

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 93S006

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND FROM THE
STATE PERSONNEL BOARD**

ROGER ALLEN MITCHELL,

Complainant,

v.

DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

This matter is before Administrative Law Judge Margot W. Jones on the State Personnel Board's November 22, 1996, Order remanding this matter for further proceedings. Further proceedings were held on June 2 and 3, 1997, before the undersigned. At hearing, Complainant, Roger Allen Mitchell, was present and represented by Mary Beth Sobel, Attorney at Law. Respondent appeared at hearing through Elvira Strehle Henson, Assistant University Counsel.

Procedural History

On November 5, 1992, Complainant filed an appeal alleging discrimination in his non-selection for the position of Stationary Engineer, Gas Turbine Technician in the power house at the University of Colorado at Boulder. The case was referred to the Colorado Civil Rights Division (CCRD) for investigation. On August 28, 1993, CCRD issued a finding of "no probable cause". A hearing was granted by the Board and an initial decision was issued on November 3, 1994. The initial decision found that Complainant proved that he was discriminated against on the basis of race and directed Respondent to appoint Complainant to the Gas Turbine Technician position, awarded back pay and benefits, and awarded attorney fees and costs.

Respondent appealed the initial decision to the Board. On April 24, 1995, the Board adopted the findings of fact and conclusions of law contained in the initial decision and affirmed the order.

Respondent then filed a notice of appeal with the Colorado Court of Appeals but subsequently withdrew it. On December 29, 1995, the Court remanded the matter to the Board for consideration of

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Complainant's request for attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

On January 5, 1996, Complainant moved for a forthwith hearing on the grounds that Respondent had not complied with the Board's April 24, 1995, order. The forthwith hearing was held on February 7, 1996. An amended initial decision issued after the forthwith hearing and was considered by the Board at its November 19, 1996, public session. By order dated November 22, 1996, the Board reversed the amended initial decision in part. The Board remanded this matter to the Administrative Law Judge for further findings on whether Respondent complied with the Board's April 25, 1995, order and for findings on the exact amount of attorney fees and costs owed to Complainant. The June 2, and 3, 1997, hearing was held to take additional evidence on these issues.

ISSUES

The following issues are before the Administrative Law Judge in this case on remand from the Board:

1. whether Respondent complied with the Board's April 25, 1995, order affirming the Initial Decision of the Administrative Law Judge ordering that Complainant be appointed to the position of Gas Turbine Technician;
2. whether Complainant is entitled to an award of front pay; and
2. how much is owed to Complainant for attorney fees and costs under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

PRELIMINARY MATTERS

1. The Administrative Law Judge takes administrative notice of the complete record of the proceedings in this matter.
2. On May 30, 1997, Respondent moved to quash a subpoena duces tecum and trial subpoenas. Respondent contended that the motion should be granted because the trial subpoenas were not properly served. With regard to the subpoena duces tecum, Respondent contends that it should not be required to produce the requested documents because they are voluminous and would be burdensome to produce. In the alternative, Respondent moves for entry of a protective order.

Complainant contends that the Motion should be denied because the subpoenas were properly served on the witnesses. Complainant

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contends that should the motion to quash be granted, which in effect would strike all of Complainant's witnesses, the burden of production should shift to Respondent. Complainant concedes that the documents subpoenaed are voluminous and that it would be burdensome to require their production.

Respondent's motion to quash the trial subpoenas was denied. It was determined that the subpoenas were properly prepared and served on the witnesses.

3. As a preliminary matter at hearing on June 2, 1997, the parties argued their positions with regard to the issue whether Respondent at the February 7, 1996, hearing conceded its obligation to pay Complainant an additional \$10,721.68. Respondent's position was that it made no such concession and that absent a finding under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B) Complainant is not entitled to an award of attorney fees and cost incurred for representation prior to February 7, 1996, and thereafter. Complainant's position was that Respondent conceded these amounts to be owing and therefore should be required to pay.

The Board's order of November 22, 1996, remanding this matter to the undersigned for further proceedings directs that a determination be made whether Respondent owes this amount to Complainant either as a result of a concession made by Respondent at the February 7, 1996, hearing or as a matter of fact.

It was found that the record of the February 7, 1996, hearing does not contain Respondent's concession to owing \$10,721.68 in additional attorney fees. Therefore, it cannot be concluded that such a concession was made. The findings herein conclude that Complainant is entitled to an award of attorney fees and cost for representation of Complainant prior to the February 7, 1996, hearing and thereafter.

FINDINGS OF FACT

1. In October, 1992, Complainant, Roger Allen Mitchell (Mitchell), was not selected to the position of Gas Turbine Technician, Stationary Engineer II at the University of Colorado at Boulder (CU-B) in the power house. He was not selected due to race discrimination. The matter was appealed twice, but in the end CU-B reluctantly agreed to put Mitchell back to work on January 2, 1996.

2. It had been a little over three years since Mitchell left the power house as a Gas Turbine Technician, on temporary appointment. He served in the temporary position for six months. On January 2,

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1996, when Mitchell returned to the work place, Kristin Brandt (Brandt) was the plant manager and was his immediate supervisor. Brandt began her employment as the power house manager in January, 1995.

3. On December 27, 1995, just six days before Mitchell's return to the Gas Turbine Technician position, Brandt wrote to Don Crim, an employee of U.S. Turbine, the company with whom CU-B has a maintenance contract for the gas turbines. Brandt wrote,

December 27, 1995

Mr. Don Crim
US Turbine
7685 South State Route 48
Maineville OH 45039

Dear Don:

You may recall a temporary turbine technician, Rodger (sic) Mitchell, that worked during the plant start up.

He sued the University for racial discrimination. Well, there is finally closure on the case.

He will be starting as the gas turbine technician on January 2nd, 1996. Ray [Hein] will be performing other duties.

I need to discuss with you in detail the up coming outage and preparing its readiness.

I will try to contact you in a couple of days.

Sincerely,

Kristina Brandt

4. Brandt had no work related justification for the letter to Crim. She was angry about Mitchell's return to work displacing Raymond Hein (Hein) as the Gas Turbine Technician. Despite the counterproductive quality of this correspondence for future relations of US Turbine with the CU-B powerhouse, Brandt wanted to sour the relationship between Mitchell and those with whom he would have to interact upon his return to the Gas Turbine Technician position.

5. Prior to Mitchell's arrival at the plant, in January, 1996, Brandt deviated from her standard practice. It had been her practice to post the resume of new employees on the bulletin board prior to the employee's arrival at work as a means of allowing the staff to get to know the new employee. In Mitchell's case, despite the expiration of more than three years since his departure from

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the power house, Brandt did not post Mitchell's resume.

6. When Mitchell returned to the work place in January, 1996, the Gas Turbine Technician, Stationary Engineer II position was not the same position to which he was denied appointment in 1992. It had been downgraded to a Stationary Engineer I position without a reduction in pay or benefits. The job description changed.

7. The job description for the Gas Turbine Technician position first changed in 1993. In 1993, the job consisted of 25% coordinating and monitoring a maintenance contract, lube, predictive and preventative maintenance, 50% diagnose malfunction and correct deficiencies in gas turbine, 5% spare parts and inventory; and 10% insure reliability of the safe effective use of the generators.

8. In 1993, Hein held the position of Gas Turbine Technician. He was appointed to the position in 1992, instead of Mitchell. In 1993, Hein's position was temporarily assigned additional responsible job duties. Hein was assigned Maintenance Supervisor responsibilities resulting in a 10% increase in wages and benefits. The assignment was temporary until the appointment of Brandt as the power house manager in January, 1995.

9. In January, 1995, Hein resumed the duties of the Gas Turbine Technician described in paragraph 7 above. The position remained unchanged until December, 1995.

10. In November, 1995, Respondent decided to withdraw its appeal. The appeal was filed in the Colorado Court of Appeals. The appeal challenged the Board's April 24, 1995, order affirming the initial decision of the Administrative Law Judge appointing Complainant to the Gas Turbine Technician position. In November, 1995, a position description (PDQ) was revised for the Gas Turbine Technician position. At that time, Hein was assigned to the position. But, the changes were made in preparation for Mitchell's return to the position pursuant to the Board's order.

11. On December 1, 1995, Respondent's counsel contacted Mitchell to request his return to work on December 4, 1995. Mitchell was employed at the time in a position in which he felt obligated to give 30 days notice. Mitchell agreed to return to the power house position on January 2, 1996. On December 1, 14, and 28, 1995, Mitchell requested a PDQ for the position to which he planned to return. The PDQ was not produced.

12. Mitchell resigned his position and reported for work on

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January 2, 1996. On January 2, Brandt presented him with training materials and documents, which included a description of job duties for a Stationary Engineer, operator or rover, and not a Gas Turbine Technician. The training program was for four weeks of training as an operator. On January 17, 1996, Mitchell was assigned to work an operator's schedule from 6 a.m. to 6 p.m. The training program had no plans in place to train Mitchell as a Gas Turbine Technician.

13. On January 4, 1996, Mitchell received the PDQ for the Gas Turbine Technician position. The PDQ represented a 60% change in job duties from the original PDQ for the position. The PDQ had been rewritten to assign Mitchell duties which are similarly to duties assigned the Stationary Engineer I, operator, maintenance mechanic, and pipe fitter positions.

14. The position description for the pipe fitter position required the incumbent of that position to inspect, repair, align, install and maintain major equipment in the power house at CU-B. The pipe fitter position required that these duties be accomplished by welding and pipe fitting. During Mitchell's employment, Kenneth Morse served in the pipe fitter's position. The position was classified as a Stationary Engineer I, millwright. Mitchell was assigned duties which included welding and pipe fitting. He was advised that he needed to cross train in all the Stationary Engineer, operator positions and to be prepare to perform the job duties of these Stationary Engineers 60% of his time.

15. Stationary Engineer, operators, function as rovers in the power house. There are significant experiential and technical differences between the operator and the Gas Turbine Technician positions. The operator's job consist of 50% sitting in the control room operating or monitoring the chillers, boilers, steam turbines, pumps, and fans. Fifty percent of the operator's time is spent roving, acting as the eyes and ears of the control room operator in doing maintenance.

16. In January, 1996, Mitchell was 60% unqualified to perform the duties of the newly described Gas Turbine Technician position. He did not possess the skills, knowledge and abilities to be appointed to the Stationary Engineer, operator, pipe fitter or maintenance mechanic positions. Yet, his PDQ was rewritten to incorporate 60% of the job duties from these job classes.

17. The duties of the Gas Turbine Technician had been moved to a new position, position number 5728. Position 5728, Stationary Engineer I, was the new position to which Hein was appointed upon Mitchell's return to work in January, 1996. All the status and

responsibility had been removed from Hein's position, but, per Brandt and Hein's understanding, Hein continued to perform the duties of the Gas Turbine Technician. He was assigned the same office as when he was the Gas Turbine Technician prior to Mitchell's return to work. This was the same office Mitchell was assigned when he was in the temporary Gas Turbine Technician position.

18. Mitchell was assigned a work table in the middle of the power house floor. He was greeted by his new co-workers at this table when one approached him and slammed a clipboard down next to him without explanation, apology or greeting.

19. The duties assigned Hein illustrate the fact that Hein held the Gas Turbine Technician position in August, 1995, in position number 7093, and thereafter. In this position in August, he was assigned responsibility for predictive and other maintenance 25% of the time. In December, 1995, in position number 5728, Hein was assigned responsibility for predictive and other maintenance 20% of the time. Mitchell's January 4, 1996, PDQ assigned him responsibility for predictive and other maintenance 1% of the time.

20. Mitchell was also assigned duties 15% of the time to oversee the maintenance contract for the turbines. In fact, in January, 1996, he was not provided any opportunity to perform this duty. Brandt was in charge of the maintenance contract during this period. Seventeen percent of Mitchell's duties were to continually optimize co-generation operations, perform maintenance, and correct deficiencies or malfunctions in gas turbine. In fact, Hein was assigned to perform this duty in January, 1996. One percent of Mitchell's time was to be spent inventorying spare parts for the gas turbines. Five percent of his time was to be spent maintaining efficient operation of the turbines.

21. In the January 4, 1996, PDQ 40% of Mitchell's time was to be spent working on power house equipment, i.e., boiler and chillers. Extensive training materials were assigned Mitchell in order to prepare him to perform these duties. He was advised that his work with "power house equipment", excluding the gas turbines, would be his predominant duties. At the same time, Hein continued to perform duties identified on the PDQ, or through understanding with Brandt, which placed dominant emphasis on the Gas Turbine Technician duties.

22. On January 4, 1996, when Mitchell received his PDQ, was disturbed about the assignment of duties, and still had not been awarded the back pay, attorney fees and costs, he filed a motion

with the Board for the forthwith hearing. Shortly thereafter, Brandt learned that Mitchell felt that the work environment was hostile.

23. Mitchell attempted to discuss his concerns about the assignment of duties and the hostile work environment with Paul Tabolt, the director of facilities maintenance, Gary Swoboda, Brandt's supervisor, and a co-worker, Bill Paulman. Tabolt and Swoboda, in the name of keeping the interaction with Mitchell on a positive note, refused to discuss Mitchell's concerns.

24. Tabolt contacted Mary Andrews. Andrews, an employee of the human resources office, was assigned to communicate with Mitchell during the initial period as he re-entered the work place. On or around January 23, 1996, Mitchell attempted to discuss his concerns about the assignment of duties with her. Andrews advised Mitchell to talk with Brandt about the PDQ.

25. Mitchell asked Brandt about the assignment of duties and she refused to discuss the issues. Brandt maintained that since Mitchell requested a forthwith hearing to address issues which included the assignment of duties, she would not discuss this with him.

26. Based on Brandt's response to Mitchell's attempt to discuss the assignment of duties and concerns that Mitchell had about his treatment by his co-worker's in the powerhouse, Mitchell concluded that the Brandt was not sincere in her effort to comply with the Board's order to appoint him to the gas turbine position.

27. From January 2 to January 24, 1996, Mitchell was under tremendous stress. He attempted to get help from the Colorado State Employees Assistance Program. He also sought treatment from a private physician.

28. On or around January 23, 1996, Mitchell requested that Brandt grant him leave until the forthwith hearing. Brandt refused to grant him the requested leave. On January 24, 1996, because Mitchell felt the working conditions at the power house were intolerable, he resigned his position with the University of Colorado, effective 30 days from that date.

29. One day following Mitchell's departure from the work place, on January 25, 1996, Brandt addressed a memorandum to the power house staff. It states,

January 25, 1996

TO: All Plant Personnel

FROM: Kristina

SUBJECT: **Roger Mitchell's Resignation** [emphasis supplied.]

On January 24th, 1996, Roger turned in his resignation. He will be taking vacation until February 21st. That is his official last day.

He was considered a certified employee. He received back pay, full vacation and sick time. His attorney's fees were also paid for by the University.

I want to express my gratitude for how the power plant people handled the situation. Everyone here acted in a professional manner. And dealt with his return in a mature, admirable fashion.

THANK YOU for your support.

30. Brandt's January 25 memorandum to all plant personnel was her congratulations to them on their effort to eliminate Mitchell from the work place through ostracism, which was born of hostility toward him. She again unnecessarily imparts details of Mitchell's employment record. She announces his official last day, his utilization of accrued leave, and the details of the monetary settlement with the state.

31. In July, 1996, there was an accident involving the gas turbine. The accident caused catastrophic damage to a turbine. Hein was believed to have some responsibility in the accident.

32. In April, 1997, a R8-3-3 meeting was held with Hein to consider whether corrective or disciplinary action should be imposed for his role in the accident. Hein met with Gary Swoboda and Brandt. During this meeting, Hein's duties before, during, and after Mitchell's employment in January, 1996, were discussed.

33. With regard to the July, 1996, turbine accident, Hein offered in mitigation the fact that his PDQ did not reflect that he performed gas turbine technician duties. At the R8-3-3 meeting, Brandt told Hein that she made a mistake in failing to rewrite his PDQ to include more Gas Turbine Technician duties after Mitchell resigned his position on January 24, 1996.

34. Swoboda noted at the R8-3-3 meeting that Mitchell did not perform any turbine technician duties in January, 1996. Swoboda stated that Hein continued to perform all turbine technician duties

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during Mitchell's employment at the power house in January, 1996, with the exception of contract issues with Public Service Company of Colorado and US Turbine which were handled by Brandt.

35. Swoboda further noted at this meeting that after January 24, 1996, when Mitchell resigned Swoboda directed Brandt to return Hein to performing the Gas Turbine Technician duties right away.

36. The communication at the R8-3-3 meeting affirmed that Brandt and Swoboda never intended to divest Hein of the Gas Turbine Technician duties and never intended to place Mitchell in the position with appropriately assigned duties.

37. Mitchell acquired significant skill in the area of turbines while serving in the United States military. However, following Respondent's failure to select him for the permanent Gas Turbine Technician position in 1992, he had not been able to secure comparable employment on June 2, 1997.

38. Reasonable attorney fees and costs in the amount of \$10,721.68 were incurred by Complainant up to the February 7, 1996, forthwith hearing. This sum was incurred as a result of Complainant's effort to regain his position from which he was wrongfully separated. These expenses relate to establishing the amount of the back pay awarded including accumulated vacation and sick pay, communication with Respondent's counsel in an effort to arrange for Complainant's return to work, and preparation for and appearance at the February 7, 1996 forthwith hearing. Additional fees have now been incurred by Complainant related to counsel's representation in matters related to the appeal of the Amended Initial Decision Following the Forthwith Hearing and in preparation for and appearance at the hearing on remand from the Board held on June 2 and 3, 1997.

DISCUSSION

In the Board's November 22, 1996, Order remanding the case to the Administrative Law Judge, it states,

In this case, there has been a finding of wrong doing by the respondent, i.e. discrimination, therefore, the appropriate standard to be used by the ALJ in weighing respondent's efforts to comply with the 1995 order is the higher standard of substantial compliance.

The determination of whether an action substantially complies with a statute, rule, or contract depends exclusively on the facts of the particular case. *Trussell v. Fish*, 154 S.W. 2d 587, 590 (Ark. 1941; *Kasner v. Stanmire*, 155 P.2d 230, 232 (Okla. 1944). Courts

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have varying approaches to defining substantial compliance. However, it is clear from these decisions that substantial compliance requires Respondent to meet a higher standard than mere compliance.

In this case, the April 24, 1995, Order of the State Personnel Board in which Respondent was directed to appoint Complainant to the Gas Turbine Technician position was for the purpose of remedying discrimination. A considered review of the total record in this matter reveals that Respondent altered the Gas Turbine Technician position to which it appointed Complainant on January 2, 1996, for the purpose of circumventing the Order's objective.

Only through the appointment of Complainant to the same position or an equivalent position can Respondent establish substantial compliance with the Board's April 24, 1995, order. *Michigan Ladder Co.*, 286 NLRB No.4 (September 30, 1997). The record is replete with evidence that Complainant was not appointed to the same position. He was not appointed to the position of which he was wrongfully deprived in November, 1992, he was not appointed to the position held by Raymond Hein in 1995, shortly before Complainant's return to work at the power house, and Complainant was not appointed to the position to which Hein was reassigned immediately following Complainant's January 24, 1996, resignation.

An employer must offer the employee's former position if it still exists; however, the position may not be discontinued as a consequence of the employer's unfair labor practice. *NLRB v. Jackson Farmers, Inc.*, 457 F.2d 516 (10th Cir. 1972).

Respondent contends that the position to which Complainant was appointed on January 2, 1996, was an equivalent position. Respondent contends that in January, 1996, the turbines were installed and functioning. Respondent asserts that the needs of the power house changed emphasizing maintenance of the turbines and the time to be expended on Gas Turbine Technician duties greatly reduced.

The evidence contradicts Respondent's position. The position to which Complainant was appointed was not the same or an equivalent position because predominant duties were more consistent with that of the operator, pipe fitter and maintenance mechanic classifications. The evidence also establishes that Hein served in the Gas Turbine Technician position before, during and after Complainant's January 2, 1996, return to the power house. The evidence established that there was no intention to remove Hein from those duties. The evidence established that Hein was assigned

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duties which were consistent with the Gas Turbine Technician position as it had been structured at least since 1995.

The evidence established that it was as result of Respondent's malicious, frivolous, and groundless actions to circumvent the intent of the Board's April 24, 1995, order that Complainant failed to be appointed to the turbine technician position with the assignment of the appropriate duties. The totality of the evidence established that the power house managers, particularly Swoboda and Brandt, intentionally took steps to prevent Complainant from being appointed to the same or an equivalent position. Respondent's managers directed Hein to continue performing the turbine technician duties after Complainant return to work on January 2, 1996.

The evidence presented at hearing established that power house managers went to great lengths to circumvent the Board's April 24, 1995, order. Their efforts evidence such complete hostility for Complainant and contempt for the due process procedure from which the Board's order arises that it is not possible to expect Complainant to return to the work place. The Board states in its April 25 order,

Reinstatement is the preferred remedy in separation from employment cases before the Board. However, in some cases, the antagonism between the employer and employee may be so great that reinstatement is not appropriate. See, *Daniels v. Essex Group, Inc.*, 740 F.Supp. 553 (N.D. Ind. 1990). In such instances, it would be unjust to deny reinstatement without offering some quantum of monetary relief or "front pay" as a substitute. Front pay is designed to make an employee whole for a reasonable future period as he re-establishes his rightful place in the job market. Based on the findings before the Board in the amended initial decision after forthwith hearing, it does not appear that an award of front pay would be appropriate in this case. However it is possible, depending on the evidence and findings made on remand, that the question of front pay may need to be determined; therefore, the standard of when front pay might be appropriate is addressed. If it is impossible or impractical, through no action or fault of a complainant, to put a complainant back to work then front pay may be considered. Front pay may be available where an employer has created such a hostile work environment that reinstatement is not a reasonable remedy. *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980); *Griffith v. State of Colorado Division of Youth Services*, 17 F.3d 1323 (10th Cir. 1994). Specific findings that an employer has created such a hostile work environment that reinstatement is not an available remedy and a date certain as to when complainant would have a reasonable opportunity to find comparable employment are necessary.

The evidence at hearing in this matter established that Respondent

created such a hostile work environment and that reinstatement is not an available remedy. Complainant asserts that it is entitled to four years front pay. In other words, it is Complainant's position that four years is a reasonable period in which to expect Complainant to find comparable employment. In fact, the evidence is uncontroverted that Complainant did not find comparable employment for the period from 1992 to 1996, an approximate four year period.

The attorney fees and cost incurred by Complainant totaling \$10,721.68 were established to be due and owing Complainant. The action from which this appeal arose and from which each subsequent administrative and appellate proceeding arose is due to Respondent's malicious, frivolous, and groundless actions which were taken in bad faith. Thus, Complainant is not only entitled to the award for the fees and costs incurred up to the February 7, 1996, hearing on the Motion for a Forthwith Hearing totaling \$10,721.68, but also for fees and costs incurred thereafter.

CONCLUSIONS OF LAW

1. Respondent wilfully failed to comply with the Board's April 24, 1995, order. Respondent failed to appoint Complainant to the same or a substantially similar position on January 2, 1996.
2. Complainant is entitled to an award of front pay for a four year period because Respondent created a hostile environment in which the hostilities toward Complainant were so great that reinstatement is not an appropriate remedy.
3. Complainant is entitled to an award of attorney fees and costs totaling \$10,721.68 for fees and cost incurred to the February 7, 1996, hearing. Complainant is also entitled to an award of reasonable attorney fees and cost incurred after the February 7, 1996, hearing through the June 3, 1997, hearing. These awards result from the determination that Respondent's actions from which the appeal arose, and from which each subsequent administrative and appellate action arose, were shown to be frivolous, malicious, groundless, and taken in bad faith under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

ORDER

1. Respondent shall pay Complainant front pay for a four year period. The four year period for calculating the payment commences on February 21, 1996, the effective date of Complainant's resignation from the Gas Turbine Technician position.

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2. Respondent is ordered to pay Complainant reasonable attorney's fees and costs under section 24-50-125.5 as specified in the conclusions of law.

Dated this 28th day
of July, 1997,
at Denver, Colorado

Margot W. Jones
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), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ 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 should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

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

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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 R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the 28th day of July, 1997, I placed a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND FROM THE STATE PERSONNEL BOARD** in the United States mail, postage prepaid, addressed as follows:

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