

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 98B148

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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M. BERNADETTE VILLALON,

Complainant,

vs.

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

Respondent.

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THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on June 22, 1998. Respondent was represented by John R. Sleeman, Jr., Assistant Attorney General. Complainant represented herself.

Complainant testified in her own behalf and called no other witnesses. Respondent called no witnesses. Complainant's Exhibits A, B, C, D, G, I and H, and Respondent's Exhibits 1 through 21 were stipulated into evidence.

**MATTER APPEALED**

Complainant appeals the reduction of her hours from .5 FTE to .25 FTE. For the reasons set forth herein, the action is upheld.

**ISSUE**

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

#### **PRELIMINARY MATTERS**

At the outset of the hearing, respondent moved to exclude from the issues to be heard complainant's denial of retention (bumping) rights and sex discrimination for lack of proper notice. The judge found that the issue of retention rights was sufficiently raised in complainant's prehearing statement to provide reasonable notice and ruled that the issue would be heard and considered in determining whether respondent's personnel action was arbitrary, capricious or contrary to rule or law. Respondent's motion was granted as to sex discrimination since complainant's allegation of discrimination had not been previously raised and was untimely.

#### **FINDINGS OF FACT**

1. Complainant, M. Bernadette Villalon, is employed as a part-time Program Assistant I with the Minority Biomedical Research Support Program (MBRSP) of respondent, the University of Southern Colorado (USC or University). MBRSP is funded by a grant from the National Institutes of General Medical Sciences (NIGMS) of the United States Department of Health and Human Services.

2. Complainant began full-time employment with the State of Colorado in January 1976 and, at her request, transferred to part-time status in January 1986. As a part-time employee, she worked one-half time and her position was funded exclusively by the NIGMS grant. Her annual performance evaluation ratings were consistently in the Commendable range.

3. NIGMS terminated its funding of MBRSP in June 1997. The University temporarily absorbed the funding of complainant's position from July 1 through December 31, 1997.

4. The University submitted a grant application to the federal agency requesting that the local program be funded from January 1, 1998 through December 31, 2001. There was uncertainty among USC officials as to whether the federal grant would be reinstated.

5. Complainant was uneasy over what might happen to her job. The personnel director assured her that, in the worst case scenario, *i.e.*, her position was abolished, she would have retention rights to another position if one were available.

6. In December 1997, the director of MBRSP was informed that NMBRS would only fund complainant's position at the .25 FTE level.

The director proposed to the Dean of USC's College of Science and Mathematics that the University take over the funding of another employee's position in order to free up grant money which could be utilized to fund complainant's position. (Exhibit D.) Provost/Interim President Les Wong opposed the proposal because it relied on hypothetical money and the University could not afford to make up funds that were not approved by the grant. (Exhibit C.)

7. While the federal grant allotted funds only at the .25 FTE level for complainant's position, the University made up the difference so complainant could continue as a half-time (20 hours/week) employee instead of a one-fourth time (10 hours/week) employee.

8. Complainant did not apply for other positions, although she felt that there were vacancies for which she possessed the

necessary qualifications.

9. By memorandum dated April 29, 1998, Provost/Interim President Wong advised complainant that the federal grant funded her position at the rate of .25 FTE and the University would not fund the additional one-fourth of her salary beyond May 22, 1998. Dr. Wong listed three options: 1) accept the .25 reduction in salary and remain in her position; 2) accept a re-assignment exercising her retention rights; 3) separate from the University. Complainant wrote on the document that she chose option #2 and turned it into the Provost's office. (Exhibit A.)

10. On May 1, 1998, Dr. Wong sent complainant a memo correcting his earlier communication in two respects: a) notification of her appeal rights; b) notification that she was not eligible to exercise retention rights under Personnel Rule R9-3-5. (Exhibit B.)

11. Complainant M. Bernadette Villalon filed a timely appeal of the reduction of her hours on May 6, 1998.

#### **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).

At the close of complainant's case-in-chief, respondent moved for a directed verdict on grounds that complainant had proffered insufficient evidence to make a *prima facie* showing that respondent's action was arbitrary, capricious or contrary to rule or law. In response, complainant submitted that she relied on having bumping rights when she did not apply for certain vacant positions and that the University could fund her position at .50 FTE with grant money under the category of indirect costs, conceding that her position has always been funded from direct costs in the budget during the seventeen years since the grant began. Following argument and questions from the bench, respondent's motion was granted.

Motions for a directed verdict present a question of law. *Grossard v. Watson*, 221 P.2d 353 (Colo. 1950). See C.R.C.P. 50(a); § 24-4-105(4), C.R.S. The evidence must be viewed in the light most favorable to the non-moving party. *Singer v. Chitwood*, 247 P.2d 905 (Colo. 1952). It is the duty of the trial court to grant the motion when the evidence establishes that there is no issue upon which the non-moving party could prevail as a matter of law. *Montes v. Hyland Hills Park*, 849 P.2d 852 (Colo. 1992).

In the present matter, complainant presented no credible evidence, only speculation, that there were adequate funds available under the grant to continue her position as a .5 FTE or that the University did anything improper in distributing the grant funds. In response to the query from the bench, "What did the University do wrong?," complainant reiterated that she was misled into believing that she had bumping rights. That a mistake was made is

undisputed, yet Dr. Wong promptly corrected his mistake by advising complainant that, as a part-time employee, she did not possess retention rights to another position when her working hours were reduced. The personnel director correctly advised complainant that she would have retention rights in the worst case scenario of her position being abolished, though complainant may have misunderstood. See R9-3-5, 4 Code Colo. Reg. 801-1. At any rate, complainant was not entitled to retention rights, and to whatever extent she was mistakenly steered into thinking she would be able to exercise retention rights, there is no remedy. She did not, in fact, apply for another position and her contention that she would have been hired if she had applied is purely speculative, even if there were no other applicants. The error was not intentional and is not cause for restoring her to .5 status.

In *Hughes v. Department of Higher Education*, 934 P. 2d 891, 896 (Colo. App. 1997) (Ruland, J., dissenting), a layoff case, the court held:

The scope of review of agency action of this nature is exhausted if a rational basis is found for the decision made or the action taken. (Citation omitted.) It is not within the province of the ALJ, the Board, or this court to operate or second-guess the University in the making of these decisions which are based on intertwined, and conflicting, policy grounds. The fact that the ALJ, the Board, or this court may disagree with the decision, or conclude that the University failed to consider adequately all appropriate circumstances, does not deny the decision a rational basis.

As did the complainant in *Hughes, supra*, this complainant disagrees with the University's decision, but her disagreement does not deny the decision a rational basis. She failed to carry her initial burden to present a *prima facie* case of wrongful action.

Consequently, because there was no evidence upon which complainant could prevail as a matter of law, the administrative law judge was compelled to grant respondent's motion for a directed verdict and dismiss the proceedings. *Montes, supra*.

**CONCLUSION OF LAW**

Respondent's action was not arbitrary, capricious or contrary to rule or law.

**ORDER**

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_\_ day of  
July, 1998, at  
Denver, Colorado.

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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), 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 must make arrangements with a disinterested recognized transcriber to prepare the transcript. The party should advise the transcriber to contact the Board office to obtain the hearing tapes. In order to be certified as part of the record on appeal the original transcript must be submitted to the Board within 45 days of the date of the notice of appeal is filed. It is the responsibility of the party requesting a transcript to ensure that any transcript is timely filed. If you have any questions or desire any further 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 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.

CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of July, 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:

M. Bernadette Villalon  
2520 Lowell Avenue  
Pueblo, CO 81003

and in the interagency mail, addressed as follows:

John R. Sleeman, Jr.  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, Fifth Floor  
Denver, CO 80203

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