

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LAWRENCE FAULKNER,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION.
AURARIA HIGHER EDUCATION CENTER,

Respondent.

This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on March 10, 1998. Respondent was represented by Toni Jo Gray, Assistant Attorney General. Complainant represented himself.

Complainant's sole evidence consisted of his own testimony. Respondent's only witness was Rhonda Pylican, Assistant Director of Human Resources at the Auraria Higher Education Center (AHEC). Respondent's Exhibit 2 was admitted into evidence without objection.

MATTER APPEALED

Complainant appeals the alleged denial of re-employment rights to his former position.

ISSUES

1. Whether respondent's action was arbitrary, capricious or

contrary to rule or law;

2. Whether the State Personnel Board has jurisdiction to order reinstatement in the event that complainant prevails.

PRELIMINARY MATTERS

On March 6, 1998, respondent filed a motion for sanctions against complainant for failure to file a prehearing statement. At hearing, respondent's motion was partially granted. Complainant's evidence was limited to his own testimony and the witnesses and exhibits that had been endorsed by respondent. See *Weiss v. Department of Public Safety*, 847 P.2d 197 (Colo. App. 1992).

At the outset, respondent argued that the Board lacks jurisdiction over this matter, asserting that complainant was notified of his re-employment rights on October 21, 1997 but did not file an appeal of re-employment rights until January 26, 1998, well past the ten-day period in which an appeal may be filed. I ruled that an employee may file an appeal of the denial of re-employment rights within ten days of receiving information, *i.e.*, notice, that someone else had been hired into his former position in violation of his right to be re-employed. Otherwise, the employee has no remedy in the event that his right to re-employment is wrongfully denied. Since complainant allegedly received information on January 22, 1998 that his re-employment rights were violated, and he filed an appeal on January 26, 1998, his appeal was timely.

Because this is an appeal of an administrative action, the burden was placed on complainant to go forward with the evidence and to prove by a preponderance that the action of the agency was

arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant, Lawrence Faulkner, was a Groundskeeper I at the Auraria Higher Education Center (AHEC). His employment was administratively terminated for medical reasons on October 2, 1997.

2. By letter dated October 21, 1997, the agency acknowledged that Faulkner had been cleared by his physician to return to work. He was advised that his name was placed on the agency's re-employment list for the position of Groundskeeper I effective October 17, 1997, and that his name would remain on the re-employment list for one year. (Exhibit 2.)

3. No one has been hired into the position of Groundskeeper I since Faulkner vacated the position.

4. The hiring authority for groundskeeping positions holds the title of Manager of Groundskeeping.

5. The position left by Faulkner is still vacant. His name remains on the re-employment list.

DISCUSSION

In an appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of proving by preponderant evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo. 1991); *Department of*

Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent's action only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S. It is for the administrative law judge, as the fact finder, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Complainant testified that he went to AHEC in January and spoke with Tom Moody, his former supervisor. Moody, who is not the hiring authority, told Faulkner that he was not to be hired for any reason and that three people had been hired recently, one of whom was a transfer from another agency. Complainant testified that he next went to the human resources office, where he was assured that he was on the re-employment list and was told to not talk to Moody because Moody did not know. He then decided to file an appeal with the State Personnel Board alleging that his re-employment rights were violated.

Complainant does not contend that he was not placed on the re-employment list. Rather, he argues that "something is going on" to keep him from getting his job back. His testimony was sincere. His concern is real.

Complainant did not present sufficient credible evidence to prove that respondent committed an improper act. Tom Moody did not testify and consequently was not subject to cross-examination. Complainant's understanding or interpretation of Moody's words is not dispositive. This hearsay testimony may be noteworthy for the questions it raises, but it provides no answers. Its evidentiary effect is to give a context to complainant's appeal.

Respondent presented persuasive evidence that complainant's former position not only has not been filled and remains vacant, but that he will be given an opportunity to fill the position at the appropriate time for the duration of the period of his right to re-employment. If, during that time, complainant has a good-faith reason to believe that his re-employment rights were denied, he may file another appeal based on the subsequent event. The circumstances of the present appeal cannot be litigated again in this forum.

Respondent raised the issue of whether the Board has jurisdiction to order the agency to reinstate complainant to his former position under the circumstances of this case. In view of the outcome, it is unnecessary to address that issue.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
2. It is unnecessary to reach the issue of remedy.

ORDER

Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
March, 1998, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of March, 1998, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Lawrence Faulkner
651 South Raleigh
Denver, CO 80219

and in the interagency mail, addressed as follows:

Toni Jo Gray
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State Services Section
1525 Sherman Street, 5th Floor
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