STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001G016

INITIAL DECISION

MARGARET M. HILL,

Complainant,

vs.

DEPARTMENT OF REVENUE

and

DEPARTMENT OF PERSONNEL,

Respondents.

This matter came on for hearing on June 27, October 16, 18, and 23, 2001. Margaret M. Hill ("Complainant") represented herself. Respondent Department of Revenue ("DOR") was represented by Assistant Attorney General Joseph Q. Lynch. Respondent Department of Personnel ("DOP") was represented by Assistant Attorney General Y.E. Scott.

MATTER APPEALED

Complainant, a Tax Examiner III ("TE III") at DOR, appeals the denial of her grievance. Her grievance challenged a salary inequity between herself and another TE III who was at the exact same level in the TE III pay grade, with less experience. The pay disparity occurred by virtue of the state's conversion in pay plans from the step system to an open range system. At the time of Complainant's grievance, she was paid $211.00 less per month than the other employee; ultimately, over a 22-month period, the pay inequity totals $4712.00.

For the reasons set forth below, Respondents' actions are rescinded.

PROCEDURAL HISTORY

This case has a lengthy procedural history. On September 6, 2000, Complainant filed a petition for hearing with the State Personnel Board ("Board"), requesting preliminary review of DOR's denial of her grievance. On December 1, 2000, a Board Administrative Law Judge ("ALJ") issued a Preliminary Recommendation that Complainant's petition for hearing be granted. On December 21, 2000, the Board entered an order granting Complainant's petition for hearing.

On January 17, 2001, DOP filed a motion to intervene. On that same date, DOP, DOR, and Complainant filed a stipulated motion to dismiss without prejudice, for procedural reasons, in order to enable the parties to comply fully with the formal grievance process. The Board granted this motion, and the case was dismissed without prejudice. On March 1, 2001, Complainant re-filed her appeal and the case was set for hearing.

On May 11, 2001, DOR filed a Motion to Dismiss, or, In the Alternative, Motion for Order to Show Cause Why the Board has Subject Matter Jurisdiction over Colorado's Pay Classification System. This motion was denied.

On May 22, 2001, this case came on for hearing. At the outset of the hearing, DOR moved to join DOP as an indispensable party. The case had recently been reassigned to the undersigned ALJ, who was at that time unaware of DOP's pending motion to intervene. Therefore, DOP's motion to intervene and DOR's motion to join DOP were granted. The case was re-set for hearing.

At the close of Complainant's case in chief, Respondents moved for dismissal pursuant to C.R.C.P. 41(b). On July 12, 2001, the motion was granted as it relates to Director's Procedure P-3-49, Discretionary Pay Differentials. 4 CCR 801 (2000). Complainant's situation fits none of the four criteria under P-3-49, which are, matching pay, signing bonus, referral award, or acting, long-term project, or specialized skill assignments. Further, decisions regarding discretionary pay differentials are not grievable or appealable, under Board Rule B-8-5.

The motion to dismiss was denied as to the remainder of Complainant's claims under Colo. Const. art. XII, section 13(8), and section 24-50-103(6), C.R.S. (whether Respondents' actions were arbitrary, capricious, or contrary to rule or law).

ISSUES

1. Whether the Board has jurisdiction over this case;

2. Whether the actions of Respondents were arbitrary, capricious, or contrary to rule or law;

3. Whether Respondents' actions were in violation of Colorado Constitution art. XII, Section 13(8).

FINDINGS OF FACT

<u>Background on the Conversion in Pay Plans from the Step System to</u>

Open Ranges.

1. Prior to July 2, 1998, all Colorado classified employees were paid under a compensation plan known as the **step system**. Each employee in a specific job, defined by a pay grade, was paid at one of seven steps within the pay grade. Employees were customarily hired into a given pay grade at Step 1, and moved up one step each year on their anniversary date, if their performance was satisfactory or above. These annual raises are called "anniversary increases."

2. Under the step system, each step increase was approximately 5%. Every employee at a certain step level received the exact same dollar amount of pay.

3. Rewarding longevity was not a policy goal of the step system, with one exception: Step 6. Step 6 rewarded longevity by requiring employees to remain at frozen at Step 6 for five years prior to moving to Step 7, the maximum salary in the pay grade. Step 7 was approximately 5% greater than Step 6. During this period at Step 6, employees received no anniversary increases, but did receive annual salary survey [also known as cost of living] increases, when approved by the Colorado General Assembly.

4. In 1998, the Colorado General Assembly passed legislation creating Colorado Peak Performance ("CPP"), or "pay for performance," a new compensation system. CPP was designed to provide appointing authorities with the discretion to reward performance through permanent (base-building) and one-time (non-base building) increases in pay.

5. CPP was to be implemented over a three-year period, incrementally.

6. On July 2, 1998, in order to accommodate the new flexibility in awarding performance-based pay, the Colorado Director of Personnel ("Director") eliminated the step system. In its place, the Director implemented the **open range pay system** on July 2, 1998.

7. The **open range pay system** was designed to increase appointing authorities' flexibility in compensating their employees. By eliminating the step system, the open range system would enable state managers to give performance pay awards anywhere in the pay grade up to a certain level.[1] Formerly, appointing authorities had had no authority to deviate from the pay grid of step increases. (The open range pay system enabled state managers to hire new employees, bring in re-hires, and promote or transfer existing employees, at any salary level in the pay grade up to "job rate," upon a

1 The level was known as "job rate," which was 75% of the maximum salary in any pay grade. These performance awards would be subject to limitations established by Board Rule and Director's Procedure.

showing of recruiting difficulty or other unusual condition.)

8. Under CPP, automatic anniversary increases under the step system were to be eliminated.

9. On July 2, 1998, however, appointing authorities had no fiscal authority to actually award performance pay. In fact, appointing authorities have never been given that authority, through the present.

10. Therefore, pending the implementation of CPP, DOP directed state agencies to give employees anniversary increases of exactly 5%, as a replacement for the old step increases that were approximately 5%. DOP's goal was to keep similarly situated employees moving up the pay grade ladder at an equivalent 5% rate, without having to go back to the step pay grid to do so (in anticipation of CPP implementation).

11. The open range pay system also replaced Step 6 with "the five-year rate," which is a range of pay instead of a specific amount of pay.

12. Under the open range system, once an employee advances to anywhere within the "five-year rate," regardless of where he or she is in that range, he or she remains there for five years.2 (If an employee has previously had state service at Step 6, that time is credited towards the required period at the five-year rate.) After serving the period at the "five-year rate," the employee proceeds to the maximum salary level in the pay grade.

13. The "five-year rate" is designed to serve the same policy goal of rewarding longevity that Step 6 served.

14. The top of the range of the "five-year rate" is actually only one dollar less than the maximum salary in the pay grade. For example, the five-year rate for the Tax Examiner III position at issue in this case for Fiscal Year 1999 - 2000 was $4233.00 to $4444.00. The maximum salary for the TE III pay grade was $4445.00.

15. Under the open range system of utilizing a pay range for the five-year rate, if an employee is fortunate enough to enter the five-year rate at the top of the range, that employee will be paid more for that 60-month period than another employee who enters the five-year rate at the bottom of that range.

16. In this sense, the five-year rate is different from Step 6. All employees at Step 6 were paid the same amount, and looked forward to progressing approximately 5% to Step 7.

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2 With salary survey increases, when authorized by the General Assembly.

17. The fact that people in the same position are paid at varying levels in the "five-year rate" is not based on or related to performance factors, because appointing authorities have never been empowered to award performance pay.

18. In the Spring of 2000, the Colorado General Assembly repealed the enabling legislation for CPP, electing not to fund it. In its stead, it passed Senate Bill 211, which directed the Director of Personnel to develop a new performance-based pay plan that is cost neutral.

19. The then-Director decided to retain the open range pay system. However, to date, state appointing authorities have never been empowered to award performance pay.

20. In the meantime, since July 2, 1998, all state employees with satisfactory or above performance ratings have received and continue to receive anniversary increases of exactly 5% (unless they are within the "five-year rate").

<u>Tracking Complainant's and Galen's Salaries through 2002</u>.

21. Complainant commenced her employment at DOR in April 1989. She has always been a valued employee.

22. On October 1, 1994, Complainant was promoted from Tax Examiner II to Tax Examiner III, Step 3. She moved up a step each year on her anniversary date, May 1. On May 1, 1995 she moved to Step 4; on May 1, 1996 she moved to Step 5; on May 1, 1997 she moved to Step 6.

23. Once Complainant reached Step 6 on May 1, 1997, pursuant to rule as stated above, she was required to remain there for five years. In July of each year, she would receive a salary survey increase if authorized by the General Assembly.

24. On July 2, 1998, the open range pay system was implemented, replacing steps. On that date, Complainant's monthly salary was $3922.00. The five-year rate range for the TE III position in Fiscal Year 1998 - 1999 was $3922.00 to $4118.00. Therefore, Complainant's salary level was locked in at the lowest possible level of the five-year rate, at $3922.00, for the remainder of the five-year period remaining, through May 2002. (She received credit for previous time at Step 6).

25. Cathy Galen commenced state employment in March 1982, left in 1986, and returned in January 1993 as a Tax Examiner I. In April 1997, Galen was promoted to Tax Examiner II, Step 4. On her next anniversary date, July 1, 1997, she moved to Step 5. On July 1, 1998, she moved to Step 6, and

began her five-year term there (at $3388.00).

26. On July 2, 1998, the very next day after Galen entered Step 6, the open range pay system was implemented. This simply meant that instead of being at Step 6, Galen was now within the five-year rate for the TE II position.

27. On September 21, 1998, Galen was promoted to Tax Examiner III (the position Complainant had held since October 1994). Galen's rate of increase in pay was dictated by DOR internal rules relating to promotions. Her new salary as a TE III was $3735.00. (Complainant's salary at that time was $3922.00.) As noted above, the five-year rate range for the TE III position in Fiscal Year 1998 - 1999 was $3922.00 to $4118.00. Therefore, after her promotion to TE III, Galen was taken <u>outside</u> of the five-year rate. This rendered her eligible for an anniversary increase in pay of exactly 5% on her next anniversary date.

28. Galen's next anniversary date was July 1, 1999. On that date she received an anniversary increase of 5%, in addition to the annual salary survey increase, both of which brought her salary to $4019.00. The five-year rate for the TE III position in Fiscal Year 1999 - 2000 was $4020.00 to $4220.00. Therefore, she remained below the five-year rate (by just $1.00) and was eligible for another 5% anniversary increase the following year.

29. In the meantime, on July 1, 1999, after her salary survey increase, Complainant remained at the very bottom of the five-year rate in the TE III position, at $4020.00.

30. Therefore, on July 1, 1999, Galen caught up to Complainant on the TE III pay grade. From July 1, 1999 through June 30, 2000, Complainant earned $4020.00 and Galen earned $4019.00. During this period, they were similarly situated: they performed exactly the same services in the TE III position, and they had both progressed the same distance up the salary grade in the TE III position (Complainant had progressed $1.00 higher than Galen by virtue of a pre-1998 step increase [see Finding of Fact #51]).

31. On July 1, 2000, Galen received an anniversary increase of exactly 5%, plus the salary survey increase, bringing her to $4444.00. The five-year rate for the TE III position in Fiscal Year 2000 - 2001 was $4233.00 to $4444.00. The maximum salary for the TE III position was $4445.00.

32. On July 1, 2000, Galen therefore moved directly to the very top of the five-year rate, just $1.00 below the maximum salary for the TE III position.

33. On July 1, 2000, Complainant, who was still at the very bottom of the five-

year rate, received only the salary survey increase, which brought her salary to $4233.00.

34. On July 1, 2000, therefore, Galen leapfrogged over Complainant by $211.00 per month. This was due to the $1.00 salary differential that rendered Galen eligible for the "extra" anniversary increase.

35. During the period of July 1, 2000 through June 30, 2001, Complainant earned $4233.00 per month, and Galen earned $4444 per month. Galen earned $211.00 per month more than Complainant, for a total of $2532.00 for the year. This pay disparity was not related to performance factors.

36. On July 1, 2001, both Complainant and Galen received salary survey increases, bringing Complainant to $4364.00 per month, and Galen to $4582 per month. This $218.00 monthly pay disparity will last for ten months, until Complainant moves to the maximum for the TE III position on May 1, 2002. Therefore, Galen has earned $218.00 more than Complainant per month from July 1, 2001 through the present, and will continue to do so until May 1, 2000, when Complainant moves to the maximum. Over this ten-month period of July 1, 2001 through April 30, 2002, Galen exceeds Complainant by a total of $2180.00. This pay disparity is not related to performance factors.

37. In total, during the 22-month period of July 1, 2000 through April 30, 2002, Galen will have earned a total of $4712.00 more than Complainant. This was caused by their $1.00 pay disparity July 1999 - June 2000, which qualified Galen for an extra anniversary increase, and to Galen entering the five-year rate range at the very top, and Complainant entering it at the very bottom. This pay disparity is not related to performance factors.

38. Complainant will earn $1.00 more per month than Galen during the period May 1, 2002 through May 1, 2005, when Galen moves up $1.00 to the maximum for the position.

39. From May 1, 2005 forward, Complainant and Galen will earn the exact same salary, the maximum for the TE III position.

40. The following chart helps to illustrate the findings of fact above:

	Complainant (Event)	Galen (Event)
10-1-94	Tax Examiner III (promotion)	Tax Examiner II
5-1-97	$3735.00 (Step 6)	

7-2-98	$3922 (bottom of five-yr rate)	$3388.00 TE II (five-yr rate)
9-21-98	$3922.00	$3735.00 TE III (promotion - no longer in five-yr rate)
7-1-99	**$4020.00 (salary survey incr still at bottom of five-yr rate)**	**$4019.00 (salary survey incr plus anniversary increase - still below the five-yr rate by $1.00)**
7-1-00	$4233.00 (salary survey incr. still at bottom of five-yr rate)	$4444.00 (anniv. increase plus salary survey increase - now at top of five-yr rate)
7-1-01	$4364.00 (salary survey incr.)	$4582.00 (salary survey incr.)
5-1-02	$4583 (out of five-yr rate to max for TE III position	
5-1-05	pay parity at maximum	pay parity at maximum

41. This chart demonstrates that the only reason for the $4712.00 pay disparity was Complainant's $1.00 advantage on July 1, 1999, which placed her in a salary freeze in the five-year rate one year earlier than Galen.

Complainant's Grievance.

42. In early August, 2000, Complainant and Galen discussed how they intended to spend their salary survey increases. They soon discovered that Galen had jumped over Complainant by $211.00 per month (because Galen had also received a 5% anniversary increase).

43. Complainant and Galen went to see the Human Resources office at DOR, and spoke to Jackie Tremble. Tremble indicated that the pay disparity between the two TE III's was due to the conversion to the open range pay system. Trimble attempted to explain to Complainant that she had not been eligible for the anniversary increase Galen received because Galen was not yet at "job rate." What Tremble should have said was that Galen was not yet in the "five-year rate." Tremble confused "job rate" with "five-year rate."

44. Complainant filed a grievance on August 10, 2000. Complainant stated in part, "My salary prior to July was $4,020.00 per month; hers was $4,019.00 - $1.00 less. We are both Tax Examiner IIIs. I have been with the Department since 1989 and a TE III since 1994. Cathy was promoted to TE III in October 1998. Now my coworker, who has less time at the same level as I do, has . . . surpassed me monetarily. Please understand that I am not attempting to

get her raise removed . . . " She requested as relief: "1. I want to be certain that salaries are accurately computed. I want a reasonable explanation of the salary adjustment process. Otherwise, this action is arbitrary and capricious. 2. I want to be compensated to the same level as Cathy Gallen."

45. At all times relevant herein, Complainant has sought to bring her salary up to that of Galen. She has never sought to have Galen's July 2000 anniversary increase nullified. Further, she does not challenge the open range pay plan on its face, but simply the pay plan conversion as it applies to her situation.

46. John Vecchiarelli, Senior Director, Tax Group, DOR, Complainant's appointing authority, discussed Complainant's grievance at length with Neil Peters, Human Resources Manager at DOR. Peters was responsible for overseeing the conversion in pay plans, and he had anticipated that this type of leapfrogging might be an unfortunate outcome of the transition in pay plans in 1998, well before Hill encountered the problem. Peters believed it was part of his job responsibilities to advise DOP of problems he saw in the compensation system. He viewed the potential leapfrogging as a potential problem with the system, and believed the transition and its effects would cause "confusion and perhaps frustration" as well as unhappiness among DOR employees.

47. Peters had advised DOP of his concerns in 1998. At that time, DOP officials had explained to Peters that some inadvertent leapfrogging was an unfortunate consequence of the transition in pay plans, but that it would "correct itself" once employees eventually reached the maximum salary in the pay grade.

48. Peters knew of only one other employee in the entire Department of Revenue that had suffered the same leapfrogging effect as Hill as a result of the pay plan conversion.

49. In the year 2000, when Vecchiarelli came to Peters about Hill's grievance, Peters once again turned to DOP officials, this time seeking a specific remedy for Hill. Peters and DOP officials reviewed the compensation rules and Director's Procedures. They focused on P-3-49, the discretionary pay differential rule, to see if it could be utilized to rectify Hill's pay disparity with Galen, but determined that her situation did not fit any of the four criteria in the rule. DOP officials informed Peters that no rule or procedure could be utilized as a remedy for Hill's grievance.

50. After Peters reported back to Vecchiarelli that DOP advised there was no remedy for Hill, Vecchiarelli sent Peters back a second time to be absolutely sure that there was no remedy. Vecchiarelli valued Hill highly as an employee, and sought to remedy the situation. Peters came back with the

same answer.

51. Vecchiarelli reviewed the compensation rules and procedures. He then responded in writing on August 31, 2000. He stated in part as follows:

> I want you to know that I can certainly understand your frustration in regard to this issue. I have discussed the matter with our Human Resources Director, Neil Peters, and Mr. Peters has inquired at the State Department of Personnel on your behalf to see if there had been some mistake in the calculation or if there was a prescribed remedy available for this circumstance. Unfortunately, at this point in time all efforts have uncovered no potential appropriate remedy to this issue.
>
> As you know, you and another employee at the same class and grade level experienced somewhat uneven treatment in regard to salary increases this year. As I understand it, **the problem arose because you received your last step increase at a time when a step table was used to calculate a person's salary anniversary increase. The other employee received their anniversary increase at a point in time when it was calculated at exactly five percent.** The net effect was an anniversary increase took you to the job rate, while the other employee's anniversary left her $1.00 below job rate. You must wait the 60 months in order to move to step seven; however, the other employee received a five percent increase, which took her above job rate where she will now have to wait for 60 months before she received another anniversary increase (this assumes no change to the current anniversary increase process).
>
> I apologize that I am unable to correct this situation. Sometimes when one process is replaced by another, there are transitional issues that occur which yield an uneven result. This is one of those unfortunate circumstances.
>
> I am not sure how you would like to proceed, but I encourage you to check with Human Resources on what to do to preserve any rights you might have with regard to appealing or grieving my decision." (Emphasis added.)

52. It is clear from his response that Mr. Vecchiarelli was sympathetic with Hill's situation; he apologized for being unable to correct it and encouraged her to grieve his decision. Like Tremble, he confused "five-year rate" with "job rate."

53. In September 2000, Complainant appealed the grievance decision to the Board.

54. During the pendency of Complainant's appeal, on January 17, 2001, DOP moved to intervene as a party. On that same date, Complainant and Respondents DOR and DOP filed a stipulated motion to dismiss without prejudice in order to enable the parties to bring her grievance through formal step 2 of the grievance process.

55. On January 23, 2001, Complainant timely filed her second written grievance. She stated, in part,

> This letter is in response to your memo of August 31, 2000, stating you were unable to correct the situation of the pay inequity between another Tax Examiner III (Cathy Galen) and me. I have 4 years more experience at this level than she does.
>
> . . . Neal Peters' article in the November 7, 2000 issue of ReveNews was surely not for my sole benefit. [See Findings of Fact 59 and 60 below.] Just because the salaries were calculated correctly does not mean that the situations are right or that they cannot be corrected.
>
> I believe that it is the responsibility of the Office of Human Resources to prevent situations like this from occurring. They should have seen this coming and taken steps to head it off. . . They [the Office of Human Resources] advised you to render a decision that is arbitrary and capricious. . .
>
> But even more important, this issue is about equal pay for equal work. The state Constitution (Art. II, section 13(8)) states that 'persons in the personnel system of the state . . . shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties.'
>
> I am asking you to reconsider your decision. I am asking to be compensated at the same level as Cathy Gallen, retroactive to July 1, 2000."

56. Mr. Vecchiarelli once again consulted Mr. Peters in addressing Hill's grievance. He valued Hill very much as an employee, and sought to exhaust every available avenue of relief available to him. Again, Peters consulted with DOP, who informed him that no remedy was available.

57. Mr. Vecchiarelli responded in writing on February 22, 2001. He had by this time fully familiarized himself with the open range pay system. In his letter, he correctly defines "five-year rate" and other important terms, and states in part, "I have reviewed the following: Colorado Constitution Art. XII, Section 13(8); C.R.S. Section 24-50-104 (2000); Chapter 3 of the State Personnel Board rules; Chapter 12 of the State Personnel Board Rules; specifically P-3-14, P-3-6(C), P-3-18, and P-3-49."

58. Mr. Vecchiarelli explains the transition from steps to the open range pay plan. He states that Complainant "would not have been eligible [for an anniversary increase] on July 1, 1999," because she was "already in the five-year range. Note, however, that each employee will be eligible for an increase in pay to the traditional maximum after completing his/her 60 months at the five-year rate, no matter what his/her pay rate was during the five-year rate."

59. Mr. Vecchiarelli relies on the Director's Procedures in denying Complainant's grievance. He concludes, "In summary, I am unable to grant you the relief you request. The State Personnel Director has the authority to establish pay plans, procedures and directives to implement the state's prevailing total compensation philosophy in accordance with C.R.S. section 24-50-104(5)(a). These procedures and directives were followed in calculating your anniversary increase. I do not have authority to alter this process. Within the

State Personnel System, an employee is entitled to be paid within the pay range assigned to a specific job title. The concept of 'equal pay for equal work' entitles you to a salary within that pay range, but not to a specific pay rate."

60. In November 2000, Peters, in charge of overseeing the conversion from step system to open range system for DOR, published an article in ReveNews, entitled, "Confusion Remains Concerning Anniversary Increases." He stated in part,

> "In July 1998 the State Personnel System replaced the traditional salary grid (steps 1 - 7) with an open range salary plan. Open salary ranges brought a change in the way anniversary increases were calculated and **the impact of this change is still not clearly understood today**." (Emphasis added.)
>
> "Under the old former step system an employee's salary was moved to the next higher step in the pay plan on the employee's anniversary date. Employees were required to serve at step 6 for 60 months before moving to step 7. Each step in a grade was approximately, but not exactly, five percent higher than the next lower step. The dollar values at step 6 and 7 were consistent for all employees in a particular grade.
>
> Under the open salary range system, an eligible employee receives an anniversary increase calculated at exactly 5%. The monthly salary resulting from this calculation will most likely not be the same amount as it would be under the step system. **This is one of the facts that cause confusion and consternation**." (Emphasis added.)
>
> "Another difference is that the former step 6 single-salary amount has been replaced by a salary range called the 'traditional five-year range.' . . . . A few examples illustrate the impact of these changes."

61. Peters then goes on to review the basic facts of Complainant's and Galen's case in detail, using different names, concluding, "[Complainant], who has more state service time than [Galen], is making a lower salary than [Galen] is. [Complainant] is not a happy camper even though his salary is what he expected it to be."

62. Complainant requests pay equal to that of Galen retroactive to July 1, 2000.

DISCUSSION

In this action challenging an agency response to a grievance, it is Complainant's burden to demonstrate that the Respondents' actions were arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

I. Board Jurisdiction

Respondents challenge the Board's jurisdiction over this case. They argue that the Board has no jurisdiction over the compensation system or its constitutionality, and that the Director has exclusive authority over the compensation system, citing Colorado Constitution, art. XII, 14(4), C.R.S. sections 24-50-102 and 104, and *Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993).

In *Horrell*, the Colorado Supreme Court held that the Board does not have authority to assess the facial validity of a statute. The Court clarified, however, that "The Board, of course, may evaluate whether an otherwise constitutional statute has been unconstitutionally applied with respect to a particular personnel action." *Horrell*, 861 P.2d at 1199, n. 4. This case does not involve a facial challenge to the constitutionality of a statute or the compensation system. It examines the effects of the implementation of a new pay plan on one employee. It is squarely within the Board's authority.

The Director administers the personnel system under the authority of the Colorado Constitution, state statutes, and Board rules.

Article XII, section 14(4) of the Colorado Constitution states,

> "There is hereby created the department of personnel . . . . The state personnel director shall be responsible for the administration of the personnel system of the state under this constitution and laws enacted pursuant thereto and the rules adopted thereunder by the state personnel board."

In *C.A.P.E. v. Lamm*, 677 P.2d 1350, 1355 (Colo. 1984), the Colorado Supreme Court discussed the distinct powers of the Board and the Director as contemplated by article XII, section 14(4). The Court stated, "**The laws of the General Assembly and the rules of the Board have coordinate authority over the Director's administration of the personnel system under section 14(4)**." *Id.*, 677 P.2d at 1355, n. 1. (emphasis added).3 The Colorado Court of Appeals stated in *Spahn v. Department of Personnel*, 615 P.2d 66, 68 (Colo. 1980), "the Board reviews the actions of the head of the Personnel Department." A primary reason for this is, "The Board is ultimately responsible for protecting the rights of public employees." *Hughes v. Department of Higher Educ.*, 934 P.2d 891, 894 (Colo. App. 1997).

Respondents further argue that the power to fix compensation within the classified state personnel system abides solely in the General Assembly - not DOP, not DOR, and not the Board. They argue, "absent the statutory authority to fix compensation levels, the Board is without jurisdiction to hear Complainant's appeal," citing *Dempsey v. Romer*, 825 P.2d 44, 52 (Colo. 1992). *Dempsey* upheld the General Assembly's power to establish a maximum monthly salary cap for classified employees which conflicted with the Director's compensation pay plan. However, the separation of powers analysis in *Dempsey* is inapposite here, as disposition of this case does not implicate the legislature's power to fix

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3 Board Rule R-3-1 states, "The Department of Personnel shall establish procedures governing compensation for the state personnel system." 4 CCR 801 (2000).

compensation levels.

II. Respondents' Actions Were Arbitrary, Capricious, or Contrary to Rule or Law.

Complainant agues that Respondent DOR's actions were arbitrary and capricious in both her first and second written grievances. The Colorado Supreme Court recently clarified the standard to be applied in determining whether agency action is arbitrary or capricious. *Lawley v. Dep't of Higher Education*, ____ P.3d ____ (Colo. No. 00SC473, December 3, 2001). The Court stated, "we make clear that the principles we annunciated in *Van DeVegt* continue to apply to administrative actions." *Id*. at page 31, n. 15. In *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703 (Colo. 1936), the Court defined arbitrary and capricious agency action as:

> (a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. 55 P.2d at 705.

In applying this standard herein, the Board examines the conduct of DOR and DOP, for a number of reasons unique to this case. In acting on Complainant's grievance, DOR sought out and relied heavily on the advice of DOP in rendering its grievance decision. DOR worked closely with DOP in determining what action to take. And, DOP filed a motion to intervene in this case in January 2001, <u>before</u> the final grievance decision was even rendered. In view of this high level of involvement, DOP's intervention was appropriate, and it has afforded the agency full due process - the opportunity to explain and defend its role in rendering the grievance decision.

Turning to *Van DeVegt*, once officials at DOR and DOP became aware of the unintended pay inequity between Hill and Galen, they should first have calculated the total amount of disparity that would occur over time. Knowing ultimately how much money was at issue was the foundation for assessing the seriousness of the problem. The $4712.00 disparity in this case is an extremely serious one. No evidence demonstrates that DOR or DOP officials closely involved in responding to the grievance had any idea that the ultimate amount was as high as $4712.00. This information constitutes evidence available to Respondents that they neglected to use reasonable diligence to procure. *Van DeVegt.*

Second, and more importantly, it was arbitrary and capricious for neither DOR nor DOP to utilize Director's Procedure P-3-9, 4 CCR 801 (2000) in addressing Complainant's grievance. Both agencies' managers reviewed Chapter 3 (Compensation) of the Director's Procedures prior to denying Complainant's grievance; both agencies relied on these rules in denying Complainant's grievance. A review of these rules would have revealed the existence of P-3-9, which provides a simple resolution to the problem. The rule states:

> "P-3-9. In the case of fiscal emergency or **for other reasons that benefit the employer and employee,** an employee may agree to voluntarily reduce current base pay, which shall be approved in writing by the appointing authority and employee. The agency may later restore base pay to any rate up to, and including, the former base pay." (Emphasis added.)

The genesis of the $4712.00 pay disparity between Hill and Galen was the $1.00 difference in their salaries from July 1, 1999 through June 30, 2000. Closing that $1.00 gap via P-3-9 provided the solution, as follows: DOR could have reduced Complainant's current base pay by $1.00, taking her out of the five-year rate and thereby rendering her eligible for the same 5% anniversary increase Galen received on July 1, 2000 (plus the salary survey increase both received). Complainant and Galen would then have remained at exactly the same level of pay for the duration of their respective times in the five-year rate. The $1.00 reduction in base pay therefore eliminates Galen's 5% jump in pay over Complainant, ultimately totaling $4712.00.

Both Vecchiarelli and Peters were extremely concerned about Hill's situation, valued her highly as an employee, and sought to remedy the inequity. The evidence therefore does not account for how they overlooked this rule. It may have been due to an over-reliance on DOP: DOR's final grievance decision states, "The State Personnel Director has the authority to establish pay plans, procedures and directives to implement the state's prevailing total compensation philosophy in accordance with C.R.S. section 24-50-104(5)(a). These procedures and directives were followed in calculating your anniversary increase. I do not have authority to alter this process."

Notwithstanding their manifest good intentions, it was arbitrary and capricious for DOR managers to fail to consider Director's Procedure P-3-9 in this situation, as it provided such an easy remedy. Further, since DOR's final grievance decision expressly relies on the Director's procedures, it is appropriate to hold DOR accountable for its failure to utilize one of them.

DOP Ignored its Own Rule

Turning to DOP, it had the following information available to it: a gross disparity in pay between two identically situated employees caused by the pay plan conversion, by accident; a highly valued DOR employee who was the victim of the inequity; an appointing authority and HR director who sought to remedy the inequity and repeatedly asked DOP for assistance in doing so; one of DOP's own rules provided an easy remedy; and only one other employee in the entire Department of Revenue faced a similar problem (hence, minimal fiscal impact if P-3-9 were utilized). Faced with this information, DOP's failure to direct DOR to P-3-9 as the remedy it sought is inexplicable.

DOP failed to give candid and honest consideration to its own rule as a remedy for Hill, and reasonable people fairly and honestly considering the evidence before DOP would have done so. DOP's failure to direct DOR to P-3-9 as a remedy for Hill was arbitrary and capricious. *Van DeVegt, supra*.

DOP presented evidence through its rules expert making it clear that it disapproved of utilization of P-3-9 in this situation.4 First, the expert testified that P-3-9 is designed only for situations in which a fiscal emergency threatens to cause layoffs. In order to "decrease the adverse impact" of such fiscal situations, the rule enables employees to take a base pay cut until the fiscal problem is resolved. The expert testified that that it is mandatory that employees be returned to their base pay if P-3-9 is used; therefore, it could not have been utilized as a remedy for Complainant. The expert further indicated that the rule had only been used three times during her long tenure at DOP.

When the ALJ pointed out that the rule contains the term, "may," and not "shall," with respect to returning employees to their original base pay amount, the expert testified that "may" is used because if the fiscal problem doesn't resolve, employees would not be restored to their base rate of pay.

An administrative agency's construction of its own rule is generally entitled to great weight. Such construction will not be disturbed upon review unless it is plainly erroneous or inconsistent with such rule or the underlying statute. *Department of Admin. v. State Personnel Bd. of State*, 703 P.2d 595, 597 (Colo. App. 1985). DOP's construction of P-3-9 is plainly erroneous and inconsistent with the language of the rule.

The rule states that it can be used in <u>either</u> "the case of fiscal emergency **or for other reasons that benefit the employer and employee** . . . ." P-3-9 (emphasis added). The situation in this case fits into the second category: "reasons that benefit the employer and employee." Use of P-3-9 benefits Complainant by reducing her salary by $1.00, thereby rendering her eligible for the same July 2000 anniversary increase experienced by Galen, and eliminating the $4712.00 inequity. Use of P-3-9 benefits DOR by providing the remedy for Hill they persistently sought.

DOP's position that P-3-9 mandated that Complainant be returned to her original base pay after taking a temporary reduction is contrary to the language of the rule. The rule states, "An employee may agree to voluntarily reduce current base pay . . . **The agency may later restore base pay to any rate up to, and including, the former base pay**." P-3-9 (emphasis added). The rule is permissive, not mandatory. It expressly provides the appointing authority with discretion never to return the employee to former base pay.

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4 The issue of utilization of P-3-9 was not raised in this case until issuance of the July 12, 2001 order granting in part and denying in part Respondents' motion to dismiss. DOP therefore had a full opportunity at hearing to present expert testimony on the rule. None of this evidence demonstrated that DOP ever considered the rule prior to denial of Hill's grievance.

DOP's policy-based arguments against utilization of P-3-9 here also fail, as they are unsupported by the evidence. DOP argues that if Hill were permitted to use the rule to gain pay parity with Galen, thereby postponing her entry into the five-year rate by one year, it would prompt other employees to attempt to use the rule to postpone their time in the five-year rate. Widespread misuse of the rule to make an "end-run" around the compensation rules would be expensive, and would disrupt the state's annual budget for classified employee salaries.

Only one other employee in the entire Department of Revenue suffered the same leapfrogging in salary as Complainant (in an amount unknown). The record contains no information regarding any other classified employee in the state workforce that may have been similarly victimized by the conversion in pay plans. Application of P-3-9 to Hill would have served the policy interest of maintaining equity in treatment in the compensation system, while causing no undue fiscal hardship on either DOR or the state's classified personnel budget.

DOP's rules expert further testified as follows. If DOR had used P-3-9 to bring Hill into pay parity with Galen, this would have been "caught" by the DOP Director in his post-audit review of agencies' actions, would have been viewed as an abuse of the procedure, and that the Director could (or would) have ordered the appointing authority to correct the "misapplication" of the procedure. This evidence had no weight, as it was purely hypothetical.

In an apparent concession that P-3-9 does apply in non-fiscal emergency situations, DOP argued that use of P-3-9 in this case would have benefited neither employer nor employee. It argued that it would not benefit Hill because it postponed the time she would reach the maximum salary in her pay grade. The evidence contradicts this argument, demonstrating conclusively that use of P-3-9 would have qualified Hill for two salary increases in July of 2000 instead of one, thereby bringing her to the very top of the five-year rate when she entered it, and that she would have remained at that top level for the duration of her time in the rate. Her ultimate increase to the maximum salary for the TE III position would have consisted only of a $1.00 increase. (See Findings of Fact #28 - 41). Respondent's argument that use of P-3-9 would not benefit the employer consisted of the arguments discussed, and rejected, above. The appointing authority sought to provide Hill with a remedy; using P-3-9 as that remedy would clearly have benefited it.

DOP Could Have Crafted an Alternate Remedy for Appointing Authorities' Use

Were there any other alternatives DOP could have and should have considered in responding to Hill's grievance? Yes. DOP had known about the potential leapfrogging that would occur because of the pay plan conversion since 1998. It had a considerable period of time to consider what action it would take to rectify an accidental pay disparity, when and if it arose. Hill's grievance presented a $4712.00 pay disparity: an extremely serious situation. DOP could easily have modified P-3-49, the discretionary pay differential rule, to add a fifth type of discretionary pay differential to cover just this type of situation. The procedure could have expressly empowered appointing authorities to rectify inequities caused by the conversion in pay plans, with standards set forth for doing so. (For instance, "if the conversion in pay plans causes similarly situated employees to be treated inequitably, the appointing authority may grant a discretionary pay differential in order to correct the base pay inequity"). Instead, DOP elected to do nothing.

DOP's failure to provide a remedy for a problem it anticipated for years was arbitrary and capricious. No reasonable compensation plan administrator would allow its conversion in pay plans to inadvertently subject a highly valued employee to a $4700.00 pay disparity, without crafting a remedy empowering the appointing authority to remedy it. DOR managers repeatedly sought out DOP's assistance to provide Hill with a remedy; given the existence of P-3-9, they should not have had to come away empty-handed.

DOP argues that leapfrogging is endemic to the compensation system, since employees are sometimes hired (or promoted or transferred) at salary rates higher than existing employees with greater tenure in the same pay grade.5 Unlike the Hill case, however, these situations reflect an intentional act on the part of appointing authorities, expressly permitted "on a showing of recruiting difficulty or other unusual condition" under C.R.S. section 24-50-104(1)(f). When an appointing authority hires a new employee at a rate higher than an existing employee based on market factors, that action is well within the appointing authority's discretion. The resulting pay disparity or "leapfrogging" has a reasonable basis in both fact and law.

Complainant's appointing authority intended to treat Complainant and Galen the same, and sought to rectify the $4712.00 inequity between them. There is no basis in fact for the inequity. Further, no statutory or regulatory provision either anticipates or intends that such leapfrogging to occur. As Complainant argued in her appeal filed with the Board, it was not the intent of the pay plan conversion to cause such leapfrogging. It was an anomaly that called for a remedy.

III. The Conversion in Pay Plans Violated Hill's Right to Equal Pay For Equal Work under Colo. Const. art. XII, Section 13(8).

Complainant argues that her rights under Colo. Const. art. XII, Section 13(8) have been violated. This provision, known as the "equal pay for equal work provision," states that classified employees "shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties." Colo. Cont. art. XII, Section 13(8).

Complainant and Galen Were Similarly Situated.

Respondents argue that the equal pay for equal work provision is inapplicable here,

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5 The fact that Galen promoted into the TE III position is irrelevant: she was brought into the position well below Complainant on the TE III pay grade, demonstrating no intention to pay Galen more than Complainant.

because Complainant and Galen were not similarly situated. Respondents point to the different salary and promotion paths that brought the two employees to different points in the five-year rate as evidence that they should not be considered to be similarly situated.

This argument, based on circular reasoning, is rejected. The fact that Complainant and Galen were treated differently does not vitiate the fact that they were similarly situated.

Findings of Fact 30 and 40 demonstrate that Complainant and Galen were similarly situated from July 1, 1999 through June 30, 2000. As of July 1, 1999, both employees had progressed an equal distance up the pay grade in the TE III position; Complainant had merely progressed $1.00 further. The $1.00 disparity is immaterial. It was due to the fact that Complainant received a pre-July 1998 anniversary [step] increase of approximately 5%, and Galen received post-1998 anniversary increases of exactly 5%. (Finding of Fact #51.) DOP's replacement of step increases with 5% increases was designed to maintain pay parity between employees such as Complainant and Galen, not to destroy it. Under the compensation system, Complainant and Galen were similarly situated.

Respondents further argue that even if Complainant and Galen were similarly situated, the compensation rules are facially neutral, and were uniformly applied; therefore, no preferential or disparate treatment occurred. Specifically, they argue that because both employees were required to spend 60 months in the five-year rate (minus Step 6 time), they were treated the same. Therefore, even if the facially neutral rules' application resulted in a $4712.00 pay disparity, as here, this disparity fails to defeat the fact that they were treated "fairly" under a uniform set of rules.

Respondents contend that under *Blake v. Department of Personnel*, 876 P.2d 90, 97 (Colo. App. 1994), Complainant has no right to a particular salary. They aver that her only valid claim is to be paid within the same pay grade as Galen. *Blake* is inapposite, as it did not involve an allegation of disparate treatment of two employees within the same pay grade. *Blake* involved an entire class of employees challenging the Director's decision to lower the salary range for the entire class (pursuant to a system maintenance study).

Respondents also rely on *Dempsey v. Romer*, *supra*, the salary cap case. Complainants in *Dempsey* did raise a challenge to the salary cap under the equal pay for equal work provision of the constitution, arguing that the provision "prohibits payment of identical salaries to persons performing dissimilar duties." 825 P.2d at 51. In rejecting this argument, the Colorado Supreme Court stated,

> "Article XII, section 13(8), of the Colorado Constitution provides that state employees performing 'like' or **similar services must be graded and compensated according to the same standards. It thus prohibits preferential compensation treatment for persons equally qualified who perform substantially similar services.** The provision neither expressly nor by necessary implication prohibits payment of identical compensation to state employees performing unlike or dissimilar services." *Id*. (Emphasis added.)

Dempsey is also factually inapposite because it involved a challenge to the equal pay of two groups of employees performing dissimilar services. Here, two similarly situated employees have been subjected to different treatment.

Complainant and Galen Were Not Compensated According to the Same Standards.

The *Dempsey* Court's articulation of the standard is useful: the equal pay for equal work provision "prohibits preferential compensation treatment for persons equally qualified who perform substantially similar services." *Id.* That is precisely what occurred here. Galen, who is equally qualified to Complainant and who performs exactly the same services at the same level in the same pay grade, has received "preferential compensation treatment" in the amount of $4712.00 (calculated through May 2002).

Complainant and Galen were not "compensated according to the same standards," in violation of Colo. Const. art. XII, Section 13(8). *Dempsey*, 825 P.2d at 51. The following compensation standard has been in full force and effect prior to and since the 1998 conversion in pay plans: similarly situated employees progress up the pay ladder at 5% increments, then remain at either Step 6 or the five-year rate for 60 months. In July 2000, Galen received one extra 5% increase that Complainant did not receive; therefore, this compensation standard was not uniformly applied to Complainant and Galen. Complainant's right under Colorado Constitution, article XII, Section 13(8) to be compensated according to the same standards as Galen has been violated.

[Prior to July 2, 1998, DOP's means of achieving uniform progression up the pay scale was anniversary increases of approximately 5%, via specific "step" amounts. After July 2, 1998, DOP met the same policy goal via anniversary increases of exactly 5%. **DOP's replacement of 5% increases for step increases (pending the implementation of CPP) reflects DOP's continued compensation policy of treating similarly situated employees the same by moving them up the pay grade ladder at a uniform 5% rate. See Finding of Fact #10.]**

The Five-Year Rate Does Not Trump Complainant's Constitutional Right to Uniform Compensation Treatment

Turning to the role that the five-year rate played in the disparate treatment of Complainant and Galen, DOP's rules expert provided no evidence that the five-year rate range was designed or intended to interfere with the policy of similarly situated employees' uniform progression up the pay ladder. Therefore, there is no evidence in the record that the policy of having a five-year rate range in any way trumps the compensation policy of uniform progression up the pay grade.

The only new compensation policy in place after July 2, 1998 that could provide a defensible reason for the disparate compensation treatment of Complainant and Galen would be performance pay. However, as is clear from the record, DOR managers had no authority to grant Galen performance pay, and performance factors played no role in the pay inequity here.

In summary, Colorado Constitution art. XII, Section 13(8) entitled Complainant, as an employee similarly situated to Galen, to progress up the TE III pay grade in equivalent 5% increments. The conversion in pay plans, as it applied to Hill, deprived her of that right.

IV. The Conversion in Pay Plans Violated Hill's Right to Equal Protection.

Director's Procedure P-3-1 states, "Compensation practices shall provide for equitable and fair treatment of similarly situated employees." 4 CCR 801 (2000). This Director's Procedure is essentially a regulatory codification of the equal protection standard. Because Complainant's claim is also, at its core, an equal protection claim, an equal protection analysis follows.

The due process clause contained in the Colorado Constitution encompasses a guarantee of equal protection. Colorado Constitution, art. II, section 25; *Rodriguez v. Schutt*, 914 P.2d 921, 926 (Colo. 1996). The constitutional guarantee of equal protection of the law assures that those who are similarly situated are afforded similar treatment. *Diamond Shamrock v. Dept. of Labor & Emp*., 976 P.2d 286, 293 (Colo. App. 1998).

"Regulatory classifications which neither impinge on fundamental rights nor affect suspect classes do not deny equal protection guarantees if the distinctions have a reasonable basis and are rationally related to a legitimate government interest. And, under this test, a presumption of constitutionality attaches to the classification, and the challenging party must establish a constitutional violation beyond a reasonable doubt." *Bingo Games Supply Co., Inc. v. Meyer*, 895 P.2d 1125, 1130 (Colo.App. 1995).

It has previously been established that Complainant and Galen were similarly situated and were not afforded similar treatment. The only remaining question is whether the regulatory classifications that created the salary inequity have a reasonable basis and are rationally related to a legitimate government interest. *Meyer, supra*.

Two regulatory classifications in this case led to the disparate treatment of Complainant and Galen: 1. the pay plan conversion caused a slight difference in the amount of anniversary increases received by Complainant Galen, resulting in a $1.00 pay disparity as of July 1, 1999; and, 2. the creation of the five-year rate range in pay (replacing Step 6) resulted in Complainant's salary being frozen at $4712.00 below Galen's for 22 months.

Neither of these regulatory classifications, as applied to Complainant herein, has a reasonable basis or is rationally related to a legitimate government interest.

The only government interest furthered by the pay plan conversion was to increase state managers' flexibility in compensating employees. By eliminating the step system, appointing authorities would have greater freedom to award performance pay in the pay grade range. This government interest was actually defeated in Hill's case. Both Vecchiarelli and Peters sought to use any rule available to rectify the inequity suffered by Hill. The rigidity demonstrated by DOP in its response to the situation actually quashed the appointing authority's objective of being flexible in compensating its employee.

Focusing on the five-year rate, the only reasons for making the five-year rate a range, instead of a set amount as Step 6 had been, were to accommodate performance pay award flexibility, and to reward longevity. In this case, neither of these objectives was met. First, performance was not an issue in the pay disparity between Complainant and Galen. Second, to the extent that the five-year rate is designed to reward longevity, here it did the opposite. The longer Hill remained frozen at the bottom of the five-year rate, the greater the pay disparity grew between her and Galen.

There is no rational basis in the record supporting the disparate treatment of Hill and Galen. What occurred is nothing more than the willy-nilly application of compensation rules, resulting in an accidental $4712.00 inequity. As Hill argued in her appeal filed with the Board, it was not the intent of the pay plan conversion to create this inequity.

In *Dempsey v. Romer*, *supra,* the salary cap case, Complainants raised an equal protection challenge. Complainants averred that the General Assembly's salary cap "bear [s] no reasonable relationship to any legitimate governmental purpose and thus unfairly discriminate[s] between state employees classified at grade 99 and all other state employees." 825 P.2d at 57. The Court disagreed, finding that the salary cap bore a reasonable relationship to the governmental interest of "legislative responsibility of maintaining the fiscal integrity of the state personnel system." *Id*. at 57. The Court further explained, **"the maximum monthly salary level limitation contained in section 24-50-104(6) does not discriminate between members of a given class or grade**." *Id*. (Emphasis added.) Applying this standard to Hill, the conversion in pay plans did "discriminate between members of a given class or grade." *Id*.

The pay plan conversion, solely as it applies to Hill, violated her right to equal protection under the Colorado Constitution. *See also Employees' Retirement System v. Martin*, 533 S.E.2d 68, 71 (Ga. 2000)(finding no rational basis for disparity in treatment [retirement benefits] of state employees based solely on date of transfer). The *Martin* case is similar to this one, in that it is solely the date of anniversary increase that led to the pay disparity between Complainant and Galen.

The above conclusions of law herein are limited to the facts of Hill's case, and are not intended to pass judgment on the open range pay plan on its face or as applied in any other situation.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this case.

2. Respondents' actions were arbitrary and capricious or contrary to rule or law.

3. Respondents' actions violated Complainant's rights to equal pay for equal work under Colorado Constitution article XII, section 13(8), and her right to equal protection under Colorado Constitution article II, section 25.

INITIAL DECISION

Respondents' actions are <u>rescinded</u>. Complainant is to be compensated at the same level as Galen retroactive to July 1, 2000, by operation of P-3-9, and is to serve the remainder of her time within the five-year rate as otherwise provided by rule and procedure.

DATED this _____ day of January, 2002, at Denver, Colorado.	___________________________ Mary S. McClatchey Administrative Law Judge 1120 Lincoln Street, Suite 1400 Denver, Colorado 80203

<u>NOTICE OF APPEAL RIGHTS</u>

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. The notice of appeal must be received by the Board no later than the 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) 894-#2136.

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 2 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 January, 2002, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Margaret M. Hill
8014 West Polk Place
Littleton, Colorado 80123

and in the interagency mail, addressed as follows:

Joseph Q. Lynch
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