STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B138

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOROTHY M. FOLLETT,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
STATE BOARD OF AGRICULTURE,
COLORADO STATE UNIVERSITY,

Respondent.

This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on July 28, 1995. Respondent was represented by Assistant Attorneys General William Thro and Hollie Stevenson. Complainant appeared and represented herself.

Respondent's sole witness was William B. Liley, Jr., Director of Human Resource Services, Colorado State University. Complainant testified in her own behalf.

Respondent's Exhibit 1 and Complainant's Exhibits D and F were stipulated into evidence. Exhibit G was admitted without objection. Exhibits B and C were offered but not admitted. Exhibit E was withdrawn upon the admission of Exhibit G.

MATTER APPEALED

Complainant timely appealed an agency decision to not fully compensate her for a four-year underpayment of salary. For the

reasons set forth below, respondent's action is reversed.

ISSUE

Whether respondent's action was arbitrary, capricious or contrary to rule or law.

PRELIMINARY MATTERS

On June 21, 1995, respondent filed a motion for summary judgment, arguing that a state agency's liability for underpayment of salary is limited to a two-year period as a matter of law. The motion was denied on July 19.

At hearing, complainant alleged for the first time that she had been wrongfully denied sick and annual leave for the past four years, stating that this information had come to her the previous day. Having received no prior notice, respondent objected to complainant's raising and litigating a new issue in this proceeding. Respondent's objection was sustained.[1]

STIPULATION OF FACTS

The parties stipulated to the following facts:

1. Complainant has been employed by the respondent Colorado State University, State Board of Agriculture as an Administrative Assistant II on a .75 full-time equivalent (FTE) basis since July 1, 1991.

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[1] Respondent is encouraged to resolve this matter on a factual basis. As a permanent classified employee, complainant is entitled to sick and annual leave and, if she was wrongfully denied such benefits, respondent should take the appropriate action.

2. For the period from July 1, 1991 to March 9, 1995, complainant was paid as a .65 FTE even though she was working the hours of a .75 FTE employee.

3. On March 9, 1995, respondent discovered that it had underpaid the complainant and advised her of that fact.

4. Respondent paid to complainant an amount equal to the underpayment for the period from March 9, 1993 to March 9, 1995.

5. Respondent has declined to compensate complainant for the underpayment of salary for the period from July 1, 1991 to March 8, 1993.

FINDINGS OF FACT

1. Complainant is employed as the assistant ticket manager in the athletic department. She works full-time during the nine months of the academic year and does not work during the three summer months. She receives twelve monthly paychecks.

2. According to William Liley, the complainant was "misidentified" as a twelve-month part-time employee. The opportunity for an employee to have a nine-month salary distributed over a twelve-month period is normally available only to faculty members, and only upon request. Other nine-month employees, such as food service and dormitory workers, receive nine monthly paychecks and are placed in leave without pay status during the summer months. There is no policy that provides for an employee in complainant's position to be paid over a twelve-month period.

3. Complainant's position was brought into the classified system

in July 1991. She was the incumbent, having served in the position as a non-classified employee. She did not request a twelve-month salary distribution but was told by her supervisor that this would be the arrangement. She was told the total amount she would be paid but was not advised of her grade and step. She received various pay increases during the ensuing four years but did not necessarily know the nature of the increases. Because the classification process took place during the summer, when she did not work, complainant did not receive the normal orientation for classified employees.

4. As a result of certain library employees having been paid less than their full salary for an undetermined period of time, an agency policy was adopted in December 1994 to provide that employees who had been underpaid would be fully compensated only for two years from the date of the discovery of the error. The single written expression of this policy is found in the minutes of the meeting in which the policy was approved:

> 2. Library Shift Differential. The University recently discovered a technical error in how shift differentials were being applied to some library employees. This technical error resulted in some staff receiving only a portion (as opposed to all) of their shift at a higher rate. It is not known how long this technical error has impacted the library employees. **It was agreed we needed to move forward immediately to correct this error, and that we would go back up to two (2) years for employees to provide them payment for this error**. Joan Chambers and Bill Liley will work together, and with legal counsel as appropriate, to fully develop a plan to correct this error.

Complainant's Exhibit D (emphasis in original).

5. Liley testified that the two-year limitation was derived from the state fiscal rule regarding overpayments, the two-year period

for correcting errors established by the Fair Labor Standards Act, the Colorado wage claims statute affecting private employers, and the general two-year statute of limitations for claims against the state.

DISCUSSION

In an appeal of an agency administrative determination, unlike a disciplinary proceeding, the complainant bears the burden to prove by preponderant evidence that the 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).

Complainant's argument is simple: She is entitled to her full salary for the time that she worked. She asks for nothing more.

Respondent first argues, as it did in its motion for summary judgment, that there is a two-year statute of limitations which precludes recovery for an underpayment of salary for a period of more than two years. Respondent relies on the following three statutes:

a) § 8-4-126, C.R.S. (1986 Repl. Vol. 3B and 1994 Cum. Supp.) providing that wage claims must be brought within two years "after the cause of action accrues and not after that time." This wage claims statute applies to the private, not the public sector, and the administrative law judge will not usurp the legislative function of extending the coverage of the act. Nevertheless, it is found that complainant initiated her appeal encompassing the four years of underpayment within two years of the date upon which

she knew or reasonably should have known that she had been wronged. The underpayments commenced with the first paycheck of her classified employment and continued uninterrupted thereafter. There was never a significant decrease in her income, or some other indicator, which could be reasonably expected to make her aware of the underpayments or to put her on notice of the accrual of a cause of action. Her pay stubs included several calculations, and she reasonably relied upon the employer for their accuracy.

b) 29 U.S.C. § 255 et. seq. (1994), the Fair Labor Standards Act (FLSA) establishing a two-year statute of limitations on claims for "unpaid minimum wages, unpaid overtime compensation, or liquidated damages". This judge cannot conclude that the FLSA prohibits this complainant from being rightfully compensated. And, as stated above, it is found that the complainant filed her appeal within the statutory period.

c) § 13-80-102(1)(f), C.R.S. (1987 Repl. Vol. 6A and 1994 Cum. Supp.) imposing a two-year statute of limitations on bringing actions against a state entity. Respondent erroneously applies this statute by characterizing complainant's appeal as a typical claim for monetary damages, which it is not. It concerns a matter within the jurisdiction of the State Personnel Board and was appealed to the Board in a timely manner.

In the absence of a two-year statutory limitation on recovery for salary underpayments, respondent submits that its policy on underpayments is rationally based and represents sound financial management. Part of the rationale stems from the state fiscal rule on overpayments, which sets employee liability for repayment of a salary overpayment at a maximum period of two years from the

date the error occurred and the overpayments began.[2] Yet an analogy fails. The most obvious difference between the rule and the policy is the difference between an employee who receives a benefit to which she can claim no legal entitlement and one who has a right to be paid the agreed upon salary for the time worked. In one case the employer is deserving, in the other the employee. Additionally, the state fiscal rule is not written in the vein of sound financial management. Rather, the rule evinces a recognition that an employee faced with the repayment of previously undetected salary overpayments should not be caused to suffer an undue hardship as a result. Public policy favors the protection of employees who have done no wrong in relying upon the representations of the employer. Unlike respondent's underpayment

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[2] The state fiscal rule referred to by witness Liley was not identified or proffered as evidence. State Fiscal Rule 2.31, 1 Code Colo. Reg. 101-2, provides in full:

> Through error, a State employee may be paid more than is due him. When the error is detected, provisions must be made for the repayment of the overpayment.
>
> If the overpayment is nominal, it shall all be deducted from the employee's next pay check. However, in some cases the overpayment may be significant and require a repayment schedule extending over a period of time. The department executive director will establish a repayment schedule based on the particular facts involved in each case. The objective is to recover the overpayments as quickly as possible while taking into account the creation of an undue hardship on the employee. Repayment schedules extending more than six months must be approved by the State Controller. An employee's maximum liability for repayment, should an error go undetected for an extended period of time, shall be for an amount overpaid for two years from the date the error occurred and the overpayments began.

See Cordova v. Department of Health, Case No. 94B150 (Thompson, Initial Decision, Sept. 1994).

policy, the overpayment policy reflected in the state fiscal rule is designed to ease the burden that is placed on the employee by an agency mistake. It is not intended wholly for the benefit of the employer.

Respondent contends that complainant should have known that she was being paid at a .65 instead of .75 FTE rate and now seeks to charge complainant with the responsibility of bringing the error to the attention of the agency long before four years had elapsed. Complainant counters that she did not have all of the information necessary to verify respondent's calculations, and that she saw no reason to do so; she trusted people to do their jobs. Respondent failed in an attempt to show that complainant was made aware of her correct salary through the issuance of the State Classified Personnel Handbook (Respondent's Exhibit 1) or the Stateline newspaper.

There is no law or public policy to account for the denial of the duly earned salary, or any portion thereof, of a state classified employee. Public policy does not condone such action even if the action represents sound financial management, as respondent asserts. A similar economic argument was heard in support of slavery. That concept was laid to rest in 1865.[3] The present complainant did nothing to cause this problem for herself and is entitled to be paid in full for the work she performed.

In addition to the foregoing, it is found that respondent's underpayment policy violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

[3] Amendment XIII of the Constitution of the United States provides: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Neither party requested an award of attorney's fees.

CONCLUSIONS OF LAW

Respondent's action was arbitrary, capricious and contrary to law.

ORDER

Respondent shall pay to complainant the balance owed as the result of salary underpayments, with interest accruing on that amount at the statutory rate from the date that payment was intentionally denied by respondent.

DATED this _____ day of August, 1995, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of August, 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:

Dorothy M. Follett
1824 Busch Court
Fort Collins, CO 80525

and in the interagency mail, addressed as follows:

William E. Thro
Assistant Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, CO 80203

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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 $257.00. 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.