

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DENISE GOMEZ,

Complainant,

vs.

DEPARTMENT OF PERSONNEL,
CENTRAL SERVICES,

Respondent.

This case came on for hearing on November 5, 1999, and was heard by Administrative Law Judge Mary S. McClatchey. Respondent was represented by Coleman Connolly, Assistant Attorney General, Office of the Colorado Attorney General. Complainant appeared and represented herself.

PRELIMINARY MATTERS

Witnesses.

Respondent called the following witnesses: Ann Marie Heuth, Accountant IV or "payroll manager," Central Services, Human Resources division, General Support Services ("GSS"), Department of Personnel ("DOP"); Richard D. Malinowski, Director of Central Services, GSS, DOP; and Complainant.

Complainant called the following witnesses: herself and Helen Nopens, Complainant's supervisor at Central Services.

Exhibits.

Respondent's Exhibits 1, 2 and 3 were admitted without objection. Complainant's Exhibit A was admitted without objection.

MATTER APPEALED

Complainant appeals the Respondent's deduction of \$5582.45 (in payments of

\$193.00 per month for 29-30 months) of saved pay erroneously paid to Complainant from January 1998 through June 1999. For the reasons set forth below, the action of the appointing authority is affirmed.

ISSUES

1. Was the administrative action taken by Respondent arbitrary or capricious, or contrary to rule or law?

FINDINGS OF FACT

1. In October of 1997, Complainant was transferred to Central Services from the Department of Revenue. At the time of her transfer, she was on saved pay.
2. The three years of saved pay should have expired in January of 1998. However, Respondent failed to process this information correctly at the time Complainant arrived at Central Services, and it therefore continued to pay Complainant saved pay until June of 1999.
3. It is uncontested that Complainant was not entitled to receive saved pay during the period January 1998 through June 1999, and that the amount of saved pay overpaid to Complainant is \$5582.48 (hereinafter "overpayment").
4. When Respondent discovered the overpayment, it also determined that if Complainant's saved pay had been timely discontinued in January of 1998, she would have been entitled to a salary survey increase of approximately \$60.00 per month, commencing in July of 1998. Respondent included this retroactive increase in pay in its calculations of the overpayment.
5. After discovering the overpayment, Respondent stopped paying Complainant saved pay in July, 1999. This reduced Complainant's monthly gross pay in the amount of \$290.00.
6. Respondent has not yet deducted any money from Complainant's paycheck for the purpose of reimbursing the state for the overpayment.
7. Respondent initially informed Complainant that it intended to extract repayment from her in monthly installments of \$310.00 over an 18-month period.
8. Respondent's agents have had three meetings with Complainant to renegotiate the repayment schedule.
9. Respondent has modified its position, and it seeks to reduce Complainant's gross monthly salary, before taxes, in the amount of \$193.00. It would take just over 29 months

to reimburse the state for the \$5582.48 overpayment under this plan.

10. In September of 1999, Complainant was promoted to the position of Office Manager I. This resulted in an increase in gross monthly pay in the amount of \$241.00, to \$2650.00. This makes up for all but \$50.00 of the extra saved pay to which she had previously become accustomed.

11. Complainant has had to borrow money due to the missed saved pay in July and August, 1999 and to having had to replace a large appliance.

12. Complainant will have a more difficult time making ends meet if her salary is reduced by \$193.00 per month. After making such a payment, she will net approximately \$1500.00 per month (this includes a PERA contribution of unknown amount). Her monthly living expenses are approximately \$1400.00.

13. Complainant was told by someone, but she cannot remember who, that her saved pay would be indefinite because of "the series" she was under.

14. Complainant worked a second job as a janitor for a short time in order to earn extra money after the saved pay was stopped. Her condition as a diabetic rendered this difficult for her physically, and she resigned from that job.

15. Complainant believes she will have to work a second job in order to make up for the lost \$193.00 per month.

16. Complainant's line supervisor knew she was on saved pay at the time she transferred her to Central Services and did not mind paying her the extra salary.

17. Complainant seeks an order from the Board cutting the amount of repayment in half. She believes it is fundamentally unfair for her to have to pay back such an enormous amount of money, since it was not her error. She believes that an error consists of a two or three month problem, not an 18 month problem. She also seeks a reduction of the \$193.00 monthly reimbursement amount.

DISCUSSION

In this appeal of a non-disciplinary, administrative action, the burden is on Complainant to prove that the Respondent's action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. (1999); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

Arbitrary and capricious action by a state agency can arise in one or more of three ways: a) by neglecting or failing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider; b) by failing to candidly and honestly

consider the evidence; and c) by basing its action on conclusions that reasonable persons fairly and honestly considering the evidence could not reach. Van de Vegt v. Board of Commissioners, 55 P.2d 703, 705 (Colo. 1936).

The essence of the relief Complainant requests is for Respondent to exercise discretion by reducing the \$5582.48 amount to a lesser number. However, Respondent argued correctly that, as a matter of law, it has no discretion at all in this situation with regard to the total amount of saved pay it must recoup from Complainant.

Colorado Fiscal Rule, Miscellaneous Compensation, .02, Over-payments, states:

Through error, a State Employee may be paid more than is due. When the error is detected, provisions shall be made for the repayment of the overpayment.

If the overpayment is nominal, it shall be deducted from the employee's next paycheck. However, in some cases the overpayment may be significant and require a repayment schedule extending over a period of time. The chief executive officer, or a delegate, of the State Agency shall establish a repayment schedule based on the particular facts involved in each case. Any repayment schedule extending for more than six months shall be approved by the State Controller.

An employee's maximum liability for repayment, should an error go undetected for over a two year period, shall be limited to the total amount of the overpayment for the first two years in which the employee was overpaid.

Section 24-30-202(17), C.R.S. (1999), provides that it is a misdemeanor for any state officer or employee to fail to perform duties in conformity with the state fiscal rules.

Section 24-50-104(1)(e), C.R.S. (1999), and Personnel Director's Procedure P-3-6 provide that saved pay shall not exceed three years in duration. P-3-6 states that this is the case "even if it results in a loss of pay."

Under the above provisions, Respondent has no authority to waive any portion of the overpayment of saved pay, since it is less than two years in duration.

Respondent does, however, have discretion with regard to the rate at which the overpayment is paid back to the state. While it will be difficult for Complainant to endure the deduction of \$193.00 from her monthly paycheck, such an amount is not arbitrary or capricious or contrary to rule or law.

Respondent took into account the information Complainant submitted, and it acted on it by amending its original position significantly to accommodate her (from \$310 to \$192 monthly). Further, it has postponed the commencement of the monthly deductions of reimbursement since July pending the outcome of this action. That postponement will also assist Complainant in preparing for the deductions to come.

It is clear from the record that a monthly reimbursement of \$150.00, instead of

\$193.00, would make an enormous difference to Complainant, and would certainly cause no hardship to the state. Complainant may need to re-finance a car loan, temporarily alter her savings plan, or take out a loan from her credit union, in order to live with a \$193.00 monthly deduction. Moreover, Complainant is obviously a dedicated employee who has served the state well since 1976. On the other hand, she has enjoyed the benefits of \$5500.00, interest-free, over the past eighteen months.

In conclusion, Respondent's choice of \$193.00 per month in reimbursement is not arbitrary or capricious. However, it would be in the interests of justice to accommodate Complainant by reducing the monthly amount further.

CONCLUSIONS OF LAW

1. Respondent's actions were not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's action is affirmed.

Dated this ____ day
of November, 1999, at
Denver, Colorado

Mary S. McClatchey
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of November, 1999, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Denise Gomez
3061 West 92nd avenue, #8E
Westminster, Colorado 80031

and in the interagency mail, to:

Coleman M. Connolly
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