

PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

WAYNE WILSON,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
Respondent.

Complainant petitions the State Personnel Board (Board) to grant a discretionary, evidentiary hearing to review the appointing authority's response to his grievance. The question presented for purposes of this preliminary recommendation is whether valid issues exist which merit a full evidentiary hearing. It is the recommendation of the undersigned administrative law judge that a hearing be **denied**.

SUMMARY

Complainant, a Client Care Aide (CCA) at the Colorado Mental Health Institute at Pueblo (CMHIP), Department of Human Services, filed a petition for hearing on November 26, 2011, arguing that the final grievance decision denying his request for saved pay was arbitrary and capricious and contrary to rule or law. Complainant requests saved pay in his new position for three years.

Respondent did not file an information sheet. Respondent did file a Motion to Dismiss and/or for Summary Judgment, which was granted in part on the issue of disability discrimination. However, the motion was denied on the issue of saved pay, as it did not address that claim.

UNCONTROVERTED FACTS

The following facts were either included in both parties' information sheets, were contained in exhibits that were not disputed by either party, or were not controverted by either party:

1. Complainant was formerly employed as a Licensed Psychiatric Technician at CMHIP. In September 2011, after an absence from work, Complainant was placed into the position of CCA at CMHIP.

2. Respondent views the CCA position as a reasonable accommodation of Complainant's disability. Complainant views the CCA position as an involuntary demotion and asserts Respondent never offered a reasonable accommodation or demonstrated an undue hardship posed by his work restriction. These issues will be addressed separately in the evidentiary hearing.

3. Complainant has been serving in the CCA position since September 6, 2011.

4. Complainant's appeal of the demotion is pending before the Board in a separate case, and the matter has been remanded to the ALJ for evidentiary hearing.

5. On September 21, 2011, Complainant filed a grievance with Respondent, stating the following:

- Complainant's CCA position is a demotion;
- Under Board Rule 3-7, "Saved pay applies to downward movements due to individual allocation, system maintenance studies, and the annual compensation survey to maintain an employee's current base pay when it falls above the new grade maximum. It may also apply when retention rights are exercised pursuant to the 'Separation' chapter. Base pay shall be moved to the maximum at the first available opportunity that does not cause a loss in the employee's pay. However, in no case will the employee's base pay remain above the grade maximum after three years from the action, even if it results in a loss in pay."
- Complainant requested that he be paid saved pay for three years in his new position.¹

6. The CCA position represents a \$100.00 per month pay reduction from Complainant's prior position.

7. On November 14, 2011, Beverly Fulton, Assistant Superintendent, CMHIP, denied Complainant's grievance. In her decision, she stated:

- Saved pay "is pay that is above the maximum pay grade for an individual's current classification";
- She had conferred with Human Resources (HR) about his request and had consulted the Department's ADA policy and the personnel rules;
- Reciting Rule 3-7 in its entirety, she concluded that a voluntary demotion, "even one offered as an ADA accommodation, is not included in this Rule";
- "Saved pay is authorized only in situations where an individual's job is reallocated through a PDQ review to a lower-paying class ('downward movements due to individual allocation'); layoffs ('when retention rights are exercised pursuant to the Separation chapter'); a lowering of the salary parameters for a class when the annual compensation survey recommends a decrease; and a decrease in the salary parameters for a class due to a system maintenance study";
- The practice at CMHIP is that an employee who voluntarily demotes takes at least a 5% base pay decrease unless (1) the employee's current salary is within

¹ Complainant also requested pay for September 20, 2011, when he asserts he was sent home by the Americans With Disabilities Act Coordinator. However, Respondent has demonstrated that he was paid for that entire day.

the pay range for the class of the new position and (2) the Executive Committee finds that the demotion serves an important business need of the hospital. Those situations are rare. In Complainant's case, a 5% reduction would put his new salary at \$3013, slightly less than Complainant's current pay rate. Since his previous pay rate exceeds the class maximum, the Executive Committee would not be able to lawfully grant his request to maintain his previous salary, even if the Executive Committee wished to do so.

8. Complainant timely appealed the adverse grievance decision to the Board.
9. Complainant timely filed an information sheet.

COMPLAINANT'S CONTENTIONS

As relief, Complainant requests that a hearing be granted. If the hearing is granted, Complainant offers to prove the following allegations at hearing:

1. Complainant has 24 years of experience as a Licensed Psychiatric Technician and most recently has been employed at CMHIP since 2001.
2. Complainant provided copies of the grievance, the grievance decision, the applicable State Personnel Board Rules governing saved pay, and the Voluntary Demotion Agreement form, as exhibits.

Legal Argument

3. Complainant notes that Board Rule 1-68 defines "Saved Pay Rate" as, "Temporary means of maintaining current base pay during certain situations that accommodate base pay amounts between the maximum of a pay grade and a statutory lid."
4. Complainant notes that in the final grievance decision, Ms. Fulton states that ADA coordinator Eileen Tanoue told Complainant, "if you do not accept the voluntary demotion into the client care aide position, a status meeting under Personnel Board Rule 5-10 would be held and you could be separated from service." Therefore, he argues, retention rights were exercised under the rules of separation. He also contends that this was an individual allocation, therefore meeting the definition of Saved Pay.

DISCUSSION

The Board may use its discretion to grant a hearing for actions that do not adversely affect a certified employee's current base pay, status, or tenure, and where the employee does not have a right to a hearing, appeal, or review by law or rule. Board Rule 8-46, 4 CCR 801. The Board's authority to review the grievance decision of an appointing authority is limited by state statute. Under C.R.S. § 24-50-123(3), "[t]he Board may grant the petition only when it appears that the decision of the appointing authority violates an employee's rights under the federal or state constitution, part 4 of article 34 of this title, article 50.5 of this title, or the grievance procedures adopted pursuant to subsection (1) of this section." *Id.* This statute limits the Board's review to matters presenting a constitutional issue, an alleged violation of Colorado's Anti-Discrimination or Whistleblower Acts, or an alleged violation of the Board's or agency's rules governing grievance procedures.

Complainant has not alleged a violation of the state or federal constitution, the state anti-discrimination or whistleblower acts, or the grievance procedures that govern state employees. He asserts that Respondent violated Board Rule 3-7, which governs decisions to grant saved pay to state employees under specific circumstances.

The grievance statute does not confer subject matter jurisdiction to the Board to review a grievance appeal concerning any rule unrelated to the grievance process, unless there is an accompanying allegation of a statutory or constitutional violation delineated in the statute. C.R.S. § 24-50-123(3). There is no such allegation made by Complainant in this appeal. Therefore, the Board lacks jurisdiction over Complainant's claim for saved pay.

RECOMMENDATION

For the foregoing reasons, it is the preliminary recommendation of the undersigned administrative law judge that Complainant's petition for hearing be **denied**.

Dated this 7th day
of March, 2012,
Denver, Colorado.



Mary S. McClatchey
Administrative Law Judge
State Personnel Board
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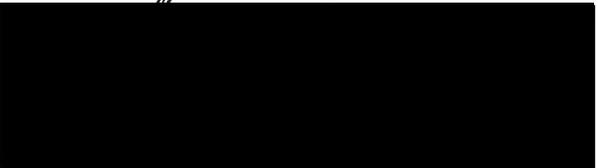
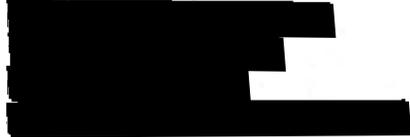
CERTIFICATE OF MAILING

This is to certify that on the 7th day of March, 2012, I electronically served true copies of the foregoing **PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Wayne Wilson



Stacy Worthington, A.A.G.



Andrea Woods