
INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STEVEN KINGCADE,

Complainant,

vs.

DEPARTMENT OF MILITARY AFFAIRS,

Respondent.

The hearing in this matter was held on September 30, 1997, in Denver before Administrative Law Judge Margot W. Jones. Complainant, Steven Kingcade, was present at the hearing and represented by James Kreutz, Attorney at Law. Respondent appeared at hearing through Maurice Knaizer, Assistant Attorney General

Complainant testified in his own behalf and called no other witnesses to testify at hearing. Respondent called Edrie Womack to testify at hearing.

The parties stipulated to the admission of complainant's exhibits A, C, D1 through F, H, and I and respondent's exhibits 1 through 11. Complainant's exhibit B was admitted into evidence without objection. Complainant's exhibit G was admitted into evidence over objection.

MATTER APPEALED

Complainant appeals respondent's decision to abolish his position as a stationary engineer I. Complainant also appeals his voluntary demotion to the maintenance mechanic position which he accepted in lieu of lay off. Complainant contends that respondent's decision was arbitrary, capricious, and contrary to rule and law. Complainant alleges discrimination on the basis of age.

ISSUE

The parties raise the issue whether respondent acted arbitrarily, capriciously, or contrary to rule or law in abolishing complainant's stationary engineer position and voluntarily demoting complainant to the maintenance mechanic position.

FINDINGS OF FACT

1. Complainant Steven Kingcade was employed by the State of Colorado in 1974. He began his employment as a trades helper at the Colorado School of

Mines. In 1984, he was appointed to the position of stationary engineer in the Department of Military Affairs.

2. In the position of stationary engineer, Kingcade maintained the heating and cooling systems at Buckley Military Base.

3. The Department of Military Affairs was informed by the Federal government that the boiler plant in which Kingcade worked would be taken off line because it was out-moded. Staff at the Department of Military Affairs, including Kingcade, were advised of the changes in the boiler plant at a meeting in January, 1992. At that time, Kingcade had concern that the changes would result in the abolishment of his position as a stationary engineer.

4. In November, 1994, a position description questionnaire was prepared for Kingcade's position. It described the class title as that of heating, ventilation, and air conditioning (HVAC) mechanic. Duties included maintenance of the heating, ventilation, and air conditioning systems. Kingcade completed the position description questionnaire, signed it, and it was reviewed by Kingcade's supervisor who also signed it. No further action was taken with regard to the position description questionnaire. A position audit was not conducted. Kingcade made no inquiries in 1995 or 1996 about the upgrade of his position classification.

5. In November, 1995, Kingcade, and other Buckley staff, were advised that the work force would be reduced as a result of the boiler plant closure. In March, 1996, there were delays in the replacement of the out-moded boiler plant. Kingcade was advised of the delays in a memorandum dated March 25, 1996. He was advised that a "force restructuring" or reduction in force would occur in March, 1997, as a result of the closure of the boiler plant.

6. The boiler plant was replaced and two positions were created to maintain the system. These positions were classified as HVAC mechanics.

7. An interview was conducted to fill the newly created positions. Kingcade was among three employees interviewed for the positions. Kingcade was not selected to fill a position. Kingcade's supervisor and an employee serving employment probation with the Department of Military Affairs were selected to the newly created positions.

8. On March 29, 1997, Kingcade received notice that his position of stationary engineer I would be abolished due to lack of work on May 15, 1997. He was also advised of his bumping rights. Kingcade was certified in the job classes of stationary engineer and maintenance mechanic. There were no vacant positions in the stationary engineer job classification. Kingcade was offered a voluntary demotion to a vacant maintenance mechanic position at Fort Logan, which he accepted.

9. Kingcade experienced a loss of pay as a result of his appointment to the maintenance mechanic position. He also experienced a monetary loss as a result of the fact that the position was assigned at Fort Logan. The assignment to Fort Logan required a longer commute everyday to work which resulted in increased cost for Kingcade.

10. On April 2, 1997, Kingcade appealed the March 26, 1997, notice of lay off. In his appeal, he alleged that he was improperly demoted, downgraded, and denied save pay. Kingcade alleged that he was discriminated against on the basis of age. Kingcade seeks relief in the form of an order directing respondent to reprimand the employee responsible for the personnel action taken against him and to appoint Kingcade to a position comparable to that of stationary engineer.

DISCUSSION

A certified state employee has the right to appeal a decision to lay him off. Section 24-50 125.5, C.R.S. (1988 Repl. Vol. 10B). At a hearing to consider such an appeal, complainant has the burden of proof and the burden of going forward to establish that the decision to lay him off was arbitrary, capricious, or contrary to rule or law. Renteria v. Colorado Department of Personnel, 811 P.2d 797 (Colo. 1991). A presumption of regularity attaches to the many administrative decisions made on a daily basis by state agencies. Chiappe v. State Personnel Board, 622 P.2d 527,532 (Colo. 1981). However, if arbitrary and capricious action is shown, it may overcome any presumption of regularity.

An appeal of a position allocation decision and an appeal of the content and conduct of an examination is governed by the State Personnel Director's Procedure. Director's Procedure, P10-3-1. Under sections 24-50-104(3)(g) and 24-50-112(3)(a) C.R.S. (1988 Repl. Vol. 10B), authority is granted to the State Personnel Director, not the State Personnel Board, to consider appeals pertaining to allocation decisions and the selection process.

Complainant contends that he was improperly laid off from his position as a stationary engineer. He maintains that prior to the lay off he performed the duties of the HVAC mechanic. Complainant further contends that he submitted a position description questionnaire (PDQ) for purposes of a position audit. Complainant contends that the PDQ reflected that he performed the duties of the HVAC mechanic, but no action was taken on the PDQ to audit and upgrade Complainant's position. Complainant maintains that the failure to audit his position and reallocate it from stationary engineer to HVAC mechanic was arbitrary, capricious and contrary to rule and law. With regard to the failure to select complainant for one of the new HVAC positions, complainant maintains that this action was discriminatory on the basis of age.

Respondent contends that the only claim over which the Board has jurisdiction is the claim that complainant was improperly laid off from his position as a stationary engineer. Respondent contends that the Board lacks jurisdiction to consider the claims related to the selection process for the HVAC positions and with regard to complainant claims that his stationary engineer position was not audited and upgraded to the HVAC classification. Respondent maintains that these claims were neither raised in a timely manner nor were the claims challenged in the proper forum.

Respondent finally contends that complainant failed to sustain his burden of proof to establish that the lay off was arbitrary, capricious, or contrary to

rule or law. Respondent contends that complainant failed to present evidence that the lay off procedures followed or substantive decision made was in violation of the rules or law. Respondent contends that complainant's appeal should be denied.

It appears from all the evidence presented at hearing that complainant cannot prevail in this matter. At hearing, no evidence was presented to support the conclusion that respondent's decision was discriminatory on the basis of age. And, the Board is without jurisdiction to consider complainant's claims with regard to a position selection and position allocation decisions. These claims were improperly directed to the Board and do not appear to have been timely raised.

The only relevant issue raised by complainant pertains to the challenge of respondent's action laying him off. Respondent represented that complainant was laid off from his position as a stationary engineer due to lack of work because the boiler plant at Buckley Military Base closed. No evidence was presented at hearing to establish that this decision was arbitrary, capricious, or contrary to rule or law. Complainant's equitable contentions were considered and determined not to be persuasive. Complainant's fundamental argument was that it was not fair that he was classified as a stationary engineer, performed HVAC duties, had his position abolished and took a voluntary demotion, and was not selected for one of the HVAC positions.

Complainant was required to establish evidence of arbitrary or capricious action. This could have been accomplished by establishing that the appointing authority making the decision to lay off complainant neglected or refused to procure evidence, failed to give candid consideration to the evidence, or exercised discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2d 703,705 (Colo. 1936). Complainant presented no such evidence of arbitrary or capricious action. Nor was evidence presented that respondent violated rule or law. Thus, there is no basis upon which to find for complainant.

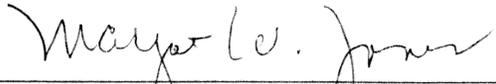
CONCLUSION OF LAW

Complainant failed to establish that respondent's action in laying him off and voluntarily demoting him was arbitrary, capricious or contrary to rule or law.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this 14 day of
November, 1997, at
Denver, Colorado.



Administrative Law Judge

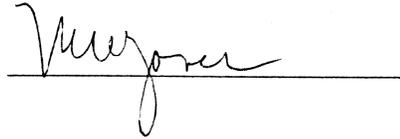
CERTIFICATE OF MAILING

This is to certify that on the 14 day of November, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James K. Kreutz
James K. Kreutz & Associates, P.C.
5655 South Yosemite Street, Suite 200
Englewood, CO 80111

and, through interagency mail addressed as follows:

Maurice Knaizer
Assistant Attorney General
1525 Sherman St., 5th Floor
Denver, CO 80203

A handwritten signature in cursive script, appearing to read "Maurice Knaizer", is written over a horizontal line.

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

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

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

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

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date 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 CCR 801-1.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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