

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 94B067

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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SCOTT MELLE,

Complainant,

vs.

DEPARTMENT OF ADMINISTRATION,

Respondent.  
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Hearing was held on August 4, 1994 and October 6, 1994 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Laurie Rottersman, Assistant Attorney General. Complainant appeared in person and was represented by James R. Gilsdorf, Attorney at Law.

Complainant testified in his own behalf. Respondent's witnesses were Robert Haddock, Audit Manager for the State Auditor's Office and Sharron Payton, Personnel Director for the Department of Administration.

Complainant's Exhibits B, I, H, L, Q, R, and S were admitted into evidence without objection. Complainant's Exhibit G was admitted over objection. Complainant offered the following exhibits of Respondent, which were admitted without objection: 1, 3, 6, 7, 9, 12, 22, 24, 36, 41, 42, 45 and 50. Offered by Complainant and admitted by stipulation were Respondent's Exhibits 27, 28, 29, 31,

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39, 44, 47, 56, 57 and 58. Respondent's Exhibits 10, 11 and 72 were admitted without objection. Respondent's Exhibit 69 (as amended) was admitted by stipulation.

Per Complainant's request, an order sequestering the witnesses was entered excepting Complainant and Respondent's advisory witness.

#### **MATTER APPEALED**

Complainant appeals the November 19, 1993 termination of his employment and seeks to be deemed a certified personnel system classified employee entitled to all rights, benefits and privileges flowing from such employment, which rights, benefits and privileges were denied him by Respondent on the basis of Complainant having been employed as a temporary or contract employee.

#### **ISSUES**

1. Whether Complainant was employed as a temporary employee for more than six months;
2. If so, whether that changed Complainant's employment status;
3. Whether Complainant should be deemed a certified state employee entitled to all rights and benefits of such status, inclusive of the date upon which Complainant should be deemed to have obtained certified status;
4. Whether the action of Respondent was arbitrary, capricious or contrary to rule or law;
5. Whether Complainant is entitled to an award of attorney fees

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and costs.

#### **PROCEDURAL HISTORY**

On November 3, 1993, Complainant filed a letter with the State Personnel Board requesting that he be considered a full-time classified state employee entitled to all of the rights and benefits resulting therefrom. On November 8, an order to show cause was issued to Complainant and to Respondent to determine whether the State Personnel Board had jurisdiction over this matter. Both parties responded. On February 2, 1994, an order was entered discharging the order to show cause and setting the matter for preliminary review. On May 4, 1994, Administrative Law Judge Margot Jones issued a preliminary recommendation that a discretionary hearing be granted. On May 20, 1994, the Board adopted the recommendation and granted a hearing.

#### **STIPULATED FACTS**

1. The parties stipulated that the following employment history of Complainant is correct:

8/15/90 - 10/31/90 Original hire with the COFRS Project was through the State Auditor's Office (SAO) as a Management Analyst IA.

11/1/90 - 1/31/91 Position was upgraded to a Management Analyst IC. Position was terminated on January 31, 1991.

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2/1/91 - 12/13/91 Contracted through Command Personnel Services, Inc. for Mr. Melle's services until the COFRS Project was disbanded.

1/6/92 - 2/28/92Hired in a state temporary position by the Division of Purchasing as a Management Analyst IC. Position was terminated on February 28, 1992.

3/1/92 - 6/30/92Hired in a state temporary position by the COFRS Division as a Management Analyst IC. Position was terminated on June 30, 1992.

7/1/92 - 12/31/92Contracted through Brandon Consulting Group. Purchase Order #C-65295 requested Mr. Melle's specific services from July 1, 1992 to August 31, 1992. Purchase order was amended to provide additional services until December 31, 1992.

1/1/93 - 6/30/93 Hired in a state temporary position with the COFRS Division as a Management Analyst II. Position was terminated on June 30, 1993.

7/1/93 - 11/19/93Contracted through Systems West Computer Resources. Contract between Systems West and the COFRS Division (contract routing #940352) to obtain specific services by Mr. Melle was set forth July 27, 1993. Services discontinued effective November 19, 1993.

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(Exhibit 69, as amended.)

2. Complainant performed duties at the level of Management Analyst II at the time of the termination of his employment on November 19, 1993 and prior to that performed duties at the level of the jobs noted above.

#### **FINDINGS OF FACT**

1. In March 1989, Robert Haddock of the State Auditor's Office became Project Director of the Colorado Financial Reporting System (COFRS) Project. The COFRS Project was to implement a new computer system for the State of Colorado dealing with financial statements and management reporting, i.e., a new accounting system. As Project Administrator, Haddock was responsible for putting the project together and training people in the new system. The project employed approximately 120 people at its height. This included ten FTEs (full-time equivalent positions) assigned to the Department of Administration, COFRS Division. Except for these ten, all of the COFRS employees were either temporary or contract employees. Seventeen million dollars was appropriated for the COFRS Project. COFRS is administered by Respondent Department of Administration.

2. Complainant, Scott Melle, was hired to work on the COFRS Project as a Management Analyst IA. Melle was referred by the State Auditor's Office, where he had applied for a position but was not hired. (Exhibit 9.) The position of Management Analyst was created for the purpose of employing Melle to work on the COFRS Project. A Management Analyst classification did not exist in the Auditor's Office but did exist within the Department of Administration.

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3. Melle's original hire date was August 15, 1990. Bob Haddock recommended that Melle be brought in as an in-grade hire (at a level higher than step 1) because of his specific knowledge and unique skills. (Exhibit 7.) On December 26, 1991, March 2, 1992 and December 9, 1992, it was again recommended that Melle be hired on a temporary basis as an in-grade hire, with acknowledgement that he had been employed by COFRS since August 1990. (Exhibits 36, 22, and 42.)

4. Employees on the COFRS Project at times worked between 70 and 80 hours per week. Melle was promoted to Management Analyst IC because he was working the same number of hours as everyone else but his position was at a lower level. Melle was told that the job would end after six months. At the end of that period, Melle and ten to twenty others became contract employees through Command Personnel.

5. The COFRS Project ended on December 13, 1991. By letter dated November 13, 1991, Haddock advised Melle that the COFRS Project had exhausted its appropriated funding and that December 13 would consequently be the last day for which he would be paid. (Exhibit 72.)

6. The temporary nature of the COFRS Project is the reason permanent positions were not created. Melle's services were contracted out because they were still needed. This was an effort to overcome the problem of only being able to employ Melle as a temporary employee for six months. The contract agencies provided payroll services only. Melle continued to work for the Department of Administration, Colorado Financial Reporting System. (Exhibits 12, 27, 28, 29, 44, 45 and 47.)

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7. The contract agencies were reimbursed by COFRS for Melle's salary.

8. Melle was exempt from earning overtime pay, but his position was not exempt from the classification system. He was compensated for the additional hours of work through compensatory time. The only employee in the Department of Administration who is exempt from the state personnel classification system is the agency's executive director.

9. By letter dated December 8, 1992, Harry Massey, COFRS Division Director, wrote on Melle's behalf:

Lending Institution Loan Officer/Underwriter,  
Scott Melle started working as a 6 month temporary-full time State employee for the State of Colorado August 19, 1990. He was hired within the Department of Administration to work on the Colorado Financial Reporting System (COFRS) project, the State's new accounting and financial reporting software package. He proved to be a valuable employee and his employment was continued. Because of a hiring freeze imposed at the time, we have been unable to hire Scott as a permanent - full time State employee. We have contracted his services through two different sources and are looking to hire him again as a temporary-full time State employee through June, 1993.

As of the new budget fiscal year (July 1993) the conditions are very favorable and there is an excellent chance that we will hire Scott on as a permanent-full time State employee.

His employment history is as follows:

8/90 - 1/91 State of Colorado temporary-full time employee  
2/91 - 12/91 Command Personnel Services Inc.  
1/92 - 6/92 State of Colorado temporary-full time employee  
7/92 - 12/92 Brandon Consulting Group

PROJECTED:

1/93 - 6/93 State of Colorado temporary-full time employee.  
7/93 - State of Colorado permanent-full time employee

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(Exhibit I).

10. Temporary employees receive the state matching share for PERA and are eligible for Worker's Compensation. They receive no other benefits as a state employee. All employees of the Department of Administration, including temporary employees, hold classified positions and are recorded as state classified employees. In order to have a temporary employee, a position must be created so the employee can be paid the salary of the position. This applied to Melle.

11. Non-temporary employees serve a probationary period for one year. It is the policy of the Department of Administration to certify all of its probationary employees after one full year of employment. If an employee is hired in temporary status, but the position then becomes permanent without a break in service, the employee is given credit for the time served in temporary status. At the end of twelve months, the employee must either be certified or discharged from employment.

12. During his periods of contract employment, Melle continued to work under the supervision of state classified employees. His duties remained substantially the same. He was not personally involved with the creation of any of the contracts. The contracts were arranged through COFRS administration. He continued to work with state employees, performing the same duties. He trained employees of the Division of Purchasing in the operation of the new accounting system.

13. During his employment, Melle was evaluated pursuant to the Performance Appraisal for Colorado Employees (PACE). For the period from August 1, 1990 to July 1, 1991, Melle received an

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overall performance rating of Good. (Exhibit B). For the period January 1992 to October 1992 Melle received an overall performance rating of Commendable. In the performance appraisal narrative of this evaluation, Melle's supervisor noted as one of his "excellent qualities" his ability to work with the client/customer and that, "this is the direction I have planned for you in the future." (Exhibit H.)

14. The contract with Systems West took effect on August 1, 1993; Melle's temporary employment had ended on June 30, 1993. Melle did not understand what his status was for the month of July. He was told by his supervisor to continue performing his duties.

15. Melle talked to Sharron Payton, Department of Administration Personnel Director, several times concerning his status and the potential for becoming a permanent state employee. Melle filled out four applications for permanent employment. He asked that an exemption from the hiring freeze be requested in order to make him a permanent employee. On November 3, 1993, he filed his letter of appeal with the State Personnel Board requesting permanent status.

He filed a copy of this letter with the Department of Administration the following day. The letter reads:

I have been working with the Department of Administration since August, 1989 performing the same related job duties; however, I am currently receiving a paycheck from Systems West Computer Resources out of Salt Lake City, Utah. These duties have also been and are currently performed by classified full-time State employees. My employment status has been bounced around between being a six month state temporary employee to being payrolled through three different consulting companies. This entire employment history was initiated by the Department of Administration hiring authorities. During this four year period I have been told by various supervisors that they will try to get me on as a full-time classified employee.

I became aware of my rights to file an appeal as of November

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2, 1993. I am appealing my rights to request that the job I have performed over the last four years be considered as full time classified employment and as such receive all rights entitled to including but not limited to all benefits, annual leave, health insurance, attorneys fees paid for litigation and any other rights and benefits applicable.

(Exhibit Q.)

16. By letter dated November 4, 1993, Melle corrected his letter of appeal to say that he started working for the Department of Administration in August of 1990. (Exhibit Q, p. 2.)

17. By letter dated November 12, 1993, Ray Newton, COFRS Manager, canceled the contract with Systems West Computer Resources for the services of Scott Melle as of the close of business on November 19, 1993 because, "Mr. Melle has completed his assignment and the COFRS Division no longer requires his services,...." This contract termination notice states that it does not affect the services being provided by a Gary Lockwood, who was employed under the same contract. (Exhibit 47.)

18. On November 15, 1993, Melle was orally advised, apparently by his supervisor, that his employment would be terminated effective November 19, 1993. (Exhibit 50.) Melle had received no warning that his job was about to end, but rather, based upon discussions with his supervisor, he believed that his employment might continue for up to one and one-half years past the date of the Systems West Contract, which originally extended through December 31, 1993.

19. Because of his status as a temporary or contract employee, Melle was not afforded the normal due process rights of a certified state employee, such as a pre-termination meeting or

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notification of appeal rights.

20. The COFRS Planning Matrix dated November 16, 1993 indicates that Melle had specific duties assigned to him through July 18, 1994. (Exhibits R and S.)

21. Complainant Melle was never certified as a state classified employee and was never appointed to a position from an eligible list. He worked full-time. Other positions within the Department of Administration, similar to that of Melle, were permanent positions.

### DISCUSSION

Because Complainant was never certified as a state classified employee, he did not acquire a constitutionally protected property interest in his state employment. His dismissal was an administrative, not disciplinary, action. Therefore, it is Complainant's burden, unlike in a disciplinary proceeding, to prove by a preponderance of the evidence that Respondent's action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B); Renteria v. Department of Personnel, 811 P.2d. 797 (Colo. 1991); Kinchen v. Department of Institutions, 867 P.2d 8 (Colo. App. 1993), cert. granted.

#### A. Contentions of the Parties

Complainant contends that he is entitled to be certified as a state employee and therefore is entitled to all of the rights and benefits of certified state employment because the respondent manipulated the system in order to employ him for three years and three months as a temporary or contract employee thereby denying

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him the benefits of permanent employment. Complainant submits that he was entitled to due process when he was abruptly given four days notice that his employment would be terminated. Except for a break in service from December 13, 1991 to January 6, 1992, his employment was continuous and at all times Complainant worked for COFRS administration performing the duties of a state classified position and being supervised by state classified employees. Complainant submits that the law of the state personnel system does not even admit the possibility of a sequence of temporary and contract employment that prevents a state employee from achieving permanent status. His performance on the job was always satisfactory. He received overall ratings of Good and Commendable on the state evaluation forms, and his satisfactory job performance is the reason the agency desired to retain his services.

Complainant argues that his employment was terminated, not because the job assignment had ended, but because he had dared rock the boat by filing an appeal with the State Personnel Board requesting permanent status. In addition to the conversations he had with his supervisor indicating that his duties would extend through the next year or year and one-half, Complainant points to Exhibits R and S, the planning matrices, which project his assignments continuing at least until July 18, 1994. Complainant submits that at all times he was treated as a state employee. His salary was paid for by the COFRS division of the Division of Purchasing within the Department of Administration, even though contracts were written so the money would be channeled through private payroll services for which he performed no duties. Complainant points to the Brandon contract, which became effective on September 1, but was not approved until September 14, meaning that he had no status at all for the intervening two-week period. (Exhibits 27, 28, and 29.) The contract that created a temporary

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position for the month of July 1993 was not entered into until July 26, 1993, although the temporary position had been abolished on June 30, 1993. (Exhibits 39 and 40). Complainant points out that he was employed in a temporary capacity from March 1992 through August 31, 1992, yet he was still working for the state in December of that year. He was then officially removed from the temporary position on June 30, 1992 and a contract was written with a private agency for the period July through December. (Exhibits 56 and 57). Complainant contends that there was no accountability within the state system for these actions and that the state must, in the end, be held accountable for its actions. Complainant requests that he be deemed a certified employee and reinstated in his position with back pay, benefits and entitlements which he would have received had he been a permanent full-time classified employee.

Respondent counters that, because Melle knew at the time he was originally hired that his position would be temporary, it was he, not Respondent, who exploited the system and received a benefit he was not entitled to by being allowed to continue his employment for more than three years without ever having gone through the competitive process. Respondent concedes that Complainant performed the duties of a state classified position but states that that is true of all temporary employees, and Melle cannot now be converted to a certified employee by virtue of the passage of time. According to Respondent, Complainant cannot become a permanent, certified employee simply by working in the position. Respondent points out that the Colorado Constitution requires that all permanent positions be filled on the basis of merit determined through a competitive examination process. Respondent argues that the planning matrices (Exhibits R and S) are speculative and that no conclusions can be drawn from them. Respondent concedes that Complainant's job performance was satisfactory and is not at

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issue.

Respondent contends that to allow this complainant to become a permanent certified employee would open the door to circumvention of the system because permanent employees could then be hired simply by initially placing them in temporary positions irrespective of the merit system.

Respondent further submits that there is no remedy in this case because there is no showing that a position even exists which Complainant could be appointed to and that the term "reinstatement" is a misnomer under these circumstances. Respondent does not contend that there were rules, policies or procedures in effect at the time which would provide for Respondent's actions taken to employ Complainant but submits generally that Complainant failed to satisfy his burden to prove that Respondent's action was arbitrary, capricious or contrary to rule or law.

## B. Analysis

The issues presented involve various constitutional and statutory provisions, rules, policies and procedures, which are set out below.

Colo. Const. Art. XII, Sec. 13(1). Appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence without regard to race, creed, or color, or political affiliation.

Colo. Const. Art. XII, Sec. 13(5). The person to be appointed to any position under the personnel system shall be one of the three persons ranking highest on the eligible list for such position, or such lesser number as qualify, as determined from competitive tests of competence, subject to limitations set forth in rules of

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the state personnel board applicable to multiple appointments from any such list.

Colo. Const. Art. XII, Sec. 13(8). Persons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law. They shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties. A person certified to any class or position in the personnel system may be dismissed, suspended or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined. Any action of the appointing authority taken under this subsection shall be subject to appeal to the state personnel board, with the right to be heard thereby in person or by counsel, or both.

Colo. Const. Art. XII, Sec. 13(9). The state personnel director may authorize the temporary employment of persons, not to exceed six months, during which time an eligible list shall be provided for permanent positions. No other temporary or emergency employment shall be permitted under the personnel system.

Sec. 24-50-111, C.R.S. Original appointments and promotions to vacancies shall be based on merit as determined by competitive examination. Examinations shall be in such form as will fairly evaluate the abilities and aptitudes of candidates but may not include any inquiry into or in any way be influenced by the political or religious affiliations or beliefs or race of any candidate. No examination shall involve any discrimination on account of sex except as a bona fide job requirement.

Sec. 24-50-114(2), C.R.S. The state personnel director may, by rule, authorize principal department heads and presidents of colleges and universities to employ persons from outside the state personnel system on a temporary basis while an eligible list is being provided or in emergency or seasonal situations nonpermanent in nature, but in each case the period of employment shall not exceed six months.

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Sec. 24-50-114(3), C.R.S. Temporary appointees from outside the state personnel system shall have none of the protection of tenure afforded by this part 1 to certified employees.

Sec. 24-50-114(5), C.R.S. Except as provided in subsection (4) [regarding emergency appointments] of this section, the prior approval of all temporary appointments to permanent positions shall be obtained from the state personnel director before such temporary appointments are made. The director may not delegate the authority to approve such temporary appointments. If any such appointment is made before the prior approval of the director is obtained, the appointment shall be considered void from the beginning and the person appointed to such position shall be immediately terminated.

Rule R12-1-29, 4 Code Colo. Reg. 801-1 Non-permanent Full-Time Position: A position established for a full-time schedule for a six-month period or less.

Rule R12-1-30, 4 Code Colo. Reg. 801-1 Non-permanent Part-Time Position: A position established for less than a full-time schedule for a six-month period or less.

Rule R12-1-36, 4 Code Colo. Reg. 801-1 Permanent Full-Time Position: A position which is established for a full-time schedule and carried on the staffing pattern in excess of six months.

Rule R12-1-37, 4 Code Colo. Reg. 801-1 Permanent Part-Time Position: A position which is established for less than a full-time schedule and carried on the staffing pattern in excess of 6 months or on an annual, seasonal basis.

Rule R12-1-38, 4 Code Colo. Reg. 801-1 Position: An individual job within the state personnel system. A position is a group of current duties and responsibilities, assigned or delegated by an appointing authority, requiring the full-time or part-time employment of one person.

Procedure P5-2-7, 4 Code Colo. Reg. 801-2 Temporary Appointment to Permanent Position (Conditional or Provisional Appointment). When no eligible list exists for the class in which there is a vacancy and there is not sufficient time to conduct an examination to establish an eligible list, the appointing authority may request the State Personnel Director to approve a

provisional or conditional appointment until the eligible list is established. The State Personnel Director may approve such appointment for no more than six (6) months. The authority to approve conditional and provisional appointments may not be delegated by the state Personnel Director. A qualified certified employee in the department may be conditionally promoted to fill the vacancy. If not filled in that manner, a qualified certified employee from another department may be conditionally promoted to fill the vacancy. If the vacancy cannot be filled by either of the foregoing methods, a qualified person from outside state service may be provisionally appointed to the position. (CRS 24-50-114 (1)).

Procedure P5-2-8, 4 Code Colo. Reg. 801-2 Temporary Appointment to Non-Permanent Position.

(A) The director may approve temporary appointments of persons from outside the state service to positions which are seasonal or non-permanent in nature, for a period not to exceed six (6) months in a 12-month period. Such appointments shall be to temporary positions only.

(B) Persons appointed to temporary positions must meet the age requirements and employment standards of the position to which appointed unless otherwise approved by the director prior to appointment.

Policy P6-1(F), 4 Code Colo. Reg. 801-1 Temporary Status.  
If an employee appointed temporarily to a position after December 31, 1973, is subsequently appointed without a break in service from an eligible list to the class in which s/he was temporarily employed, the period of service as a temporary employee shall be credited to his/her total service in the class. (See also, Procedure P6-1-6, 4 Code Colo. Reg. 801-2.)

There is no Colorado case law directly on point. However, some guidance is found in Salas v. State Personnel Board, 775 P.2d 57 (Colo. App. 1988), cert. denied (1989). Salas, an employee of the University of Colorado, was dismissed from employment without a pre-termination meeting on grounds that he was exempt from the state classified personnel system and consequently not entitled to the due process rights normally afforded state employees. In

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reversing the termination for lack of evidence that Salas' position was, indeed, exempt from the state classified personnel system, the Colorado Court of Appeals ruled:

When we read the constitutional mandate [Colo. Const. Art. XII, Sec. 13(2)] that, except for exemptions determined by law, state employees shall be members of the personnel system, in conjunction with the right of a statutory appeal of an exemption ruling, we conclude that it grants to a state employee, such as Salas, a protected property right, either to the benefits of the personnel system or to contest a determination that he is not a classified employee.

Property rights are created and their dimensions are defined, by rules or understandings that stem from sources such as state law that secure certain benefits and support claims of entitlement to those benefits. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972). Once a protected interest is implicated, there is a right to notice and opportunity to be heard. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Accordingly, here, once Salas became a state employee, he was presumed to be a member of the classified personnel system and, before there could be any valid determination that he was exempt from that system, he was entitled to notice and an opportunity to be heard.

775 P.2d at 59 (emphasis in original).

Complainant cites Salas for the proposition that a state employee is presumed to be a member of the classified personnel system. Respondent argues that Salas does not apply to the present circumstance because Complainant Melle was an exempt employee and, because the respondent in Salas did not prove that Salas was exempt, the employee was reinstated. Respondent's argument in this context fails. True, the present complainant was an exempt employee, but he was not exempt from the classified system; he was exempt from earning overtime. Respondent, in fact, admits that Melle was not exempt in the same sense as the respondent argued in

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Salas. Consequently, except for his status as a temporary employee, Melle possessed a protected property right in his employment.

The issue then becomes whether Melle was actually a temporary employee for the three plus years that he was employed by the state. He was not, although he was employed as such. Under the law he could not be. He could be a temporary employee only for the first six months of his employment. Colo. Const. Art. XII, Sec. 13(9); Section 24-50-114(2), C.R.S.; Rules R12-1-29 and R12-1-30; Procedure P5-2-8. By definition, he was a permanent full-time employee. Rule R12-1-36. His employment was continued through the actions of the agency for the benefit of the agency. His duties didn't change. His employer didn't change. His salary didn't change. The only difference was the method of payment. The salary source was always COFRS. The contracts with the respective private agencies were for payroll purposes only. Clearly this was an attempt on the part of Respondent to circumvent the law and employ Complainant for as long as the agency needed him without creating a permanent position. The Salas presumption, therefore, and the rights and benefits that follow from that presumption, apply to Complainant Melle. Colo. Const. Art. XII, Sec. 13(8).

Respondent seems to argue that while it is and should be permissible for Respondent to manipulate the system to get around the law, the system would be corrupted by certifying an employee who violated the principles of the merit system by not participating in the competitive testing process. Yet Respondent itself participated in the corruption of the system. Furthermore, the policy behind the merit system was not defeated. Melle was not a political hack. He had a record of efficient service. He was evaluated under the state classified system and was found to

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have performed efficiently. He, himself, did not participate in the series of contracts and temporary positions that resulted in the continuation of his employment. This was done by the agency for the benefit of the agency. Salas is instructive in this regard in that the court there deemed the employee a certified classified employee even though he had been appointed to a position considered exempt from the classified system and, presumably, did not test for the position. Colo. Const. Art. XII, Sec. 13(1) and (5); Section 24-50-111, C.R.S.

Respondent proffered no explanation as to why Melle's assignments were suddenly completed as of November 19, 1993. The evidence supports a conclusion that this was not the case. Agency projections were that his assignments would continue at least through July 18, 1994. The December 8, 1992 letter authored by the COFRS director (Exhibit I) reflects an agency intent to employ Melle on a permanent basis beginning July 1993. Complainant had been led to believe that his employment would continue in one form or another. This was not a disciplinary termination and there is no evidence of a justifiable layoff. A pre-termination meeting was not held. This could not have happened to a permanent classified employee.

Complainant was continuously employed from August 15, 1990 through December 13, 1991, the date that the COFRS Project officially ended. His original temporary appointment concluded on January 30, 1991. At that point he should have either been appointed to a permanent position from an eligible list or required to leave state service. Neither event happened. An eligible list from which an appointment could be made was never established. Instead, his employment was continued through a private payroll service. Had he legitimately continued as a permanent employee, the period of service as a temporary employee would have been

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credited toward his total service in the class. Policy P6-1(F). It is the acknowledged policy of the Department of Administration, under which COFRS is administered, that all probationary employees be certified at the conclusion of one year of efficient service.

In the instance of a promotion, requested transfer or reallocation of a position, the employee must serve a probationary period in the new position. Colorado Association of Public Employees v. Lamm, 677 P.2d 1350, 1358 (Colo. 1984).

Having entered state service as a Management Analyst IA, Complainant was made a Management Analyst IC two and one-half months later, on November 1, 1990. He performed efficiently in the Analyst IC position until December 13, 1991, with a break in service of thirteen working days between December 13, 1991 and January 6, 1992. As a permanent classified employee, and consistent with established agency policy, he would have been certified twelve months after his original appointment, i.e. August 15, 1991, four months prior to the unpaid break in service, which break could not have occurred at the mere pleasure of the agency if Complainant had been rightfully certified. Complainant suggests that the practical solution now is to charge him thirteen days of annual leave, which he would have accrued as a permanent classified employee, such that his employment would be continuous from the original date of hire. An alternative would be to ignore the break in service, allow Complainant to accrue leave until December 13, 1991 as if he were a permanent employee, and begin the same analysis anew with his reemployment on January 6, 1992. However, upon the determination that he should have been in certified status on December 13, 1991, it follows that Complainant's dismissal violated his right to procedural due process and he is entitled to reinstatement with back pay from December 13, 1991 until January 6, 1992.

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When Complainant was again hired as a purported temporary worker in January 1993, he filled the position of Management Analyst II.

In effect, he became a trial service employee subject to a trial service (probationary) period not to exceed six months. Procedure P6-1-2, 4 Code Colo. Reg. 801-2. His satisfactory job performance in that capacity is undisputed. He should, therefore, have been certified in the Management Analyst II position as of July 1, 1993. This is consistent with CAPE v. Lamm, supra.

Respondent argues that there is no remedy in this case because there is no job. The argument apparently goes that since there is not an FTE vacancy, there is not a position for this complainant to fill. At the same time, however, Complainant filled a state classified position for over three years, and the position was at all times funded with state money. Respondent created the position without creating the FTE. The position was there. It ended only after Complainant wrote a letter to the State Personnel Board. An expectation of continued employment was created in Complainant by Respondent. Respondent, not Complainant, caused the property interest which now entitles Complainant to due process and the other benefits of classified state employment.

The purpose of the civil service system is to secure efficient public servants for employment in government. Colorado Association of Public Employees v. Department of Highways, 809 P.2d 988, 991 (Colo. 1991). Standardless actions by an agency cannot be validated. Id. at 995, n. 6. The agency may decide what services it needs, but the selection of employees necessarily involves the state personnel system. Id. at 996.

Complainant's termination is invalid. Complainant is entitled to the rights and benefits of a state classified employee. Contrary

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to the argument of Respondent, this remedy does not corrupt the state personnel system but rather protects the system from corruption. Respondent abused the system in order to employ Complainant for a period of longer than six months without appointing him to a permanent position. Such standardless action cannot be validated.

Nothing in the law provides for Respondent's actions. The system has been corrupted. No remedy can undo what has been done, but the agency can be held accountable. To condone unauthorized acts as were engaged in by Respondent would be to validate similar conduct in the future, that is, permit an agency to contrive a way to employ an individual for as long as it desires, then dismiss the employee without cause at its pleasure.

Respondent acted as if it owned the company. But Respondent is not a private business. The people of the State of Colorado own this company, and the state personnel system has been established by constitution, statute and rule in that light.

This is not a case where a public agency manipulated the system to create a permanent position for an unqualified employee for the benefit of the employee. Rather, it is a case where the agency sought the services of a particular individual for an indefinite period of time without creating a permanent position. Respondent's intent was to enjoy an "at will" employment relationship, subverting the civil service system to serve its own end.

Complainant proved by his performance that he was qualified for the positions he held. Respondent led him to believe that his employment would continue. He was, in fact, employed full-time for almost twenty-three months past the date that the initial

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funds for implementation of the COFRS Project purportedly were expended. This could hardly be considered a temporary position. Under these conditions, the agency must be prepared to create a permanent position within the state classified personnel system.

An award of back pay must be offset by amounts received as unemployment compensation. Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984); Renteria v. Department of Labor, \_\_\_ P.2d \_\_\_, Court of Appeals No. 93CA1280 (November 17, 1994). But see, Technical Computer Services, Inc. v. Buckley, 844 P.2d 1249, 1255 (Colo. App. 1992), cert. denied (1993) (Unemployment compensation benefits not deductible by employer in mitigation of damages in employment contract action).

#### C. Attorney Fees

Complainant has moved for an award of attorney fees and costs. Section 24-50-125.5, C.R.S. of the State Personnel System Act provides for the recovery of attorney fees and costs upon a finding that the personnel action from which the proceeding arose or the defense thereof was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless.

Respondent intentionally manipulated the system and violated the law. Respondent terminated Complainant virtually without notice, without cause or other justifiable reason, and in total disregard of Complainant's rights and feelings. Under the circumstances, it is found that Respondent's actions were taken in bad faith and that it is appropriate for Complainant to receive a fee award.

#### CONCLUSIONS OF LAW

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1. Complainant was employed as a temporary employee for more than six months.
2. Complainant should be deemed a state classified employee entitled to all rights and benefits of such status from August 15, 1990 to the present.
3. Complainant should be deemed to have been certified as of August 15, 1991 and certified in the position of Management Analyst II as of July 1, 1993.
4. Respondent's action in terminating Complainant was arbitrary, capricious and contrary to rule or law.
5. Complainant is entitled to an award of attorney fees and costs.

#### **ORDER**

Respondent's action terminating Complainant's employment is rescinded. Complainant shall be reinstated in the position of Management Analyst II with full back pay and service benefits, less the amount of substitute income or unemployment compensation. Complainant is deemed a permanent classified state employee. Complainant is deemed to have been certified as of August 15, 1991 and is deemed to have been certified in the position of Management Analyst II as of July 1, 1993. Complainant shall receive back pay and benefits as a Management Analyst IC for the period December 14, 1991 through January 5, 1992. Complainant shall receive the appropriate benefits normally afforded a permanent state classified employee from the date of his original hire. Complainant shall not be paid for overtime for which he received compensatory time. Respondent shall pay to Complainant his costs

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and attorney fees incurred in pursuing this action.

DATED this \_\_\_\_ day of  
November, 1994, at  
Denver, Colorado.

\_\_\_\_\_  
Robert W. Thompson, Jr.  
Administrative Law Judge

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of November, 1994, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf  
Attorney at Law  
1390 Logan Street, #402  
Denver, CO 80203

and in the interagency mail, addressed as follows:

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Laurie Rottersman  
Assistant Attorney General  
Department of Law  
General Legal Services Section  
1525 Sherman Street, 5th Fl.  
Denver, CO 80203

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