

TECHNICAL ASSISTANCE – LAYOFF

Prepared by the Division of Human Resources in the Department of Personnel & Administration. October 28, 2011

GENERAL

Layoffs in the state personnel system are governed both by Colorado law and by the State Personnel Board Rules and Director's Administrative Procedures (hereafter referred to as the Rules). Specific references include Article XII, Section 15 of the Colorado Constitution, Colorado Revised Statute 24-50-124, and Chapter 7 of the Rules. The purpose of this technical assistance is to provide guidance for department heads (Executive Directors, Presidents, etc.), appointing authorities, and human resources professionals regarding the implementation of layoffs within the state personnel system.

State law identifies the reasons for layoff in the state personnel system as lack of funds, lack of work, or reorganization.¹ A layoff is defined as any reduction in force resulting in the elimination of one or more positions. State law mandates that department heads are responsible for administering the layoff process for any affected employee in accordance with the Rules.²

The department head, and appointing authorities, are encouraged to consider alternatives to avoid the need for, or minimize the impact of, layoffs. Such options include, but are not limited to, placement of affected employees into vacant positions for which they are qualified but for which they do not have retention rights, retraining, voluntary reduction in hours or pay, job-sharing, voluntary unpaid leave, voluntary furloughs, and voluntary separation incentives. (Refer to the Division of Human Resources (DHR) *Voluntary Separation Incentives In Lieu Of Layoff Technical Assistance* on the DHR website at <http://www.colorado.gov/dpa/dhr/> for information regarding voluntary separation incentives.)

State law mandates that certified employees affected by layoff have retention rights throughout the principal department³ in which they are employed and that a certified employee separated due to layoff be placed on a departmental reemployment list for a minimum of one year.⁴ A department may limit retention rights to major divisions within the department if the department head requests the limitation of, and is granted the limitation by, the State Personnel Board at least thirty days in advance of the posting of a layoff plan. Such retention rights may or may not result in the offer of a different position within the department or defined retention area to the employee affected by layoff, as addressed in further detail later in this document. State law further mandates that consideration be given to state performance evaluations and total state service of employees when determining retention rights.⁵

¹ Colorado Revised Statute (C.R.S.) 24-50-124

² C.R.S. 24-50-124

³ The term 'department' refers both to principal departments as defined in C.R.S. 24-1-110 and to institution of higher education.

⁴ C.R.S. 24-50-124

⁵ C.R.S. 24-50-124

The State Personnel Board exercises jurisdiction over the layoff process, and if appealed to by an affected employee, will review the case to determine whether the affected employee received his/her due process and all rights to which he/she was entitled, and whether the department exercised its discretion in a manner that was arbitrary, capricious, or contrary to rule or law. The Colorado Supreme Court has defined the arbitrary or capricious exercise of discretion as neglecting or refusing to use reasonable diligence and care to procure evidence for consideration, failing to give candid and honest consideration of the evidence, or exercising discretion in such a manner that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Prior to any involuntary separation of an employee, the appointing authority must communicate, or make a good-faith effort to communicate, with the affected employee(s), and the communication must provide the appointing authority and employee(s) with an opportunity to exchange information about the separation. Therefore, in the case of a layoff, once the positions affected have been identified, best practice is for the appointing authority to advise employees in the affected positions accordingly prior to issuing written notice of layoff. During this conversation, the appointing authority should consider information provided by the employee in relation to the business needs of the department, and apply or communicate such information appropriately.

The layoff process can not substitute for progressive discipline (corrective or disciplinary action), nor prevent or interfere with other personnel actions.

LAYOFF MATRIX

The department head is responsible for establishing a layoff matrix for the department. After employees are ranked into three-year time bands based on seniority, the matrix is applied in order to rank employees within each time band. An employee with a lower rank within the time band is displaced before an employee with a higher rank, with the exception of probationary employees and employees entitled to veterans' preference. Therefore, the matrix should make meaningful distinctions between employees and be based on data that is readily accessible, reliable, and verifiable. Time banding, ranking employees within time bands, and applying veterans' preference are addressed in detail later in this document.

The department must communicate the layoff matrix to all employees at least 15 calendar days before the first layoff notice is issued. However, as isolated layoffs may occur unexpectedly, best practice is to always have a layoff matrix in place. Such practice may help avert perceptions that the department may be manipulating the layoff process to benefit certain employees.

In accordance with the statutory requirement to consider performance evaluations when determining retention rights, the matrix must give at least 51 percent of the total value to performance as measured by an average of employees' annual performance ratings from the last three years. The annual performance rating is the final performance rating given at the end of the performance cycle. Best practice is to incorporate only those final ratings currently reflected in employees' personnel files as of the date of the first layoff notice. Here, too, such practice may help avert perceptions that the department may be manipulating the layoff process to benefit certain employees.

LAYOFF PLAN

The department head is responsible for making the business decisions related to a layoff. Such decisions include, but are not necessarily limited to, the identification of functions that will no longer be performed by the department or that will be performed in a different manner. Such decisions are made by taking into account factors that are related to the business of the department and are not made by taking into account factors that are not related to the business of the department, such as the specific identification, seniority or performance of employees in the department. These factors are addressed by the time banding of employees and the application of the department's layoff matrix, as discussed later in this document. The department head has the discretion to delegate, in writing, the authority for making the business decisions related to a layoff to subordinate appointing authorities who manage the business delegated within the department.

After these business decisions are made, the department head or designee is responsible for developing the layoff plan reflecting these business decisions. Best practice is for the department head and the department's human resources director, along with other departmental management as appropriate (such as the department's budget director) to work together to develop the department's layoff plan. The purpose of the layoff plan is to facilitate strategic planning prior to the abolishment of any positions and to provide an open and transparent explanation for the elimination of services and/or positions. The layoff plan must include a listing of the classes in which it is anticipated positions will be abolished and, if there have been any modifications to special qualifications for positions affected by the layoff within 60 days or less prior to the publication of the layoff plan, a listing of such positions. Additional required components of the layoff plan are specifically addressed in the Rules.⁶

The department must post the layoff plan, signed by the department head or designee, in a conspicuous place where all impacted parties have access to view the posting and on the department's internet or intranet web site at least ten calendar days prior to issuing the first layoff notice. Note that employees who are on extended paid or unpaid leave during a layoff, such as Injury Leave, Family Medical Leave, and Short-Term Disability Leave are afforded the rights to which they are entitled during the layoff and accordingly must be made aware of the posted layoff plan. (If the layoff matrix is new or the existing matrix has been updated, employees on extended or unpaid leave must, as with all other employees, be made aware of the matrix at least 15 calendar days prior to the issue of the first layoff notice.)

Once the department's layoff plan is finalized, it is the responsibility of the department's human resources director to identify the specific positions initially affected by the layoff.

⁶ State Personnel Board Rule 7-7 B

In an individual position review there may be an upward or downward allocation of an individual position encumbered by a certified employee that has a negative effect on the employee's base pay, status, or tenure. Although this situation triggers an assessment of retention rights for the employee,⁷ because the affected position is not being abolished, no layoff plan is required. However, if a position is allocated downward and the employee elects not to remain in the position or if a position is allocated upward and the employee does not qualify, is not appointed or elects not to remain in the position, the employee will be laid off or given retention rights as appropriate.

PREPARATION

As soon as a department's human resources director is aware of an impending layoff, the department's human resources office should begin preparing for the implementation of the layoff. Best practice is to complete preparations for the layoff prior to the publication of the layoff plan, if possible. In order to ensure that all deadlines are met, it is suggested that a timeline (beginning with the effective date of layoff and working backwards) be drafted for planning purposes. While in some cases it may be necessary to continue preparations after the layoff plan has been published, such as in a large scale layoff, all preparations should be complete, to the point possible, prior to issuing the first layoff notice.

The following position information should be gathered when preparing for a layoff:

- current organizational chart reflecting the location and classification of all positions, and identifying vacant positions, in the defined retention area;
- accurate position descriptions for, at a minimum, initially affected positions; best practice is to have accurate position descriptions for all positions in the defined retention area; and
- documentation of and any necessary supporting documentation for the minimum and bona fide special qualifications for, at a minimum, all positions in the initially affected classes in the defined retention area; best practice is to have documentation of and any necessary supporting for the minimum and bona fide special qualifications for all positions in the defined retention area. Note: special qualification updates should be frozen by the human resources director once the communication regarding the agency matrix and notice of layoff occur unless such special qualification is required by law. This precludes the appearance of special qualifications being added to protect persons in positions from being affected by other persons exercising their retention rights.

The following employee information should be gathered for initially affected employees when preparing for a layoff:

- employee status (addressed later in this document);
- continuous state service start date (addressed later in this document);
- present class, pay grade, and base salary;
- previous classes in which the employee was certified;
- a current application;
- final performance ratings for the last three years; and
- DD214, official verification of military service, to determine veterans' preference if applicable (addressed later in this document).

⁷ State Personnel Rule 2-10 and State Personnel Board Rule 7-20

It will likely be necessary to collect more position and employee information as the layoff progresses and additional positions and employees are affected. Best practice is cease all recruitment and selection for vacant positions in the defined retention area at the time the layoff plan is posted, as such practice will likely minimize the impact of the impending layoff by providing more vacant positions as opportunities to retain affected employees.

EMPLOYEE STATUS

The status of employees determines their rights during a layoff. Probationary employees do not have retention or reemployment rights. In a layoff situation, certified employees or those in trial service have retention rights within the defined retention area and have reemployment rights within the principal department if demoted or separated as a result of layoff. Retention and reemployment rights are addressed in further detail later in this document.

Provisional

Provisional status applies to a qualified person outside of the state personnel system who is temporarily appointed to an otherwise vacant permanent position for which no eligible list exists. Provisional employees do not have the rights and benefits provided to permanent employees, including retention and reemployment rights.

Probationary

State law mandates that the State Personnel Board establish a probationary period not to exceed twelve months for all persons initially appointed within the state personnel system.⁸ Accordingly, probationary status, as it applies to permanent appointments, cannot exceed twelve months except for periods of unpaid leave and ends automatically at the end of twelve months unless proper personnel action is taken prior to that time to prevent the probationary period from ending. (Refer to the DHR *Time Off Technical Assistance* on the DHR website at <http://www.colorado.gov/dpa/dhr/> for information regarding the affect of unpaid leave on service dates).

Employees who perform satisfactorily and have no unpaid leave during the probationary period accrue all the rights of certified employees upon their completion of the probationary period. Therefore, while probationary employees do not have retention or reemployment rights, a layoff does not extend the amount of time employees serve in probationary status or “stop the probationary status clock”. If an affected employee’s probationary status ends during a layoff, rights are determined and notice given based on the effective date of the layoff itself, rather than the date the layoff plan was published or written notice of the layoff was issued.

Departments have the discretion to grant certified status to probationary employees before the end of their initial twelve months of employment. However, changing a policy or standard practice in relation to early certification during a layoff would be questionable practice.

⁸ C.R.S. 24-50-112.5 (5)(b)

Conditional

Conditional status applies to a qualified, certified employee who temporarily promotes into an otherwise vacant permanent position for which no eligible lists exists. During a layoff, conditional employees have retention rights within the defined retention area in the class in which they were certified immediately preceding their conditional appointment, and have reemployment rights within the principal department in the class to which they were certified immediately preceding their conditional appointment.

Trial Service

Trial service status applies to a current certified employee who promotes or reinstates to a position in a higher class than his/her current position. (Appointing authorities also have the discretion to require an employee who transfers to a different class with the same pay grade maximum to serve a trial service period.) During a layoff, employees in trial service status are treated as though certified throughout the duration of the layoff. This means that such employees have retention rights within the defined retention area in their current class and have reemployment rights within the principal department in their current class.

Certified

State law mandates that after satisfactory completion of the probationary period, employees are certified to the class of their current position.⁹ During a layoff, certified employees are entitled to retention rights within the defined retention area in their current class and have reemployment rights within the principal department in their current class.

DETERMINING RETENTION RIGHTS

The department's human resources director is responsible for determining the position to be offered as a retention right, if any, to certified employees affected by a layoff.

Time Banding Employees

In accordance with the statutory requirement to consider seniority when determining retention rights, all employees in the classes affected by the layoff within the defined retention area must be placed in three-year time bands based on seniority. A time band represents three whole calendar years, beginning with the year in which the layoff is occurring and extending backwards, e.g., 2009 – 2007, 2006 – 2004, etc.

Seniority is defined as the calendar year in which continuous state service began.¹⁰ State service is defined as service performed for the State of Colorado both within and outside of the state personnel system.¹¹ (Refer to the DHR *Bringing Employees Or Positions Into The State Personnel System Technical Assistance* on the DHR website at <http://www.colorado.gov/dpa/dhr/> for additional information regarding crediting state service outside the state personnel system.) Continuous service is defined as service in a permanent position with no breaks of more than 90 days; this definition does not generally include temporary or student appointment.¹² An exception is that temporary service prior to December

⁹ C.R.S. 24-50-112.5 (5)(b)

¹⁰ State Personnel Board Rule 7-10 A

¹¹ C.R.S 24-50-136 (1)

¹² State Personnel Director's Administrative Procedure 1-70

31, 1998 when subsequently followed by appointment to a permanent position in the same class with no break in service is credited as continuous state service.¹³ Additionally, approved paid and unpaid leave, time spent on a reemployment list, and time spent waiting for retention rights to be determined are not considered a break in service.¹⁴ However, any other break in service of more than 90 days causes the start date of continuous state service to be reset for the purposes of determining seniority during a layoff.

There is no distinction made between part-time service and full-time service for purposes of determining seniority in a layoff. Service credit through the Public Employees Retirement Association (PERA) has no impact on the determination of seniority for layoff purposes.

Applying Veterans' Preference

In accordance with state law, employees eligible for veterans' preference during selection are also eligible for veterans' preference during layoff.¹⁵ (Refer to the Division of Human Resources (DHR) *Veterans, Active Military, and National Disaster Response Personnel Technical Assistance* on the DHR website at <http://www.colorado.gov/dpa/dhr/> for information regarding how to determine eligibility for veterans' preference.) Note that all employees who are veterans are not automatically entitled to preference, and some employees who are not veterans themselves but whose spouses are or were veterans are entitled to preference. Note also that an employee in probationary status receives veterans' preference with regard to seniority during layoff if eligible for such.

Veterans' preference during layoff takes two forms. Firstly, eligible employees receive military service credit for active military service, up to a maximum of ten years, for seniority purposes. The amount of credit the employee receives is based on the number of years the veteran served in the military. If the veteran served twenty or more years in the military, the employee is not eligible for any military service credit. In order to determine the amount of credit to give for partial years of service, round to the next whole year.

Once the amount of military service credit, if any, has been determined, it is added to the employee's continuous state service start date, and the employee is placed in the appropriate time band. For example, if the layoff is occurring in 2011 and analysis verifies that an affected employee is entitled to veterans' preference, the employee has a continuous state service start date of 5/1/08 and served four years in the military, the affected employee receives four years of military service credit, essentially changing his/her continuous state service start date from 5/1/08 to 5/1/04 for the purposes of layoff. Accordingly, the employee is placed in the third most junior time band of 2005-2003 rather than the second most junior time band of 2008-2006.

Secondly, within the same time band no employee entitled to veterans' preference can be displaced prior to an employee not entitled to veterans' preference. This type of preference is applied to eligible employees even if no military service credit can be applied to the employee's continuous state service start date. For example, if the layoff is occurring in 2011 and analysis verifies that an affected employee is eligible for veterans' preference, the employee has a

¹³ State Personnel Director's Administrative Procedure 4-49

¹⁴ State Personnel Board Rule 7-10 B

¹⁵ Colorado Constitution, Article XII, Section 15

continuous state service start date of 5/1/08 and has twenty years of military service, although the employee receives no military service credit and therefore remains in the second most junior time band of 2008-2006 due to his/her continuous state service start date of 5/1/08, the employee cannot be displaced before an employee who is not entitled to veterans' preference in the most junior time band.

Applying the Layoff Matrix/Ranking Employees

After placing all employees in the affected classes in the appropriate time bands, the department's human resources director is responsible for applying the department's layoff matrix to rank employees within the time bands. If there is only one employee in a particular time band, there is no need to apply the matrix to that particular time band, but in all other cases it is necessary to apply the matrix.

Once the matrix has been applied, ranks within the time bands are determined by the matrix score of each employee. The employee with the highest score is ranked first, the employee with the lowest score is ranked last, and other employees are ranked in between according to their scores. Employees entitled to veterans' preference should not be ranked with the other employees as they will always be the last to be displaced within the time band. If there is more than one employee eligible for veterans' preference within the same time band, apply the matrix to such eligible employees separately and rank them accordingly to determine the order in which they will be displaced if necessary. Similarly, probationary employees should not be ranked with the other employees as they will usually be the first to be displaced within the most junior time band (the exception to this is when probationary employees have moved into different time bands due to their military service credit). If there is more than one probationary employee within the most junior time band, apply the matrix to such employees separately and rank them accordingly to determine the order in which they will be displaced.

The following example illustrates how to apply a layoff matrix to rank employees within a time band.

Example – Applying a Layoff Matrix/Ranking Employees

Matrix: Performance Ratings 75%, Length of Departmental Service 25%

Applying the Matrix

Performance Rating Scale: Maximum of 3

Length of Departmental Service Scale: Maximum of 20

Converted Scale: Maximum of 5

Conversion Formula: Divide points earned by points possible, multiply result by 5

Time Band 1995-1993

Employee A, departmental service date 6/23/99

Employee B, departmental service date 2/15/93

Employee C, departmental service date 8/1/04

Employee A

Performance ratings/Points Assigned

Length of Departmental Service/Points Assigned

2010: Level 2 = 2 points
2009: Level 2 = 2 points
2008: Level 3 = 3 points
Credit (Average of points) = 2.33

Converted Performance Rating Score
 $2.33/3 = .78 \times 5 = 3.9$

Matrix Score Calculation
 $3.9 \times .75 = 2.93$
 $2.75 \times .25 = .69$

Performance ratings/Points Assigned
2010: Level 2 = 2 points
2009: Level 2 = 2 points
2008: Level 2 = 2 points
Credit (average of points) = 2

Converted Performance Rating Score
 $2/3 = .67 \times 5 = 3.4$

Matrix Score Calculation
 $3.4 \times .75 = 2.55$
 $4.5 \times .25 = 1.13$

Performance ratings/Points Assigned
2010: Level 2 = 2 points
2009: Level 3 = 3 points
2008: Level 3 = 3 points
Credit (average of points) = 2.67

Converted Performance Rating Score
 $2.67/3 = .89 \times 5 = 4.45$

Matrix Score Calculation
 $4.45 \times .75 = 3.34$
 $1.5 \times .25 = .38$

11 years = 11 points

Credit (number of years) = 11

Converted Length of Dept Service Score
 $11/20 = .55 \times 5 = 2.75$

Final Matrix Score
 $2.93 + .69 = 3.62$

Employee B

Length of Department Service/Points Assigned
18 years = 18 points

Credit (number of years) = 18

Converted Length of Dept Service Score
 $18/20 = .9 \times 5 = 4.5$

Final Matrix Score
 $2.55 + 1.13 = 3.68$

Employee C

Length of Department Service/Points Assigned
6 years = 6 points

Credit (number of years) = 6

Converted Length of Dept Service Score
 $6/20 = .3 \times 5 = 1.5$

Final Matrix Score
 $3.33 + .38 = 3.72$

In the above example, the lowest-ranked employee in the time band is Employee A; therefore, Employee A would be the first to be displaced in the time band. The second-lowest ranked employee in the time band is Employee B; therefore, employee B would be the next to be displaced in the time band. The highest-ranked employee in the time band is Employee C; therefore, employee C would be the last to be displaced in the time band.

Applying Tiebreakers

The department's human resources director is responsible for applying tiebreakers after the application of the layoff matrix as necessary.

If two or more employees in the same time band are tied in rank after the application of the department's layoff matrix, the tie is broken by ranking the employee with the earliest continuous state service start date highest and the employee with the latest continuous state service start date lowest. Applying this tiebreaker to the above example, if all three employees were tied after the application of the layoff matrix, Employee C would be displaced first, Employee A would be displaced next, and Employee B would be displaced last.

If two or more employees in the same time band continue to be tied in rank after the application of the department's layoff matrix and the continuous state service start date tiebreaker, the tie is broken by taking into account the Affirmative Action Program established by the State Personnel Director (located on the DHR website at <http://www.colorado.gov/dpa/dhr/>). The program mandates that if a tie exists between two or more employees in the same time band after application of the department's layoff matrix and the continuous state service start date tiebreaker, the employee who is a member of a protected class in which the department has identified an underutilization of members of that protected class in the employee's current position, if such exists, is the higher-ranked employee.

For example, if a layoff is occurring in early 2011 and two affected employees with the same job classification have the same continuous state service start date of 2/1/05 and the same average of the numerical values assigned to their performance ratings in 2010, 2009, and 2008 and the department's layoff matrix is 100 percent performance-based, the two employees will be tied in rank after the application of the department's layoff matrix and the continuous tiebreaker. Therefore, if the department has identified an underutilization of members of a protected class in the job classification of the employees, and one of the employees is a member of the protected class so identified and the other employee is not, the employee who is a member of the protected class so identified will be ranked higher than the other employee.

If two or more employees in the same time band continue to be tied in rank after the application of the department's layoff matrix and both tiebreakers outlined above, the department has the discretion to determine how to break the tie. Such options include, but are not limited to, the additional factors identified earlier in this document as options for inclusion in a layoff matrix, such as actual performance ratings (if on a numerical system), length of departmental service, length of time in current classification, etc. (It is not recommended to utilize a departmental tiebreaker that is already part of the department's layoff matrix or one of the specific two tiebreakers outlined above). Another possible tiebreaker at this stage is a lottery system, or randomization. If randomization is utilized, it is necessary to determine in advance whether the employees selected at random will be the employees who are displaced first or last. Witnesses to

such a process are also necessary, and consideration should be given to request an outside impartial party who has human resources knowledge, such as the human resources director of a different department, to oversee the process.

When determining and applying tiebreakers at this stage, it is essential to apply the same tiebreakers consistently throughout the layoff process. It is also best practice to determine the tiebreakers in advance and to communicate them to all the employees within the principal department. Such practices may help avert perceptions that the department may be manipulating the layoff process to benefit certain employees.

Determining Retention Rights

After determining the positions to be abolished, time banding all employees in the defined retention area in the affected classes based on employees' continuous state service start date, and ranking the employees in the time bands by applying the department's layoff matrix, the department's human resources director is responsible for determining which position, if any, is the retention right for employees in affected positions. With rare exceptions (addressed later in this section), an affected employee is not given a choice of multiple positions; rather, the employee receives only the highest, best retention offer available. If multiple positions in the highest classification are available, the department has the discretion to determine which position is offered. In this scenario, best practice is to offer the position that will cause the least amount of disruption to and/or displacement of affected employees within the defined retention area.

Employees must meet the minimum and any bona fide special qualifications for a position in order to be offered the position as a retention right. One way to ensure that employees meet minimum and bona fide special qualifications for positions to which they have potential retention rights is to require affected employees to submit updated applications to human resources. Minimum qualifications for positions in the state personnel system must be consistent with the minimum qualifications established by the Department of Personnel & Administration, Division of Human Resources on behalf of the State Personnel Director. Best practice is to ensure that special qualifications are consistent within the department for positions performing essentially the same duties and requiring the same minimum qualifications. As stated earlier in this document, positions affected by the layoff for which special qualifications are changed within 60 days or less prior to the publication of the layoff plan must be identified in the layoff plan.

Positions are offered as retentions rights in the following priority:

- Funded vacant positions in the current certified class.
- Occupied positions in the current certified class (in regard to which the employee has more seniority or a higher matrix rating than the incumbent).
- Funded vacant positions in a previously certified class with the same maximum pay rate.
- Occupied positions in a previously certified class with the same maximum pay rate (in regard to which the employee has more seniority or a higher matrix rating than the incumbent).
- The highest level demotion in a funded vacant position in a previously certified class.
- The highest level demotion in an occupied position in a previously certified class (in regard to which the employee has more seniority or a higher matrix rating than the incumbent).

- The highest level demotion in a funded vacant position in a previously certified class series.

Occupied positions are offered in order of the status of the incumbent: provisional, probationary, conditional, and certified. Employees in senior time bands have the right to displace employees in junior time bands, and higher-ranked employees have the right to displace lower-ranked employees within the same time band. (This type of displacement is commonly referred to as ‘bumping’.) Therefore, when conducting a layoff that involves multiple encumbered positions within different time bands, it is logical to first determine the position to which the highest-ranked employee within the most senior time band has a retention right, then determine the position to which the second highest-ranked employee in the most senior time band has a retention right, and so forth through the lowest-ranked employee in the most junior time band. Similarly, when conducting a layoff that involves multiple encumbered positions within the same time band, it is logical to first determine the position to which the highest-ranked employee has a retention right, then the position to which the second highest-ranked employee has a retention right, and so forth through the lowest-ranked employee.

If the only position to which an employee has a retention right within a 75-mile radius is a demotion, then in addition to the offer of that demotion, the employee is offered a position outside of the 75-mile radius to a position in the current certified class, if such exists. This is the only situation in which an employee is offered a choice between two positions as his/her retention right. Similarly, if there is no position to which an employee has a retention rights within a 75-mile radius, the employee has retention rights to a position out of the 75-mile radius, if such exists. Use a straight line between the two work locations to determine the distance between them.

Certified part-time employees whose positions are increased to full-time and full-time employees whose positions are decreased to part-time¹⁶ have retention rights to part-time and full-time positions respectively and have the option to exercise reemployment rights. Full-time certified employees are offered full-time positions before part-time positions. Part-time certified employees are offered other part-time positions in the current class, then offered full-time positions in the current class prior to the offer of a position in a previously certified class or class series. A part-time employee whose hours are reduced or increased but who remains part-time does not have retention or reemployment rights.

As addressed earlier in this document, probationary employees do not have retention rights. However, a vacant position must be offered before a position held by a probationary employee can be offered. Departments have the discretion to transfer probationary employees in affected positions to other positions to avoid the need for or minimize the impact of a layoff, but not at the expense of the retention rights of certified employees.

Determining Pay

Employees who are demoted as a result of layoff whose current base pay is above the maximum of the pay range of the new class to which demoted are eligible for saved pay. In saved pay

¹⁶ Full-time employees are those employees regularly scheduled to work 40 hours per week, 2080 hours per year, or the equivalent. Part-time employees are those employees who are regularly scheduled to work less than this amount.

status, base pay remains fixed at its current rate for a maximum of three years or until it falls within the range of the class, whatever occurs first. Employees who demote as a result of layoff and are placed in saved pay status do not have reemployment rights;¹⁷ therefore, employees have the option to decline to be placed in saved pay status in order to exercise their reemployment rights.

A department head has sole discretion to grant saved pay, and this decision must be applied consistently throughout the defined retention area.¹⁸ Therefore, the department head should determine if saved pay will or will not be granted before a layoff begins. It is recommended that department heads carefully consider the issue of saved pay before determining whether to grant it during a layoff. The reason for the layoff may contribute to the decision.

If saved pay is not applied for affected demoted employees whose current base pay is above the maximum of the pay range for the class to which demoted, best practice is to set base pay at the maximum of the pay range of the new class. If affected demoted employees whose current base pay is within the pay range of the new class, best practice is to maintain the current rate of base pay. If an affected employee transfers to a different position in the same class or a class in the same pay grade, the employee's base pay is not adjusted.

NOTIFYING AFFECTED EMPLOYEES

The department has the discretion to determine whether notice of position abolishment, notices offering a position as a retention right, and notices of displacement are signed by the human resources director of the department or by the appointing authority of the affected employee(s). If such notices are signed by the appointing authority, it is strongly recommended that they be reviewed and approved by the human resources director prior to delivery. Best practice is for the appointing authority and human resources director to hand-deliver the written notice to the affected employee in order to be immediately available to address any initial questions or concerns the employee may have. If the notice is mailed it must be sent via certified mail, and best practice is to send in via regular first-class mail as well. If mailed, the notice is considered delivered the date it is received or five days after the certified mailing, whichever is first.

Certified employees must be provided written notice of position abolishment at least forty-five calendar days prior to the effective date of the abolishment. The notice must either identify the position, if any, to which the employee has retention rights or direct the employee to indicate within three working days of the date of delivery, in writing, whether he/she wishes to exercise his/her retention rights. If the former, the notice must direct the employee to indicate within three working days, in writing, whether he/she is accepting the position offered. If the latter, a follow-up written notice must later be provided to the employee identifying the position to which he/she has retention rights and directing the employee to indicate within three working days from the date of delivery, in writing, whether he/she is accepting the position offered.

¹⁷ State Personnel Director's Administrative Procedure 3-13 A

¹⁸ State Personnel Director's Administrative Procedure 3-13 A

Certified employees who are being displaced, or bumped, by another employee must be provided written notice at least ten business days before the displacement, and must be paid for at least twenty-two working days after receipt of the notice of displacement. Probationary employees must be provided written notice of layoff, whether due to position abolishment or displacement by a certified employee, at least ten business days before the effective date of the layoff, but are not guaranteed payment beyond that.

Note that the time frames identified above are minimum time frames. Best practice is to give employees affected by layoff as much notice as possible, especially if the layoff has a negative affect on employees' base pay, status, or tenure.

All written notices to employees affected by layoff must include information regarding the employees' appeal rights. Under Colorado and State Personnel Board case law the time frame for an employee to exercise his/her appeal rights does not begin until the employee receives written notice of his/her appeal rights. Appeal rights are addressed in further detail in the next section of this document.

ADDITIONAL EMPLOYEE RIGHTS

Certified employees who are demoted or separated as a result of a layoff have certain reemployment rights and appeal rights, as discussed below. Employees who are required to move due to acceptance of a retention offer have the right to be reimbursed for their moving expenses, as discussed below.

Reemployment Rights

As stated earlier in this document, state law mandates that certified employees separated as a result of layoff be placed on a departmental reemployment list for a minimum of one year. This includes employees who decline to exercise their retention rights, employees for whom no position can be identified to which they have retention rights, employees who decline the position offered as their retention right, and employees who do not respond to either the initial notice of layoff or to the offer of a position as their retention right. Additionally, the rules state that employees who accept a position as a retention right that results in their demotion are placed on a department reemployment for one year¹⁹ (with the exception of employees who are placed in saved pay status, as addressed earlier in this document).

Departmental reemployment lists are created for the classes of the positions held by certified employees prior to their separation or demotion due to a layoff (or the upward or downward allocation of an encumbered position, as addressed earlier in this document). A departmental reemployment list is the employment list of highest priority.²⁰ This means that if an appointing authority requests to fill a position in a class for which a departmental reemployment list exists, all names of qualified individuals on the departmental reemployment list are referred to the appointing authority for consideration, and no other list can be created or considered. While appointing authorities have the discretion to consider employees within the department who are eligible for transfer, non-disciplinary (voluntary) demotion and reinstatement along with the individuals on a departmental reemployment list, no other eligible list can be established or

¹⁹ State Personnel Board Rule 7-20

²⁰ C.R.S. 24-50-112.5 (2)(a)

considered for the class in question while a qualified individual remains on the department reemployment list. Note that as the list established for an encumbered position allocated upward is a type of promotional list, if a departmental reemployment lists exists for the allocated class, the existing departmental reemployment list precludes the establishment of a new list for the reallocated position.

An employee affected by layoff does not have retention rights to a position in a class with a higher pay grade maximum than that of his/her current class, whether or not they were certified in that class, as such promotion is only attainable through competition. A department has the discretion to reinstate eligible employees to higher-level positions to avoid the need for or help minimize the impact of layoff, but not at the expense of retention rights of certified employees.

Appeal Rights

Employees whose positions have been eliminated or who have been demoted in the course of a layoff have a mandatory right to a hearing before the State Personnel Board. Accordingly, if an employee who occupied a position that was abolished or whose retention rights during a layoff were to a position that was a demotion appeals the action to the State Personnel Board, a hearing will automatically be granted. Employees who are affected by layoff in other ways may apply for a discretionary hearing to the State Personnel Board. The acceptance of retention rights to another position does not eliminate an employee's appeal rights.

Right to Moving Expenses

State law mandates that an employee who is required to change his/her place of residence due to a change in assignment is allowed his/her moving and relocation expenses.²¹ This applies to employees who accept a retention offer outside a 75-mile radius as a result of layoff. (See Fiscal Rule 2-9 located on the web at [www.colorado.gov/dpa/dfp/sco/FiscalRules/FR_Manual\(2009-0701\).htm](http://www.colorado.gov/dpa/dfp/sco/FiscalRules/FR_Manual(2009-0701).htm) for more information regarding the reimbursement of moving expenses.)

Every attempt is made to keep this technical assistance updated. For more detailed information, refer to Chapter 7 of the Personnel Board Rules or contact your legal counsel. Subsequent revisions to rule or law could cause conflicts in this information. In such a situation, the laws and rules are the official source upon which to base a ruling or interpretation. This document is a guide, not a contract or legal advice.

²¹ C.R.S. 24-50-134

SAMPLE LETTER

(Forty-five day notice to certified employee; retention offer not included.)

HAND DELIVERED [DELIVERED VIA CERTIFIED AND REGULAR MAIL]

[DATE]

[ADDRESS]

Dear [name of employee]:

The purpose of this letter is to advise you that your position as a [class title] is being abolished effective close of business on [effective date] due to [a lack of work] [a lack of funds] [reorganization]. This letter is your 45-day notice of position abolishment.

As a certified employee, you are entitled to an assessment to determine if there is a position within [name of department] [name of retention area] to which you have retention rights. Retention rights are offered in the following order:

- Vacant positions in the current certified class, then
- Occupied positions in the current certified class, then
- Vacant positions in a previously certified class with the same maximum pay rate, then
- Occupied positions in a previously certified class with the same maximum pay rate,
- The highest level demotion in a vacant position in a previously certified class, then
- The highest level demotion in an occupied position in a previously certified class, then
- The highest level demotion in a funded vacant position in a previously certified class series.

You have three working days from the date you receive this letter to notify [name and contact information of HR staff] whether you wish to have your retention rights determined. If you do not indicate in writing that you wish to have your retention rights determined within three working days of the date you receive this letter, you will be laid off effective close of business on [effective date] and your name will be placed on a [class title] reemployment list with [name of department] for one year. If you are reemployed by [name of department] in a position in your current class before the one-year period expires, your name will be removed from the reemployment list.

Per State Personnel Board Rule 7-21, employees whose positions have been eliminated in the course of a layoff have the right to appeal the action to the State Personnel Board. Should you choose to exercise this right, you or your representative must complete and sign the consolidated appeal form available on the web at <http://www.colorado.gov/cs/Satellite/DPA-SPB/SPB/1232721347216> and submit it to the State Personnel Board within ten calendar days from the date of your receipt of this letter. The address and fax number for the State Personnel Board are as follows:

State Personnel Board
633 17th St, Suite 1320
Denver, Colorado 80202-3604
Fax: 303 866-5038

The ten-day deadline and appeal procedures also apply to all charges of discrimination.

Please contact me at [contact information] if you have questions.

Sincerely,

[Appointing Authority]

cc: Human Resources Office

[If hand delivered the employee is required to acknowledge receipt by signature and date.]

SAMPLE LETTER

(Follow up notice with retention offer in current class or previously certified class with same maximum pay rate.)

HAND DELIVERED [DELIVERED VIA CERTIFIED AND REGULAR MAIL]

[DATE]

[ADDRESS]

Dear [name of employee]:

You were notified on [date] that your position is being abolished on [date] due to [a lack of work] [a lack of funds] [reorganization]. On [date] you indicated that you wished to have your retention rights determined. This letter is to notify you that there is a [vacant] [occupied] [class title of available position] position (position # _____) to which you have retention rights. A copy of the Position Description Questionnaire (PDQ) is enclosed for your reference. Your base pay will remain the same at \$_____ per month.

You have three working days from the date you receive this letter to notify [name and contact information of HR staff] in writing whether you wish to accept the above offer. If you do not accept the offer within three working days, you will be laid off effective close of business on [effective date] and your name will be placed on a [class title] reemployment list within [name of department] for a maximum of one year. If you are reemployed by [name of department] in a position in your current class before the one-year period expires, your name will be removed from the reemployment list.

Please contact me at [contact information] if you have questions.

Sincerely,

[Appointing Authority]

cc: Human Resources Office

[If hand delivered the employee is required to acknowledge receipt by signature and date.]

SAMPLE LETTER

(Follow up notice with retention offer that is a demotion.)

HAND DELIVERED [DELIVERED VIA CERTIFIED AND REGULAR MAIL]

[DATE]

[ADDRESS]

Dear [name of employee]:

You were notified on [date] that your position is being abolished on [date] due to [a lack of work] [a lack of funds] [reorganization]. On [date] you indicated that you wished to have your retention rights determined. This letter is to notify you that there is a [vacant] [occupied] [class title of available position] position (position # _____) to which you have retention rights. A copy of the Position Description Questionnaire (PDQ) is enclosed for your reference. Your base pay will [remain the same] [remain the same and you will be placed in saved pay status for a maximum of three years] [decrease to ____]. Because this retention offer represents a demotion,

You have three working days from the date you receive this letter to notify [name and contact information of HR staff] in writing whether you wish to accept the above offer. Because this retention offer represents a demotion, your name will be placed on a [class title] reemployment list whether or not you accept the offer. If you do not accept the offer within three working days, you will be laid off effective close of business on [effective date] and your name will be placed on a [class title] reemployment list within [name of department] for a maximum of one year. If you are reemployed by [name of department] in a position in your current class before the one-year period expires, your name will be removed from the reemployment list.

Per State Personnel Board Rule 7-21, employees who are downwardly allocated in the course of a layoff have the right to appeal the action to the State Personnel Board. Should you choose to exercise this right, you or your representative must complete and sign the consolidated appeal form available on the web at <http://www.colorado.gov/cs/Satellite/DPA-SPB/SPB/1232721347216> and submit it to the State Personnel Board within ten calendar days from the date of your receipt of this letter. The address and fax number for the State Personnel Board are as follows:

State Personnel Board
633 17th St, Suite 1320
Denver, Colorado 80202-3604
Fax: 303 866-5038

The ten-day deadline and appeal procedures also apply to all charges of discrimination.

Please contact me at [contact information] if you have questions.

Sincerely,

[Appointing Authority]

cc: Human Resources Office

[If hand delivered the employee is required to acknowledge receipt by signature and date.]

SAMPLE LETTER

(Follow-up notice when an employee declines a retention offer.)

HAND DELIVERED [DELIVERED VIA CERTIFIED AND REGULAR MAIL]

[DATE]

[ADDRESS]

Dear [name of employee]:

You were notified on [date] that your position is being abolished on [date] due to [a lack of work] [a lack of funds] [reorganization]. On [date] you indicated that you wished to have your retention rights determined, and on [date] you were notified that you had retention rights to a [vacant] [occupied] [class title of available position] position (position # ____). On [date], you declined accept the position.

As a result, effective close of business on [date], you will be laid off and your name will be placed on a [class title] reemployment list within [name of department] for a maximum of one year. If you are reemployed by [name of department] in a position in your current class before the one-year period expires, your name will be removed from the reemployment list.

Please contact [name] at [contact information for HR staff], in Human Resources to obtain information on PERA, COBRA, and unemployment benefits to which you may be entitled.

Please contact me at [contact information] if you have questions.

Sincerely,

[Appointing Authority]

cc: Human Resources Office

[If hand delivered, the employee is required to acknowledge receipt by signature and date.]

SAMPLE LETTER

(Notice to certified employee bumped from position & offered lower-level position.)

HAND DELIVERED VIA CERTIFIED AND REGULAR MAIL [DELIVERED VIA
CERTIFIED AND REGULAR MAIL]

[DATE]

[ADDRESS]

Dear [name of employee]:

The purpose of this letter is to advise you that you are being displaced from your position as a [class title] effective close of business on [effective date] by an employee who is exercising retention rights. This is your ten working days' notice of job abolishment and official notification of your retention rights.

There is a [vacant] [occupied] [class title of available position] position (position # _____) to which you have retention rights. A copy of the Position Description Questionnaire (PDQ) is enclosed for your reference. Your base pay will [remain the same] [remain the same and you will be placed in saved pay status for a maximum of three years] [decrease to _____].

You have three working days from the date you receive this letter to notify [name and contact information of HR staff] in writing whether you wish to accept the above offer. Because this retention offer represents a demotion, your name will be placed on a [class title] reemployment list within [name of department] for a maximum of one year. If you do not accept the offer within three working days, you will be laid off effective close of business on [effective date] and your name will be placed on a [class title] reemployment list within [name of department] for a maximum of one year. If you are reemployed by [name of department] in a position in your current class before the one-year period expires, your name will be removed from the reemployment list.

Per State Personnel Board Rule 7-21, employees who are downwardly allocated in the course of a layoff have the right to appeal the action to the State Personnel Board. Should you choose to exercise this right, you or your representative must complete and sign the consolidated appeal form available on the web at <http://www.colorado.gov/cs/Satellite/DPA-SPB/SPB/1232721347216> and submit it to the State Personnel Board within ten calendar days from the date of your receipt of this letter. The address and fax number for the State Personnel Board are as follows:

State Personnel Board
633 17th St, Suite 1320
Denver, Colorado 80202-3604
Fax: 303 866-5038

The ten-day deadline and appeal procedures also apply to all charges of discrimination.

Please contact me at [contact information] if you have questions.

Sincerely,

[Appointing Authority]

cc: Human Resources Office

[If hand delivered, the employee is required to acknowledge receipt by signature and date.]

SAMPLE LETTER
(Notice to probationary employee.)

HAND DELIVERED [DELIVERED VIA CERTIFIED AND REGULAR MAIL]

[DATE]

[ADDRESS]

Dear [name of employee]:

The purpose of this letter is to advise you that your position as a [class title] is being abolished effective close of business on [effective date] due to a [a lack of work] [a lack of funds] [reorganization]. This letter is your ten working days' notice of position abolishment. As a probationary employee, you do not have retention rights under the layoff rules. However, you are welcome to apply for other state positions for which you are qualified.

Per State Personnel Board Rule 7-21, employees whose positions have been eliminated in the course of a layoff have the right to appeal the action to the State Personnel Board. Should you choose to exercise this right, you or your representative must complete and sign the consolidated appeal form available on the web at <http://www.colorado.gov/cs/Satellite/DPA-SPB/SPB/1232721347216> and submit it to the State Personnel Board within ten calendar days from the date of your receipt of this letter. The address and fax number for the State Personnel Board are as follows:

State Personnel Board
633 17th St, Suite 1320
Denver, Colorado 80202-3604

Fax: 303 866-5038

The ten-day deadline and appeal procedures also apply to all charges of discrimination.

Please contact me at [contact information] if you have questions.

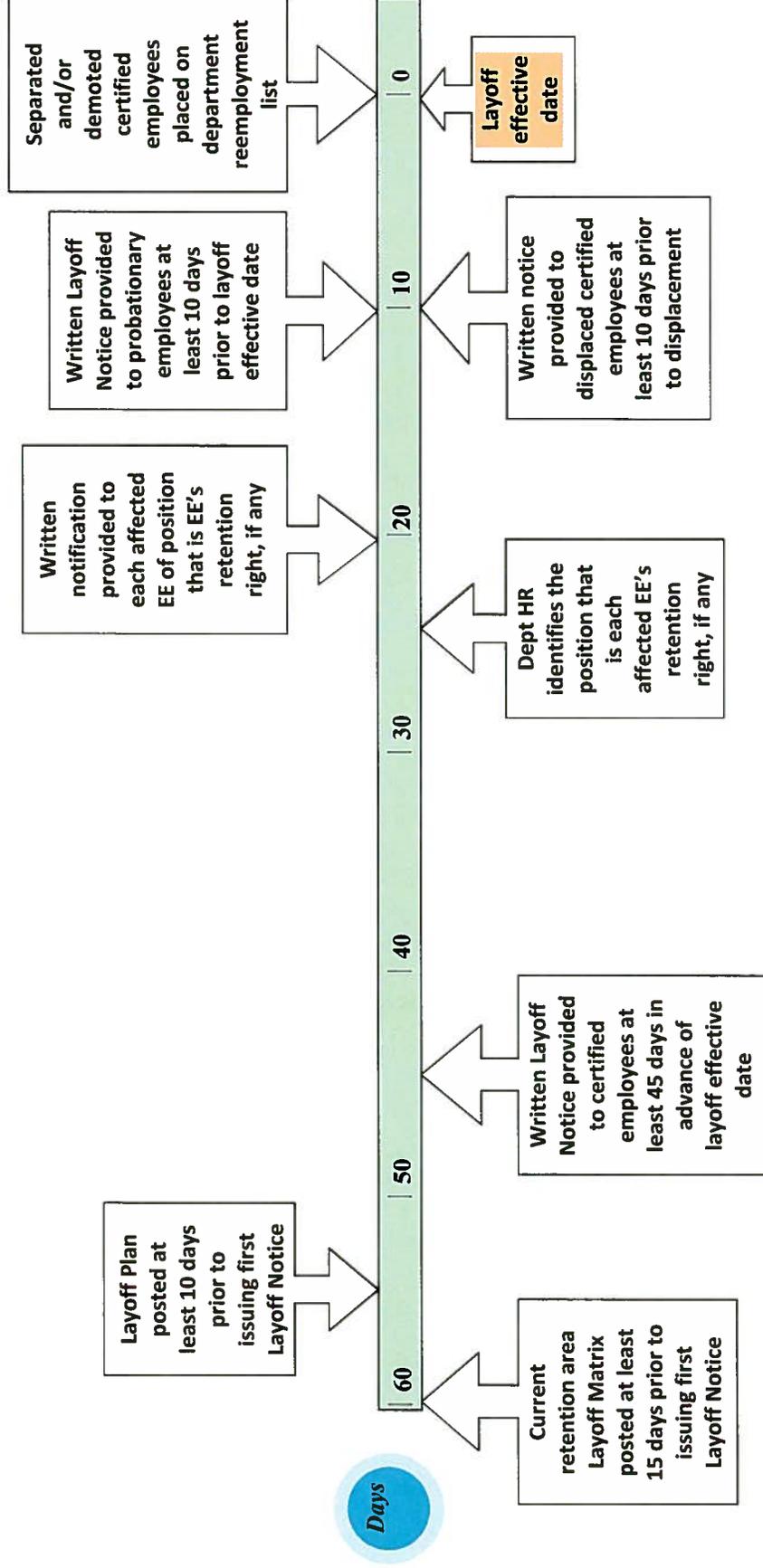
Sincerely,

[Appointing Authority]

cc: Human Resources Office

[If hand delivered, the employee is required to acknowledge receipt by signature and date.]

State of Colorado Layoff and Retention Rights Timeline*



*Note: this timeline reflects the minimum amount of time to process a layoff per Chapter 7 Personnel Rule. Departments may wish to increase the length of the timeline according to business necessity.

**TECHNICAL ASSISTANCE
DHR APPROVAL FOR PUBLICATION**

This signature page is required for new technical assistance or when major policy revisions are made resulting from changes in law, rule, directives, or official interpretation. As of March 1, 2009, new signatures are not required for non-substantive revisions resulting from correction of errors (e.g., typographical or grammatical), or updating factual information (e.g., minimum wage, statute or rule cites) or illustrative samples. Readers should always check the date on the first page to ensure they are using the most current version.

Technical Guide Topic: Layoff

Effective Date: October 28, 2011

Date of Superseded Version: N/A - NEW

Chief Human Resources Officer: 

Date: 10-28-11