

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98B130

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LAURA L. MCGRATH,

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 December 21-22, 1998. Respondent was represented by Assistant Attorney General Coleman M. Connolly. Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Respondent's sole witness was Thomas G. Holtzer, Department Head, Bioagricultural Sciences and Pest Management, Colorado State University. Complainant's sole witness was herself.

Respondent's Exhibits 1, 2, 3, 5, 6, 8, 9, 10 and 11 were stipulated into evidence, as were Complainant's Exhibits A, B, D, E and K through Q. Admitted without objection were Respondent's Exhibits 4 and 7 and Complainant's Exhibits F through J. Complainant's Exhibit C was admitted over objection.

MATTER APPEALED

Complainant appeals the downward reallocation of her position from Administrative Assistant III to Administrative Assistant II effective May 1, 1998. For the reasons set for below, respondent's action is affirmed.

ISSUES

1. Whether the downward reallocation of complainant's position was a pretext for discipline;

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2. Whether complainant is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

By order dated September 23, 1998, the State Personnel Board adopted the Preliminary Recommendation of the Administrative Law Judge and granted complainant's petition for hearing on the issue of whether the downward reclassification of complainant's position was a pretext for discipline.

Complainant's motion for the sequestration of witnesses was granted, with the exception of complainant and Thomas Holtzer, respondent's advisory witness.

FINDINGS OF FACT

1. In 1984, complainant Laura L. McGrath commenced employment as an Administrative Clerk with respondent Colorado State University (CSU or University) in the Department of Entomology. She became a Senior Administrative Clerk in 1986 and served in that capacity until 1995 when, as a result of the auditing of all CSU positions, her position was reallocated upward to Administrative Assistant III.

2. Thomas G. Holtzer became Department Head of the Department of Entomology in August 1988. As Department Head, he was a member of the faculty and the direct supervisor of seven other faculty members and complainant.

3. Complainant's duties included non-accounting functions such as ordering supplies, preparing travel vouchers, filing and other office functions. She sometimes referred to herself as "Office Manager." Holtzer did not view her as an office manager.

4. Over the years, complainant disagreed with some of the decisions rendered by Holtzer, such as the non-filing of a worker's compensation claim, the approval of a particular travel voucher and not charging staff members for coffee. She made her disagreements known to him, though he did not seek her advice or counsel. The decisions were the responsibility of the Department Head. She did not change his mind.

5. Holtzer rated complainant "Commendable" on her performance evaluations.

6. In May 1996, the Department of Entomology was merged with another department and became the Department of Bioagricultural Sciences and Pest Management. Holtzer was named Department Head of the new department.

7. The merger added sixteen faculty members and three classified personnel to Holtzer's realm of supervision. One of the classified employees left shortly after the merger and was not replaced, leaving an office staff of three people, inclusive of complainant. The positions were: Accounting Technician III, Administrative Assistant II and Administrative Assistant III.

8. The merger changed the atmosphere of the office, which became tense. Holtzer switched some of the duties around and consolidated certain functions into one position in order to avoid duplication of effort. Adaptation to the changed work environment was an ongoing process.

9. Complainant's working relationships became strained, as did her association with Holtzer. She had a personal dispute with another staff member. Although he did not make a judgment in terms of right or wrong, Holtzer held complainant responsible for at least a share of the difficulty. Complainant became upset at Holtzer because she had not been invited to participate in a group interview of a job applicant. She refused Holtzer's request for the telephone number of a former accounting technician, of whom he had a question concerning the accounting system, because the individual had told complainant to not release her telephone number to anyone.

10. In April 1997, Terri Rogakis was hired to fill the then vacant Administrative Assistant II position. A long-time state employee, Rogakis transferred to CSU from the University of Northern Colorado.

11. In the summer of 1997, referring to her work situation, complainant said to Holtzer: "This is bullshit and won't work." She complained about having too much work to do and that she was being treated unfairly. She told Holtzer that she was looking for another job.

12. In mid-summer 1997, Holtzer decided to designate a staff person "Work Leader" to relieve him of such functions as organizing staff meetings and communicating with accountants. He was working 80 hours per week and felt a need to delegate some of his functions.

13. Holtzer envisioned that the Work Leader would have good

organizational skills and good people skills. He considered assigning the duties to complainant, but he concluded that Terri Rogakis was better suited for Work Leader responsibilities because she possessed a higher "maturity level" and would be able to perform the duties without letting her personal feelings and emotions get in the way, and because she had the respect of the staff and faculty.

14. On August 22, 1997, Holtzer met with complainant and advised her that her performance was suffering and that he had received complaints from faculty members and from other offices on campus about her being rude, unhelpful and inefficient. Noting that she was unhappy in her job and had announced her intention to seek other employment, Holtzer encouraged her to continue looking for another job. He stated that there would be additional changes in the office which would not make her happy and that her duties would not continue to be consistent with the Administrative III level. He felt that it would be best for each of them and the department if she found another position. He offered to provide her with a positive job recommendation, but warned her that her upcoming November evaluation would be less favorable than it had been in the past. Complainant reiterated that she was looking for another job.

15. On Monday, August 28, at complainant's request, she and Holtzer met with the University's ombudsman in an effort to mediate their differences. Holtzer told complainant that he was going to create a Work Leader position with supervisory functions and assign the duties to someone else. Nothing was resolved by the meeting.

16. In the afternoon, following the meeting with the ombudsman, Holtzer circulated a memo advising the office staff that he had designated Terri Rogakis "to take on the additional responsibilities of serving as the 'work group leader'." (Exhibit D.)

17. On September 1, 1997, complainant filed a grievance against Holtzer charging him with harassment and alleging that he had, in effect, given her a corrective action on August 22 without following the proper procedures.

18. On September 30, the grievance was denied at Step 3 with the suggestion that complainant continue seeking other employment. (Exhibit 8.) That is what she decided to do. She halted the grievance process.

19. Complainant's overall performance rating remained in the "Commendable" range for her November evaluation, but she went down

in the area of interpersonal relations.

20. At some point, Terri Rogakis asked that her position be audited.

21. In December 1997, Rogakis' position was reallocated from Administrative Assistant II to Administrative Assistant III effective April 1, 1998. (Exhibit B.) Mary Ann Valdez of CSU Human Resource Services advised Holtzer that it was necessary to audit complainant's position as well because it would be unusual to have two Administrative Assistant IIIs in a small office.

22. In late February 1998, complainant's position was reallocated from Administrative Assistant III to Administrative Assistant II effective May 1, 1998. (Exhibits 9 and K.) She was given saved pay for three years from the effective date.

23. Complainant was advised by Human Resource Services that, pursuant to Procedures 2-2-5(B)(1) and 2-2-7 that an appeal of the reallocation decision would preclude her from exercising retention rights, and if the reallocation of her position were upheld on appeal her name would be placed on the CSU reemployment list for the Administrative Assistant III class for one year. (Exhibit Q.)

24. Complainant filed a reallocation appeal with the Department of Personnel/General Support Services on March 16, 1998, alleging, among other things, that the downward reallocation was a punitive action and therefore disciplinary in nature. On June 19, the review panel concluded that the reallocation was done properly and upheld the agency's decision, while noting an "apparent disparity" between the reallocation of the Administrative II position, reviewed by a panel, and the reallocation of the Administrative Assistant III position, reviewed by the Human Resources Specialist (Valdez). Without advocating either option, the panel recommended "that the agency examine the internal process used to review and allocate positions to ensure consistency." (Exhibits 10, 11.)

25. From August to December 1998, the Human Resource Services Department informed complainant of eight Administrative Assistant III positions on campus for which she was eligible for hire from the reemployment list. She turned down the opportunity to pursue any of the eight positions. She did not contact any of the prospective employers.

26. Complainant Laura L. McGrath requests reinstatement to the Administrative Assistant III position, the Administrative Assistant III pay raise she did not receive in July, a cessation of

harassment by Holtzer and attorney fees and costs.

DISCUSSION

In an appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of going forward with the evidence and proving by a preponderance 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). See also *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent's decision 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).

It is undisputed that an appointing authority has the discretion to assign duties to the employee deemed most appropriate to perform those duties. R1-4-2, 4 Code Colo. Reg 801-1.¹ Holtzer properly exercised his discretion in designating Terri Rogakis the Work Leader rather than complainant.

While agreeing that the appointing authority was not bound by rule or procedure to choose her over Rogakis, complainant asserts that Holtzer's purpose was punitive, that he made the reassignment of duties for the reason that he did not have grounds for a disciplinary action. There is a dearth of credible evidence from which to reach that conclusion. Holtzer set forth legitimate reasons for the designation of a Work leader and for choosing Rogakis to perform those duties. He did not audit the respective positions and he did not make the reallocation decisions. His interest was in finding the most effective and efficient way to accomplish the necessary tasks.

Complainant's testimony and demeanor on the stand resembled that of a chronic complainer who perceives herself as a victim and is incapable of seeing or respecting any point of view other than her own. By contrast, Holtzer testified straightforwardly,

¹ On October 20, 1998, the State Personnel Board Rules were repealed and replaced by new rules made effective for actions commencing on or after December 31, 1998.

unhesitatingly and blamelessly. His testimony was internally and externally consistent and deserves substantial weight.

There was no harassment of complainant by Holtzer. If anything, it might have been the other way around. The reallocation of complainant's position was upheld on appeal. The procedural propriety of the reallocation is not before this Board. The review panel's notation of a procedural difference in reallocating the two positions is not credible evidence of the assignment of duties by Holtzer being done as a substitute for discipline. There is no evidence of a conspiracy between Holtzer and Human Resource Services to punish complainant. The review panel could have overturned the reallocation, but it found instead that the reallocation was appropriate. There is insufficient evidence in this record to sustain another conclusion.

Complainant was offered eight chances to exercise her reemployment rights to an Administrative Assistant III position, all of which she declined. This is not evidence of discipline. Her performance ratings of "Commendable" are not persuasive evidence that she was better suited to be Work Leader than was Rogakis. These kinds of decisions are necessarily left to the discretion of the appointing authority. There has been no showing of abuse of the appointing authority's discretion.

Complainant asserts that the reallocation was an obvious attempt to get her out of the job. Yet, it is she who initiated the idea of leaving, and when Holtzer agreed, stating that it would be best for all concerned if she found another position, she interpreted his agreement with her idea as a covert effort to get rid of her. This is not sound logic.

Complainant asserts that the process was procedurally flawed because she was not allowed to simultaneously exercise retention rights and appeal the reallocation. She asserts that the layoff provisions should have been followed pursuant to Director's Procedure P2-2-5(B), 4 Code Colo. Reg. 801-1,² which provides:

(B) When an occupied position is allocated to a class that has a lower job rate than the current class, the incumbent shall be treated as follows:

² The Director's Procedures have been repealed and replaced, effective for actions commencing on or after December 31, 1998.

(1) If certified, the employee shall be permitted to take a demotion and remain in the position under the provisions of Procedures Chapter 3, Article 5 and be placed on the reemployment list for the former class. An employee who accepts this option cannot be processed under the layoff provisions. An employee who refuses this option will immediately be processed under the layoff provisions.

Complainant remained in the position and appealed the reallocation. Nevertheless, the only issue before this Board is whether complainant's downward reallocation was a pretext for discipline. The interpretation and implementation of the Director's Procedures are relevant only as evidence that the reallocation was pretextual. There has been no such showing. Holtzer assigned the duties, but he did not do the reallocations. He did not implement the Director's Procedures. There has been no showing that the agency's interpretation of the procedures was applied unevenly, or that complainant was singled out for unfair treatment. There has been no showing that the Human Resources Department had ulterior motives in carrying out the Director's Procedures and in reallocating complainant's position, or that the agency otherwise acted improperly. Job evaluation and compensation come under the purview of the State Personnel Director, not the State Personnel Board. § 24-50-104, C.R.S; § 24-50-104(6).

On this record, complainant failed to satisfy her burden to prove by preponderant evidence that the downward reallocation of her position was a pretext for discipline.

CONCLUSIONS OF LAW

1. The downward reallocation of complainant's position was not a pretext for discipline.
2. Neither party is entitled to an attorney fee award.

ORDER

The relief requested by complainant is denied. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of _____

February, 1999, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

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), C.R.S. 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. 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).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may 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. 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.

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 is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3244.

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 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

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 R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of February, 1999, 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 R. Gilsdorf
Attorney at Law
1145 Bannock Street
Denver, CO 80204

and in the interagency mail, addressed as follows:

Coleman M. Connolly
Assistant Attorney General
1525 Sherman Street, Fifth Floor
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