

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B046

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA L. BARRY,

Complainant,

vs.

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Respondent.

Hearing was held on November 4, December 16, 29 and 30, 1994, and February 10 and 17 and April 14, 1995 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Joyce K. Herr, Assistant Attorney General. Complainant appeared and was represented by Eva Camacho Woodard, Attorney at Law.

Complainant testified in her own behalf and called the following witnesses: Timothy Holeman, former environmental advisor to Governor Romer; Carl Kallansrud, former Administrative Officer, Rocky Flats Program; Kay Kishline, former Administrative Officer, Rocky Flats Program; Barbara Eberhart (Beavers), former Administrative Officer, Rocky Flats Program; Lee Thielen, Associate Director; Lesley Canges, Human Resources Director; and Jacqueline Hernandez Berardini, Director of Environmental Integration, Department of Public Health and Environment. Respondent's witnesses were Complainant; Patricia Nolan, M.D., Executive Director; Lesley Canges, Human Resources Director; and Thomas Looby, Director, Office of Environment, Department of Public Health and Environment. The witnesses were sequestered except for Complainant and Les Canges, Respondent's advisory witness.

The following Complainant's exhibits were admitted into evidence without objection: A through L, O, R, S, T, W through CC, HH, JJ through NN, QQ, TT, UU, VV, BBB, CCC, DDD, III, JJJ and KKK. Exhibits Z, XX, YY, ZZ and HHH were admitted over objection. Exhibits M and N were not admitted. Respondent's Exhibits 31, 32, 34 and 35 were admitted without objection. Exhibits 1 through 31¹ and 41 were not admitted. Notice was taken of State Personnel Board Case No. 912G038.

MATTER APPEALED

Complainant appeals a September 13, 1994 layoff notice, effective October 28, 1994.

ISSUES

1. Whether the procedures applicable to a layoff were followed correctly, and if not, whether this failure had a substantial adverse impact on Complainant's rights;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, Barbara Barry, began employment with the Colorado Department of Highways (now Department of Transportation) in 1973. In September 1979 she became the Director of Environment for the

¹ Two different exhibits were marked as "31".

Department of Highways. She served in that capacity until December 31, 1990. She was certified in the class of Management Group Profile 11.

2. The Rocky Flats Program Unit was created around August 1989 as the outgrowth of an "Agreement in Principle" (AIP), entered into by the Governor of Colorado and the Secretary of the Department of Energy (DOE) in June 1989. The AIP established the State's Rocky Flats Plant Oversight Program. Essentially, the AIP provided federal funds for the clean-up of the Rocky Flats nuclear weapons plant, the result of a 1989 "raid" on Rocky Flats by government agents. According to the AIP, the federal money was intended to support the Department of Health (now the Department of Public Health and Environment) in the oversight of Rocky Flats in the interest of public health and safety.

3. As the director of the Office of Environment, Tom Looby reports directly to the Executive Director of the Department of Public Health and Environment. The Rocky Flats Program is indirectly under his supervision, although when the program first began it was directly under his supervision. The AIP provided funds to increase the oversight and monitoring of the Rocky Flats facility, and out of that was formed the Rocky Flats Program Unit. Initially, the federal government provided a little more than two million dollars for the program. The federal funding now is at the level of over three million dollars annually. When the program was created, Looby had the ultimate authority as to how the funds would be used.

4. The program had begun under the supervision of temporary managers, with the Governor's office having an active role. There were three "acting" managers prior to 1991. After 1991, the Governor's office was to have less of a day-to-day role in operational activities and instead perform primarily a policy function. It was decided that a permanent program manager would be hired.

5. During October of 1990 Complainant was contacted by the Department of Health regarding the position of managing the Rocky Flats Program. She had meetings with Tom Looby and Tim Holeman, who was the governor's environmental advisor on Rocky Flats. Because of her background in environmental health issues, Complainant was, in effect, recruited by Looby to fill the position.

6. On January 1, 1991, Complainant transferred from the Department of Highways to the Department of Health at the level of Management Group Profile 10 to become the first permanent manager of the Rocky Flats Program Unit. As such, she reported directly to Tom Looby, who was her appointing authority.

7. When Complainant transferred to the Department of Health, she became a trial service employee. While it was Complainant's job to run the Rocky Flats Program Unit, consisting of a staff of from six to ten, Looby maintained an active role. Complainant and Looby did not see eye to eye on how the program should be run. For instance, Complainant objected to the concept of "tithing", whereby Looby felt that a certain percentage of the Rocky Flats Program Unit money should be assigned to his office. The concept of tithing is based upon an assessment of funds, rather than the needs of the agency. Complainant objected to Looby's request for \$80,000.00 of the federal money to support his staff because she felt that his staff was not contributing to the operation of the program. Looby, on the other hand, believed that the allocation was justified because members of his staff spent time on the Rocky Flats project. Complainant felt that Looby committed other financial improprieties, such as bypassing the Colorado Legislature to go directly to the federal managers with appropriations requests.

8. As time went on, Looby became dissatisfied with Complainant's performance. He felt that, among other things, she was spending

too much time out of the office. He heard complaints from some of her subordinates about the way she was running the program.

9. The Rocky Flats Program was set up as a "matrix management" organization where the individual divisions within the Department of Health would interact with each other through a "core" group of staff. Looby is an advocate of this management approach. Complainant disagreed with it, feeling that there were too many supervisors for people to report to. She felt that the matrix management concept undermined her control over her own staff. Complainant was not a division director. Most division directors are certified at the level of Management Profile 13.

10. By late February 1991, Complainant offered to return to the Department of Highways because of her sense that things were not going right at the Department of Health. Looby encouraged her to stay.

11. Complainant was also concerned about what she believed were inappropriate expenditures prior to her arrival. Some members of her staff were supportive of her efforts, others were not. Rumors began circulating within the agency that Complainant would be replaced. Friction between Complainant and Looby increased.

12. Complainant's basic concern was that Rocky Flats money was being used for purposes other than the Rocky Flats Program. Her concern was with the other divisions of the agency as well as the Office of Environment.

13. In April 1991, Looby hired Jacqueline Berardini as an assistant to him at the level of Management Group Profile 10. This was the level at which Complainant transferred from the Department of Highways. Berardini's function was to provide policy support and advice on a variety of issues. Berardini brought environmental expertise which she had gained through litigation as an attorney

for the Attorney General's Office. As Looby became more dissatisfied with Complainant's performance, he began to rely on Berardini for advice and counsel with respect to the Rocky Flats Program.

14. During the summer of 1991, Looby began to perceive that he and Berardini were spending an excessive amount of time on the Rocky Flats Program. He felt that he was having to do extensive review of financial documents which were the responsibility of the program manager. He began to hear complaints, through Berardini, from employees who were disgruntled over Complainant's management style.

He also felt that Complainant was lax in devising performance plans for employees and in conducting performance evaluations in a timely manner.

15. In July 1991, Looby conducted a performance appraisal (PACE) for Complainant with an overall performance rating of Needs Improvement. The appraisal contained notes from Berardini. Berardini sat in on the PACE meeting, which lasted for three and one-half hours. Complainant resented this and felt that Looby was trying to replace her with Berardini. Berardini was never Complainant's supervisor.

16. On August 13, 1991, Complainant was issued the Needs Improvement PACE together with a corrective action. She filed a grievance with the State Personnel Board. (Case No. 912G038.)

17. Because of his dissatisfaction with Complainant's job performance, Looby refused to certify her as a Management Group Profile 11. This was important to Complainant because, as a trial service employee, she could not return to the Department of Highways where there was no longer a position for her at that level. She had transferred to the Department of Health with the understanding that the position would be reclassified to a Management Group Profile 11, if not 12.

18. Looby and Complainant had a number of discussions pertaining to ways in which to resolve the disputes between them. Eventually, an "Assignment Agreement" under the Intergovernmental Personnel Act (IPA) was negotiated with the Department of Energy whereby Complainant would go to work for DOE for a period of two years but would remain an employee of the Department of Health.

19. Patricia Nolan became the Executive Director of the Department of Health on February 6, 1992. She served in that capacity until September 1994 when she resigned effective December 31, 1994. She signed the IPA for the Department of Health, although Looby had done most of the negotiating on behalf of the agency. Nolan considered the Assignment Agreement to be a critical factor in settling the issues raised by Complainant. It became her understanding that if the assignment expired before Complainant had attained 20 years of state service then she would return to the Department of Health; otherwise she would not, and the Department would assist her in finding other employment.

20. The Assignment Agreement was executed by Nolan and a DOE official on July 1, 1992, the assignment to extend from July 1, 1992 to July 1, 1994. (Complainant's Exhibit E.)

21. The purpose of an IPA assignment is to allow an employee to remain a permanent state employee while serving temporarily with another governmental agency. It is not normally the intent of such an assignment that the employee not return to state government. The Department of Health has effected IPA assignments for other employees.

22. In addition to the IPA Assignment Agreement, Looby and Complainant entered into a written "Agreement", signed by Looby in the capacity of Director of the Office of Environment of the Colorado Department of Health, and Complainant on July 2, 1992, the

day after the execution of the IPA Assignment Agreement. This Agreement is at the center of the controversy herein, and provides in full:

AGREEMENT

Whereas, the undersigned parties wish to resolve several disputes; and

Whereas, the parties also want to establish a mutually beneficial role for Barbara Barry related to Rocky Flats;

Therefore, the parties agree as follows:

1. Tom Looby will execute a performance evaluation with a satisfactory rating for calendar year 1991 and through the effective date of this agreement.
2. Barb Barry will simultaneously and formally withdraw any outstanding grievances against her supervisor or the Department.
3. The parties to the agreement will both enter into an Intergovernmental Personnel Agreement (IPA) with the Department of Energy (DOE) for the assignment of Barb Barry to the DOE for a period of two years, which may be extended by mutual consent. The parties interpret Part 15 of the IPA to allow the implementation of the specific provisions of paragraphs 4 and 5, below. The parties intend that the specific terms of this agreement will supplement the IPA and that this agreement, particularly paragraphs 4 and 5, will be applied notwithstanding the general language of Part 15.
4. If for reasons beyond the control of the parties to this agreement DOE chooses to end the IPA prior to the date of Barb Barry's 20 year service anniversary date with the State of Colorado, the Department of Health will allow Barb Barry to return to the department in a position of equal or higher grade, status, and pay, or if no such position is available, will provide save pay protection until Ms. Barry's 20 year service anniversary date.
5. On or after the date of Ms. Barry's 20 year service anniversary the Department of Health is not obligated to provide any continuing position to Ms. Barry within the Health Department, but will support and assist Ms. Barry in effecting transfer to any other position appropriate

to her rank and experience which is available within the State of Colorado system.

6. The parties to this agreement may choose to extend the initial term of the IPA if DOE is amenable to do so at the time it expires.

This agreement is approved and accepted by the undersigned parties and is effective on the date noted below.

(Complainant's Exhibit F.)

23. Part 15 of the Assignment Agreement provides that, "[a]t the completion of the assignment, the participating employee will be returned to the position he or she occupied at the time this agreement was entered into or a position of like seniority, status and pay." (Exhibit E, p. 4.) Because of this Part 15, paragraph 3 of the Agreement was inserted to provide that Part 15 would be interpreted to allow the implementation of paragraphs 4 and 5 of the Agreement, that the Agreement supplemented the Assignment Agreement and that paragraphs 4 and 5 would be applied, notwithstanding the language of Part 15.

24. After the Agreement was signed, Looby destroyed the Needs Improvement PACE he had previously completed and signed the certification of Complainant at Management Group Profile 11. (Complainant's Exhibit G.) The corrective action was withdrawn. The certification and Agreement were signed on the same day. Complainant subsequently withdrew her appeal to the State Personnel Board and that case, 912G038, was then dismissed with prejudice.

25. Complainant testified that she felt coerced to sign the Agreement in order to get certified. She did not intend for it to be a resignation from the Department of Health. She testified that it was Looby who suggested the language saying that she would return to the Department of Health if the IPA was terminated prior to her 20-year service anniversary date with the State of Colorado.

Looby testified that the provision was very important to Complainant, and that there was a very clear understanding that if the IPA extended past her 20-year anniversary date, then she would not return to the Department of Health, pursuant to paragraph 5 of the Agreement.

26. Both Nolan and Looby construed the Agreement to resolve all of the disputes with Complainant. They viewed it as part of the IPA assignment. Complainant testified that she signed the Agreement only to get certified and that, for her, it had no further meaning.

27. In a letter to a PERA representative, Les Canges, Personnel Administrator, explained that Complainant would continue to be a full-time employee of the State of Colorado while she was on the federal assignment. She would continue to be paid a state salary at the state classified title of Management Group Profile 11. (Complainant's Exhibit D.)

28. After Complainant went on the federal assignment, Jackie Berardini served as the Rocky Flats Program Unit manager at the level of Management Group Profile 10. The position held by Complainant was reallocated downward to Program Administrator. Berardini took over some of Complainant's duties. Berardini then was given the title of Director of Environmental Integration Group. In June 1994 that position was reallocated upward to the level of Management Group Profile 12. The process to upgrade the position took about two years.

29. Complainant had no contact with Tom Looby, Patricia Nolan or Les Canges during the term of the IPA assignment. On June 16, 1994, Complainant made an appointment with Nolan to discuss her state job. Complainant indicated that she wanted to return to the Department of Health. Nolan stated that it was her understanding that Complainant had resigned. At this time Complainant was working as a consultant at the Los Alamos National Laboratories in

Los Alamos, New Mexico. Nolan agreed to an extension of the IPA assignment so Complainant could continue working on that project but stated that it could not be done through a subcontractor of DOE; Complainant was not working directly for DOE on the Los Alamos project.

30. By letter dated June 20, 1994, four days following the meeting between Complainant and Nolan, Les Canges advised Complainant that pursuant to the July 2, 1992 Agreement with Looby, she was deemed to have resigned from the Department of Health on the day that her services were no longer required by DOE because she had reached her 20-year service anniversary date and the Department was consequently not obligated to provide a continuing position for her. (Complainant's Exhibit H.) Complainant contends that the Canges letter was the opposite of what she had been told by Nolan.

31. Complainant retained the services of an attorney, who responded to the Canges letter on June 24, 1994. In this response, the attorney indicated that Complainant did not interpret the July 2, 1992 Agreement as a resignation but agreed that the Department of Health was not obligated to provide a continuing position for her and would rather support and assist her in transferring to another state agency. (Complainant's Exhibit I.)

32. The IPA assignment expired on June 30, 1994. By that time Complainant had attained 20 years of state service.

33. There were various communications, written and oral, between Complainant and the Department of Health during the summer of 1994. By letter dated July 28, 1994, apparently in response to a proposal made by Complainant through her attorney, Nolan granted Complainant administrative leave with pay for July 18 and 19, days she was in the office, and leave without pay for the period July 1 through July 15 when she was working in Los Alamos. (Complainant's Exhibit J.)

34. Complainant continued working on the Los Alamos project while using personal or annual leave from the Department of Health. By letter dated August 26, 1994, from the Assistant Attorney General on behalf of the Department to Complainant's attorney, Complainant was advised that because certain leave information had not been provided to the agency Nolan would not extend the use of annual leave past September 1, 1994. Complainant was advised that the Department was "prepared to initiate a layoff process." (Complainant's Exhibit K.)

35. Following receipt of the August 26 letter, Complainant called Nolan on September 9 requesting a personal conference. The meeting was set for Tuesday, September 13.

36. By computer memo dated September 3, 1994, Canges advised Nolan that Complainant may have certain retention rights in a layoff. (Complainant's Exhibit O.)

37. At the September 13 meeting, in addition to Complainant and Nolan, Assistant Attorney General Joyce Herr and Les Canges were present. Canges delivered the layoff letter to her at that time, advising Complainant that the Department of Public Health and Environment had no vacant positions at the level of Management Group Profile 11 and, therefore, she would be terminated from her position effective 5:00 p.m. on Monday, October 28, 1994. The letter advised Complainant that the layoff was due to lack of work following the completion of her assignment with the Department of Energy. The letter advised Complainant that per the July 2, 1992 Agreement with Looby, Canges would assist Complainant in identifying state classified jobs outside of the Department of Health and would ask that the Department provide a phone mailbox and an address for her to receive messages and mail in an effort to find another state position. The letter advised Complainant that she could be placed on the departmental reemployment list for Management Group Profile 11 but did not address retention rights.

(Complainant's Exhibit A.)

38. Nolan contacted the Executive Director of the Department of Transportation concerning a possible position for Complainant and was advised that there was none available. Complainant made her own contacts in this regard. According to Complainant, the position that she had transferred from no longer existed. Complainant did not avail herself of the opportunity to use the voice mail and agency address as offered by the Department.

39. Canges conveyed Complainant's final paycheck via letter dated October 28, 1994, in which he advised Complainant that the July 2, 1992 Agreement with Looby released the Department from the obligation of offering her retention rights. Canges stated that the State Personnel Rules precluded retention rights to another state agency. Canges included with this letter a list of positions coded vacant within the state system. (Complainant's Exhibit QQ.) By that time, Complainant was no longer a state employee and could not transfer as such.

40. In drafting the July 2, 1992 Agreement in April, Looby had included a clause whereby Complainant would waive retention rights. However, Complainant objected to this clause and it was taken out and not included in the final version. Complainant had indicated her desire to return to state government after completing the IPA assignment, but with another agency, and she did not want to waive any retention rights she might have. Looby considers the September 3, 1994 memo by Les Canges (Exhibit O) to be a mistaken interpretation of the Agreement. The clear intent of the Agreement, according to Looby, was that Complainant would not return to the Department of Health under any circumstances. While Complainant disputes it, Looby contends that the July 2, 1992 Agreement was mutually negotiated in good faith. It was Looby's intent to eventually assist in effecting a transfer for Complainant from the Department of Health to another agency, but he expected

Complainant to initially find the position on her own.

41. Nolan testified that the layoff notice could have been issued prior to the completion of the IPA assignment on June 30, 1994, but she understood that Complainant had resigned and that a layoff would consequently not be necessary. Les Canges interpreted the Agreement first as a retirement, then as a resignation, then as a layoff for lack of work. During the term of the IPA assignment, Complainant's position, number 2110, continued as a departmental full-time equivalent (FTE) position. Canges determined that the Agreement obviated the need for a Rule R8-3-3 meeting.

42. Complainant contends that Jackie Berardini would be the person most affected if she exercised retention rights, and that she was alleged to be a "poor performer" in order to prevent her from bumping Berardini. Complainant told Nolan at some point that she did not want to return to the Department of Health, but that she wanted assistance in transitioning to another position with a different agency.

43. The budget request submitted by the Department of Health for fiscal year 1992/93 did not include Complainant's position. As a classified employee, Complainant's position should have been included in that document. (Complainant's Exhibits HHH and KKK.) Except for the possibility of clerical error or a subsequent correction, no explanation was offered at hearing for the omission of Complainant's position from the budget request.

DISCUSSION

In this layoff proceeding, unlike in a disciplinary proceeding, Complainant bears the burden to prove by a preponderance of the evidence that Respondent's action was arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B). Cf. Department of Institutions v. Kinchen, 886 P.2d 700

(Colo. 1994). The only permissible reasons for a layoff are lack of funds, lack of work, or reorganization. Rule R9-3-1, 4 Code Colo. Reg. 801-1.

It is Complainant's contention that the layoff was procedurally defective, was not done for lack of work and was a pretext for disciplinary action. Complainant contends that the July 2, 1992 Agreement is invalid because its terms are ambiguous and it was signed under duress and coercion, the Agreement is preempted by the Intergovernmental Personnel Act which provides that the employee is to return to her original position or a position of like seniority, status and pay, that the Agreement deprives Complainant of a protected property interest in her employment, and that Thomas Looby lacked the requisite authority to bind either the State of Colorado or Complainant. Complainant argues in the alternative that Respondent breached the Agreement by failing to provide support and assistance to Complainant in effecting a transfer to another appropriate position. Complainant further contends that Respondent's action was arbitrary, capricious or contrary to rule or law because she was not properly advised of her retention or reemployment rights, and because she was forced to use annual leave and administrative leave when the agency failed to assist her in transferring to another agency or in otherwise finding employment. She also contends that she was improperly denied a Rule R8-3-3 meeting with respect to the layoff. This was a bad faith disciplinary termination, according to Complainant, and not a bona fide layoff.

It is Respondent's contention that the Agreement between Complainant and Looby should be given full force and effect. Respondent argues that Complainant signed the agreement and acted as if she believed it to be enforceable. Looby, not the executive director, was Complainant's appointing authority. Respondent contends that Complainant waived certain rights when she entered into the Agreement. Respondent points out that Complainant

expected the Department of Health to help her in transitioning to a new position, and that obligation stems from the Agreement. Respondent asserts that the Department fulfilled its obligation by offering Complainant the use of a telephone, voice mail and address, by the list of jobs provided by Les Canges, and by Dr. Nolan contacting the executive director of the Department of Transportation in an effort to effect a transfer for Complainant. The Agreement, in Respondent's view, disposed of the agency's obligation to hold a position for Complainant upon the completion of the IPA assignment because by that time she had reached her 20 years of state service.

Respondent concedes that disciplinary action was not appropriate in this instance and asserts that the only way the Agreement could be enforced was through the layoff process. Respondent contends that the layoff was appropriate because a reorganization within the Rocky Flats Program eliminated the position previously held by Complainant. Consequently, Respondent argues, Complainant's job no longer exists.

Complainant presented an abundance of evidence purporting to establish that she was a good employee, that Looby was wrong and that Looby was responsible for various financial improprieties with respect to the Rocky Flats Program budget. She sought to prove that Looby wanted to get rid of her in order to replace her with Jackie Berardini. Yet that misses the point. It is undisputed that Looby and others within the Department of Health were unhappy, rightly or wrongly, with Complainant's performance and wanted her to leave the Department and not return. Complainant, herself, testified to her belief at the time that it would be better for her to leave the Department of Health. While there were insufficient grounds for a disciplinary termination, there was the possibility of Complainant being reverted if she were not certified upon the completion of her trial service period. The agency instituted the layoff process because, upon being informed that Complainant

intended to return to her position with the Department of Health, the layoff procedures became the way to give force and effect to the Agreement. Nolan and Looby both testified that the layoff was intended to enforce the July 2 Agreement, which they thought had resolved the issues regarding Complainant's employment.

The instant proceeding was brought about because the agency did not expect Complainant to return. There was no anticipation on anybody's part that she would come back after the completion of the IPA assignment. Complainant had not at any time indicated a desire to return to the Department of Health. She knew that the Agreement would be interpreted to mean that the Department would not have an obligation to hold a position for her provided she reached her 20-year service anniversary date. By her own testimony, she wanted to transfer to another agency. Then, a couple of weeks before the completion of the IPA assignment, she called the executive director inquiring about her job. Her testimony that the Agreement meant nothing to her when she signed it, except that she would get certified, is a demonstration of bad faith on her part. Looby had reason to believe that Complainant intended to comply with the terms of the Agreement. He had no reason to know that she was signing it even though she did not believe that it was a legal document which would be binding upon her. Looby, on behalf of the Department, would never have executed the Agreement in that light.

The parties were plainly Complainant and the Department of Health, not Complainant and Tom Looby, who acted as an agent for the agency. The clear language of the document is that the parties viewed it as a supplement to the IPA Assignment Agreement. Complainant could not have reasonably concluded that there would be a job waiting for her at the Department of Health; she knew the intent of the agency. It appears from the record that her wish was to accept the provisions of the Agreement that benefitted her and disregard the rest.

Complainant was not coerced or forced to enter into the Agreement.

She made a choice, the alternative being to continue down the road of her grievance appeal towards a resolution of the issues. She chose to withdraw the grievance in acceptance of the terms of the Agreement. Complainant presented her case largely as a litigation of the previously dismissed grievance, the merits of which are not decided here.

In her legal argument, Complainant focused on the irregularities of the layoff, and there were some. There was not actually a reorganization that resulted in a lack of work. Any reorganization there was did not comport with the requirements of Rule R9-3-1, 4 Code Colo. Reg. 801-1. In fact, reorganization as a basis for the layoff was an afterthought. In the layoff process, Complainant was not afforded the opportunity to exercise retention rights.²

This is a situation where the agency never intended to effect a layoff in the first place. It was done as a means to enforce the Agreement. The agency's actions were consistent with an intent to implement the Agreement. Retention rights were not offered specifically because of the clause in the Agreement providing that the agency did not have an obligation to provide a continuing position, not because the agency thought it could "get away" with this denial of an employee's rights.

Respondent's mistake was to treat this as a layoff rather than

² Complainant also asserts that she was denied procedural due process because she was not given a Rule R8-3-3 meeting. It is found that the meeting of September 13, 1994 and the prior communications between Complainant and the agency satisfy the minimal due process standard of University of Southern Colorado v. State Personnel Board, 759 P.2d 865, 867 (Colo. App. 1988.)

relying solely on the enforcement of the Agreement, which would have placed the legal validity of the Agreement directly before the Board through Complainant's certain appeal. The agency could have terminated Complainant's employment in reliance on the Agreement, or through a layoff. It chose layoff even though, absent the Agreement, a layoff could not be justified. Nevertheless, keeping Complainant on the payroll from June 30 through October 28, 1994, after the completion of the IPA assignment, inured to the benefit of the employee rather than the agency.

The existence of the Agreement mitigates the improprieties of the layoff. At the very least, the Agreement reflects the intent of the parties. If the layoff had occurred in lieu of the IPA assignment and without the Agreement, a different story would be told. This is the context in which Complainant would have this case decided. But the administrative law judge cannot ignore the effect that the Agreement had on Respondent's actions.

Complainant requests various forms of relief, as follows:

- a) that the Department of Health provide an FTE allotment and then loan Complainant to another agency;
- b) or, front pay;
- c) or, reinstatement to the position currently held by Jacqueline Berardini or pay Complainant a full salary until an equivalent position with another state agency is found;
- d) or, as a last resort, that Complainant be reinstated to her certified state position as a Management Group Profile 11;
- e) reimbursement for various out of pocket expenses, sick, annual and administrative leave used after completion of the federal assignment, and costs and attorney fees.

The normal remedy for a sham layoff is reinstatement with back pay and service benefits. Given the particular circumstances of this case, however, permanent reinstatement will not be ordered. At the

same time, an improper layoff will not be condoned.

An award of attorney fees and costs under § 24-50-125.5, C.R.S. of the State Personnel System Act is not warranted.

CONCLUSIONS OF LAW

1. The procedures applicable to a layoff were not followed correctly, but the adverse impact on Complainant's rights was mitigated by the Agreement.
2. Respondent's action was arbitrary, capricious or contrary to rule or law to the extent that modification, but not reversal, is required.
3. Neither party is entitled to an award of attorney fees and costs.

ORDER

Complainant shall be reinstated to her position as a Management Group Profile 11 with full back pay and benefits, less any substitute income or unemployment compensation benefits, for the period of October 28, 1994 through and including the date of this decision only. Respondent's action is affirmed as thus modified.

DATED this ____ day of
May, 1995, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of May, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Eva Camacho Woodard
Attorney at Law
200 Union Boulevard
Union Plaza, Suite 306
Lakewood, CO 80228

and in the interagency mail, addressed as follows:

Joyce K. Herr
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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 and advance the cost therefor. 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 - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. The estimated cost to prepare the record on appeal in this case with a transcript is \$3,879.50. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment 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. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing

Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 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 Code of Colo. Reg. 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 Code of Colo. Reg. 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.