligation, as steward of the taxpayers' money, to maintain the fiscal integrity of the institution.

56. At hearing, Liley did not recall considering the Director's employee handbook language mandating reimbursements of underpayments as part of his decision making process in this matter.

57. Liley stated that the language in the employee handbook has no rule authority, is merely a statement by its authors as to their position on the issue, and does not take precedence over the university's policy at issue here.

58. Liley opined that the Director's employee handbook does not hold the power necessary to govern the actions of institutions.

59. Complainants request payment of all back wages earned but not paid, reasonable interest, PERA benefits for the entire period of underpayment, and attorneys fees and costs.

DISCUSSION

I. Arguments of the Parties.

Complainants argue that CSU's policy is contrary to the express language of the State Classified Employee Handbook, is arbitrary, capricious, and contrary to rule or law, and has no basis in law. They point out that the facts that led to the adoption of the policy in 1994 are markedly different from those presented here, since in 1994 the EBC had no information regarding the duration of the underpayment, whereas here CSU knows the exact duration and amount of the underpayment. They argue that the policy unjustly deprives them of earned salaries, and that CSU's contractual obligation to pay salaries supersedes a policy with no legal basis. Lastly, they argue that CSU's policy is morally wrong.

CSU conversely argues that the Board must uphold its policy and its application of the reasonableness standard of Follett. It avers that its policy has greater legal authority than the Director's state employee handbook, which constitutes neither rule nor law. It further argues that its balancing of the interests of the university's need for fiscal integrity against the interest of treating employees fairly must be given deference. Lastly, CSU argues that the two statutes of limitation, governing actions against private employers for unpaid wages (two years for unintentional deprivations; three years for intentional deprivations) and general actions against government entities (two years), while not binding here, should be found persuasive by the Board.

II. Were the actions of Respondent arbitrary, capricious, or contrary to rule or law?

In this appeal of an administrative action, the Complainants bear the burden of proof to demonstrate by preponderant evidence that the Respondent's actions were 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).

A. CSU's actions were contrary to rule and law.

The CSU policy impermissibly encroaches on the state personnel director's exclusive jurisdiction over the state personnel system, including policy making relating to pay and compensation and the fair treatment of state classified employees. Specifically, it violates the Director's State Employee Handbook directive that the state is responsible for any underpayment of wages earned, and Director's Procedure 3-3-1(A).

CSU's actions constitute a violation of Section 24-50-101(3), C.R.S., which mandates that all appointing authorities, including presidents of universities, are subject to any and all directives of the state personnel director within the scope of his delegated authority as administrator of the state personnel system.

The legislature has vested in the state personnel director exclusive jurisdiction over all pay and compensation issues for classified employees. Section 24-50-104(5), C.R.S., "Pay Plans," states:

(a) The state personnel director shall establish pay plans as technically and professionally necessary and shall establish any procedures and directives required to implement the state's prevailing total compensation philosophy as defined in subsection (1) of this section." (The total compensation philosophy embraces compensating classified employees at a level comparable to other prevailing public and private market rates.)

Section 24-50-101(3), C.R.S., provides:

(C) It is the duty of the state personnel director to establish the general criteria for adherence to the merit principles and for fair treatment of individuals within the state personnel system. It is the responsibility of the state personnel director to provide leadership in the areas of policy and operation of the state personnel system. . . . The . . . director . . . shall provide necessary **directives** and oversight for the management of the state personnel system." (Emphasis added)

(D) The heads of principal departments and presidents of colleges and universities shall be responsible and accountable for the actual operation and management of the state personnel system for their respective departments, colleges, or

universities. Such operation and management shall be in accordance with directives promulgated by the state personnel director. . . .” (Emphasis added)

The Director’s policy in the State Employee Handbook mandating state responsibility for underpayment of classified personnel constitutes just such a directive regarding the fair treatment of state employees that is binding on CSU. The State Personnel Director’s 1999 State Employee Handbook, in Chapter II, “Your Compensation,” part 8, entitled “Reimbursing the State for Overpayment,” states:

According to present law and fiscal rules, an employee is responsible for reimbursing overpayment made by the state to the employee. **The state, on the other hand, is responsible for any underpayment.**”

This directive next clarifies that the fiscal rules limit employee reimbursements of overpayments to the state to a two -ear period. The directive contains no such time limitation on state reimbursements of underpayment to employees.

Respondent argues that this directive does not constitute a rule, and is therefore legally trumped by CSU’s own December 1994 EBC decision item. The Board rejects this argument, and finds that this directive was promulgated pursuant to the director’s exclusive authority under C.R.S. Section 24-50-101(3)(C), and that CSU is bound by it under Section 24-50-101(3)(D). CSU has no authority to adopt a policy regarding reimbursements of underpayment to employees which conflicts with a directive of the Director on this very issue.

The EBC decision item also violates Director’s Procedure P3-3-1(A), which governs all institutions. It states,

(1) Permanent full-time employees shall be compensated monthly at the appropriate monthly rate of pay when they work . . .”³

CSU concedes that it failed to pay Complainants at the “appropriate monthly rate of pay,” in direct violation of Director’s Procedure P3-3-1(A). CSU provides no legal basis upon which to conclude that it is somehow exempt from this regulatory mandate.

The CSU policy violates C.R.S. Section 24-50-104(1)(d).

Section 24-50-104(1), C.R.S., provides,

³ This rule was in effect at all times relevant to this proceeding, from 1986 through 1998. Complainants seek payment of wages earned but not paid from 1993 and 1994 through July 31, 1997.

(d) The state personnel director shall implement a performance-based pay plan over a period of three years. . . . Until an employee becomes eligible for the first performance award payment, **anniversary-based merit increases shall continue to apply.** (Emphasis added.)

Under this statutory mandate, anniversary-based merit increases are to be paid with no exceptions for clerical errors. CSU concedes that Complainants were entitled to the anniversary-based increases. (Performance-based pay did not exist during the time period at issue here, and is irrelevant.) The policy therefore violates this statute.

Further, Directors Procedure P3-3-1(A) Permanent Full-Time, which was in effect at all times relevant herein, states,

CSU's actions violated its own Compensation Policy in its State Classified Personnel Handbook.

Even CSU's own "COMPENSATION POLICY" guarantees Complainants the remedy they seek. The 1991, 1994, 1996, and 1998-2000 CSU State Classified Personnel Handbooks state the following:

"COMPENSATION POLICIES.

Salary

3. Permanent, full-time employees receive salary increases on their annual service date provided their performance has been satisfactory."

There is no exemption in this policy for clerical errors. CSU concedes that Complainants have performed satisfactorily at all times relevant. In fact, the evidence establishes that their performance was outstanding. CSU has failed to demonstrate why it should be exempt from its own duly published "Compensation policy" in its official employee handbook, a copy of which it provides to all CSU employees.

CSU argues that this policy is overridden by the decision item of the Executive Budget Committee in December 1994. However, by its own terms, CSU's compensation policy controls. The Prefaces to each of these handbooks state clearly that these policies control, unless employees are specifically notified that a modification of the policies has occurred:

"The policies and procedures outlined in this handbook are for your convenience and guidance as a CSU employee. . . The handbook . . . should not be considered as a replacement for the laws, rules, policies and procedures of the Colorado State Personnel System as contained in the [CCR] or the University Human Resources Services Manual. . . . The information in this handbook is subject to change. Revisions to the State or University policies will be announced through COMMENT,

a Human Resource Department BULLETIN, memos, or other appropriate means.”
(Emphasis added.)

The stated purpose of the handbook is to outline CSU policies and procedures. It states that employees will be notified of any changes to these policies and procedures via COMMENT or the BULLETIN, memos, or other means. CSU has never announced a modification of its official compensation policy that “full-time employees receive salary increases on their annual service date provided their performance has been satisfactory.” The EBC decision item of December 1994 did not state that it served to modify the compensation policies or procedures in this handbook. Therefore, it is barred from utilizing it as a back-door means of modifying this policy.

Even if CSU had intended such a handbook modification, the EBC failed to comply with the notice requirements set forth in the Preface of the handbook. The Board finds that in order to defeat the clear mandate of its own handbook language, CSU would have had to modify the compensation policy in a manner consistent with the notice requirements therein. The EBC decision item, sent only to department heads and never announced to CSU classified personnel, was insufficient to effect such a modification. CSU’s argument that publication of the EBC Minutes by means of circulation to department heads and administrators, and via its availability in the Minutes notebook, served to put CSU classified personnel on notice of the “policy,” is rejected.

CSU also argues that the following State Employee Handbook language controls here: “employees are advised to review pay changes carefully, because they share in the responsibility for proper amounts.” However, this language does not override the Director’s clear directive on underpayments, the director’s procedure, and that statutory provision cited above.

CSU violated the Board’s holding in Follett.

Turning next to the Board’s decision in Follett v. CSU, State Personnel Board Case No. 95B138, both parties rely on this case as support for their position. Follett examined the validity of the exact same December 1994 EBC decision item that is at issue herein.

Contrary to the argument of CSU and the statement of Liley in his letters to Complainants, the Follett decision did not “acknowledge the legitimacy of the University’s policy limiting back pay awards to two years.” In fact, the Amended Final Order of the State Personnel Board, dated February 28, 1996, concludes without ambiguity that CSU’s policy is arbitrary and capricious. It states:

“Respondent has adopted a policy stating that it will only reimburse an underpaid employee the money earned but not paid for a two year period. The Board agrees [with the ALJ] that such a blanket policy is arbitrary and capricious.

After invalidating CSU’s policy, the Board elucidates how CSU or any agency choosing to

have a two-year limitation policy in the future should draft it, in order to withstand Board scrutiny. It states,

In some instances an agency policy provision limiting recovery of underpayment to a two year period may be appropriate. However, the time limit should not begin to run until the employee knew, or reasonably should have known, of the error.” (Emphasis added.)

CSU appears to interpret this language as validating its 1994 decision item. However, this paragraph is dicta, and it is a mystery to the undersigned as to how CSU came to the conclusion that it validated its policy. Nothing in Follett validates CSU’s policy as written.

The Board’s unambiguous directive to CSU in Follett was this: in the future, should you seek to impose a limitation on recovery of underpayment, you must re-write the policy to include language stating that the time limit will not run until the employee knew, or reasonably should have known, of the error. This clear directive was premised on the very same statute of limitations language upon which CSU relied in then and relies now: C.R.S. 13-80-108, which defines when a cause of action accrues under the state’s numerous statutes of limitation. In view of the fact that Respondent relies on failed to modify its policy to comply with it after Follett.

CSU has failed to modify its policy to comply with Follett. It therefore violates that decision on its face.

The majority of CSU’s case herein consisted of an application of the reasonableness standard articulated by the Board in Follett. Since CSU never modified its policy to include that language regarding when an employee “reasonably should have discovered the payment error,” there is no basis in law or fact to apply this standard to Complainants herein. CSU’s policy states only, “It was agreed . . . that we would go back up to two (2) years for employees to provide them payment for this error.”

That said, since CSU has applied that standard to Complainants, it is only fair to address its arguments and the evidence presented on this issue below.

B. Applying the standard articulated in Follett, neither Aurand nor Smith had any reason to know of the errors in their paychecks at any time prior to their discovery.

Turning first to Aurand, when did he know, or when should he reasonably have known, of the error in his paycheck? It is found that at no time prior to actually learning of the error should he reasonably have known of the error. The reasons for this are numerous and based in common sense. First, he was unaware that his anniversary date was November, so it was reasonable for him not to check his pay stubs at that time. His job was reclassified in June; it was reasonable for him to expect his anniversary date to be in June. Second, he saw that he received the annual salary survey raises in July, and reasonably assumed that these raises also reflected his step increases. Third, in view of

the fact that this type of error is so unusual, it is inherently reasonable for any classified employee to trust that his or her anniversary increases will occur appropriately.

Fourth, since Aurand moved to a step 3 in 1993, it was reasonable for him to expect no step increases after 1996, when he would have become a step 6. Aurand believed, reasonably, that he would remain at step 6 from 1996 through 2000. This policy appears in every CSU State Classified Personnel Handbook from 1991 through 2000. See, for example, Exhibit 5, the 1998 - 2000 handbook at page 14, Compensation Policies, Salary, 3a., "Movement from Step 6 to Step 7 occurs after five years of satisfactory service at Step 6." The obscure personnel rule under which long-time employees bump from step 5 to step 7 after having already served five years at step 6 does not appear in this handbook, and was therefore reasonably unknown to Aurand.

CSU argues that Aurand had received so many pay increases over his long career that he reasonably should have known his anniversary date and that he would bump over step 6. This the Board rejects based on the facts discussed above. CSU presented no specific evidence demonstrating how Aurand either could have or should have learned that his anniversary date changed to November, or that he would skip from step 5 to step 7.

CSU also argues that Aurand should have checked the Stateline and State Classified Handbook, both of which contain information concerning step increase policies and charts of grades and steps, as well as salary survey results. However, since Aurand reasonably had no belief that there was a problem with amounts on his paycheck, he therefore had no reason to check these publications to verify his pay stubs. In the absence of such a belief, it would be unreasonable to expect him to verify the amount. In other words, to impose such a duty on him, in the absence of any evidence of error with his pay stub, would be unreasonable. Therefore, applying the standard put forth in Follett, Aurand is entitled to all wages earned but not paid.

Turning next to Smith, the Board again finds that at no time prior to actually learning of the error should she reasonably have known of the error. The reasons are nearly identical to those discussed above in relation to Aurand. Smith's promotion took place in June, so it was reasonable for her to believe her anniversary date was in July, when the salary survey increases were implemented. She saw that she received annual salary survey raises in July, and reasonably assumed that these raises also reflected her step increases. Again, given the extreme rarity of this type of error, it is inherently reasonable for any classified employee to trust that his or her anniversary increases will occur appropriately, and therefore to elect not to double check pay stubs therefor.

Since Smith moved to a step 4 in 1994, it was reasonable for her to expect no step increases after 1996, when she would have become a step 6. She believed, reasonably, that she would remain at step 6 from 1996 through 2000. She too was reasonably unaware of the rule entitling her to bump from step 5 to step 7.

CSU argues that since Smith's PDQ required her to verify payroll information, and

since her job involved her monthly receipt of management reports containing all payroll information on herself and others in her department, it is reasonable to expect her to have verified her own payroll information. However, Smith's testimony was un rebutted that the payroll verification functions she performed did not even apply to classified employees. In addition, her job duties never required her to verify her own salary information. It is therefore absurd to expect Smith to review the monthly management reports to verify her own salary, when she had no reason to expect that there was a problem with her pay stub. (In fact, technically, Smith would have been taking advantage of her position and using the agency's monthly management reports for private gain if she had done so.) There was no evidence submitted supporting Liley's assumption that Smith should reasonably be expected to validate her own salary based on her job duties.

Lastly, since Smith reasonably had no belief that there was a problem with the amounts on her paycheck, she therefore had no reason to check Stateline or the State Classified Handbook to verify her pay stubs.

C. This case does present a moral issue. Government must be held to the highest standard of conduct, and it is morally repugnant to deny classified employees wages which they have rightfully earned. CSU's policy therefore violates the public policy of treating classified employees fairly.

Respondent cites to the two- and three-year statutes of limitation governing private wage claims and civil actions against the government as persuasive authority. However, the General Assembly has chosen not to enact a statute of limitations governing public employees who have earned wages that have not yet been paid. Instead, the legislature has delegated authority over matters involving compensation and "fair treatment of individuals within the state personnel system" to the Director.

The Director's directive on this issue is the moral one. Any public employee who works for an agreed-on salary is entitled to that salary. It is just that simple. Government must be held to the highest standard of moral conduct. It goes without saying that it is fundamentally wrong for the state to take labor without paying for it. The state must be expected to follow the Golden Rule: "do unto others as you would have them do unto you." If the state makes an error, it must make good on that error. Further, as Aurand stated in his letter to Liley, he, and all classified employees, are entitled to be treated with dignity and respect.

CSU's policy violates the public policy of treating classified employees fairly, as expressed in C.R.S. Section 24-50-101(3).

D. CSU's policy does not promote fiscal integrity.

CSU argues that it balanced the employees' need for fair treatment against the university's responsibility, as steward of the taxpayers' money, to preserve the fiscal integrity of the university. This argument fails for several reasons.

First, CSU received every penny of the step increase amounts to which the Complainants were entitled via appropriations from the legislature. The step increases would have been included in the Director's annual report and budget request for classified employee salary and benefits submitted to the general assembly, which in turn would have appropriated the money to CSU pursuant to that request. See C.R.S. Section 24-50-104(5)(g), in effect during the years at issue.

CSU has neither argued nor presented evidence that it was not appropriated the money for Complainants' step increases during the years the increases were scheduled to be paid. On the contrary, CSU argues that it does not have the money now. It is therefore uncontested that CSU had the money available with which to pay Complainants the step increases at the time they were scheduled to be paid. While it is unknown what CSU did with Complainants' money, this does not mean that CSU should not be held accountable for having spent it. CSU erroneously spent the Complainants' money. This is not a fiscal integrity issue.

Second, if CSU were not held fully responsible for all wages earned but not paid, there would be insufficient deterrent effect on agencies to assure that they do not commit this type of error in the future. If agencies are not held accountable for their errors in paying employees, such a policy of non-accountability could in the long run be detrimental to fiscal integrity and responsibility.

Lastly, it is doubtful that in this era of refunds of surplus tax funds, the taxpayers of this state would support any other policy than the Director's in this situation.

E. The agency's policy and actions were arbitrary and capricious.

Arbitrary and capricious action by a state agency can arise in one or more of three ways: a) by neglecting or failing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider; b) by failing to candidly and honestly consider the evidence; and c) by basing its action on conclusions that reasonable persons fairly and honestly considering the evidence could not reach. Van de Vegt v. Board of Commissioners, 55 P.2d 703, 705 (Colo. 1936).

Aurand presented Liley with information in his letters regarding the following: the Follett decision; the Director's handbook directive stating "the state . . . is responsible for any underpayment"; the fact he was an outstanding employee; his belief that his anniversary date was June, not November; and his belief he would spend five years at step six. In his response letter, Liley discussed the Follett decision, a decision letter of Gerry Bomotti, Vice President for Administrative Services addressing the EBC policy; and the reasonableness of expecting Aurand to double check his pay stubs.

Liley failed to address the Director's policy mandating agency responsibility for underpayment in his letter. At hearing, he did not recall having considered this policy at all.

It wasn't until he was reminded of its inclusion in Aurand's letters that he recalled that it had been brought to his attention prior to making his decision. He never testified that it was among the issues he considered in rendering his decision; he never testified that he discussed it with Bomotti or any other CSU official.

Liley's failure to consider the Director's policy mandating full repayment of unpaid wages was arbitrary and capricious. This official directive was right on point, circulated to all employees in their official handbook. It directly conflicted with his own agency's old decision item which was never circulated to CSU classified employees. As a twenty-five year veteran of human resources management in the state system, Liley should have sought clarification of whether a directive in the official Director's handbook takes precedence over an internal agency decision item.

Liley also failed to respond directly to Aurand's argument that he expected to be at step 6 for a five-year period. It is clear that Liley ignored the fact that any classified employee in Aurand's shoes would have expected this. In fact, the CSU classified employee handbook to which Liley referred Aurand contains no mention of the exception to the step 6 rule, but states it precisely as Aurand believed it to be: "Movement from Step 6 to Step 7 occurs after five years of satisfactory service at Step 6." Liley never rebutted this issue, but instead points to Aurand's experience as a classified employee and his access to Stateline and the classified handbook.

In view of these facts, no reasonable person could have come to the conclusion that Aurand should be checking his pay stub for annual step increases during those years. It simply defies logic. Since Aurand's last step increase would have occurred in 1996, this conclusion applies only to the years 1997 to the present.

It was reasonable for Liley to apply the Follett standard to Aurand, since he did so on the advice of counsel.

Turning to Smith, the same analysis applies. Liley arbitrarily and capriciously failed to consider the Director's policy governing underpayment. In addition, from 1997 forward, it was arbitrary and capricious to expect her to check for annual step increases when she reasonably expected to remain at step 6.

F. The Board has no authority to order interest.

The parameters of the Board's remedial authority are defined by statute and rule. The Board may reverse or modify actions of appointing authorities. C.R.S. Section 24-50-103(6). It may enter orders awarding attorney fees and costs incurred in defending an action under C.R.S. 24-50-125.5. See also Board Rules R-8-38 and R-9-6. However, there is no basis upon which the Board can grant Complainants interest on the earned wages they have not yet been paid.

III. Attorney Fees.

Although Complainants have both requested attorney fees, no evidence was submitted demonstrating that either of them was represented by counsel. In the absence of such evidence, there is no basis upon which to grant an award of attorney fees.

CONCLUSIONS OF LAW

1. The policy and actions of the Respondent were arbitrary, capricious, and contrary to rule or law.
2. Neither party is entitled to an award of attorney fees.

ORDER

The actions of the Respondent are rescinded. Respondent is ordered to pay Complainants all wages earned but not paid, \$28,228 to Aurand, and \$10,344 to Smith, and to remit its and Complainants' contributions to PERA as appropriate.

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

Mary S. McClatchey
Administrative Law Judge

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 February, 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:

Thomas E. Aurand
2707 Rochdale Court
Fort Collins, CO 80525

Cathy L.Z. Smith
736 East Dale Drive
Fort Collins, CO 80524

and via interoffice mail to:

Stacy L. Worthington
Assistant Attorney General
Office of the Colorado Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
