

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAN WELLS and BARRY RICE,

Complainants,

vs.

DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF COLORADO AT DENVER, AURARIA MEDIA CENTER, AURARIA LIBRARY and AURARIA HIGHER EDUCATION CENTER,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on April 22, 2002; July 8, 2002; October 29, 2002; January 27 and 29, 2003; February 26, 2003; and April 7, 2003 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Mark Schwane represented Complainant Dan Wells; Nora Kelly represented Complainant Barry Rice; Rosemary Augustine represented Respondent University of Colorado at Denver; Assistant Attorney General Luis Corchado represented Respondent Auraria Higher Education Center. Both Complainants were present throughout the hearing. Respondent University of Colorado at Denver's advisory witness was Andrew Jhanji; Respondent Auraria Higher Education Center's advisory witness was Cynthia Hier.

MATTER APPEALED

Complainants Dan Wells and Barry Rice, (collectively "Complainants," and individually "Wells" and "Rice") appeal their layoffs by Respondent University of Colorado at Denver ("UCD") and Respondent Auraria Higher Education Center's ("AHEC") failure to implement Complainant's retention rights. Complainant Dan Wells seeks back pay, interest, attorney fees and costs and reinstatement to his former position, or, in the alternative, employment with the University of Colorado at Denver; Complainant Barry Rice seeks reinstatement, back pay, interest, costs and attorney fees.

For the reasons set forth below, Respondent UCD's actions are **affirmed**. For the reasons set forth below, Respondent AHEC's actions are **affirmed** with regards to Complainant Wells and **rescinded** with regards to Complainant Rice.

PROCEDURAL HISTORY

Complainants Wells and Rice, along with eleven other complainants, timely filed their appeals in this action listing Respondent UCD as the sole respondent in this action. The thirteen appeals were consolidated. At the time of commencement, there were six remaining complainants. Prior to going to evidentiary hearing, four complainants' appeals were dismissed from this consolidated action due to settlement or non-appearance. In addition, by order dated October 15, 2002, Respondent AHEC was joined as an indispensable party as it was determined that complete relief, if granted, could not be given without joinder of AHEC as a party. After the two remaining complainants and the two respondents completed discovery, the evidentiary hearing in this matter began on January 27, 2002. The evidentiary hearing was concluded on April 7, 2002. The parties submitted written closing arguments and the record was closed on May 7, 2003.

ISSUES

1. Whether Respondent UCD's action was arbitrary, capricious or contrary to rule or law;
2. Whether Respondent AHEC's action was arbitrary, capricious or contrary to rule or law;
3. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant Rice was employed by UCD as a Telecommunication/Electronic Specialist II in the Auraria Media Center (the "Media Center") from November 1998 until April 14, 2002, the effective date of his layoff. His job performance while at UCD was excellent.
2. Complainant Wells was employed by UCD as a Media Specialist I in the Media Center until April 14, 2002, the effective date of his layoff. His last performance evaluation rating from UCD, for the period of 5/1/01 to 4/30/02, was "outstanding."
3. At the time of being laid off, Wells had over twenty years of state service and Rice had over three years of state service.

Entities' Structures

4. The Auraria Higher Education Center ("AHEC") is a distinct entity, governed by a board of directors (the "Auraria Board") and created by statute, §23-70-102, C.R.S. The Auraria Board consists of nine voting members, three of whom are appointed by the Governor, the chief executive officers of the University of Colorado at Denver ("UCD"), Community College of Denver ("CCD") and Metropolitan State College of Denver ("Metro") (collectively the

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“Constituent Institutions” and three members, one each, from the three governing boards of the Constituent Institutions.

5. AHEC is the entity that oversees the land, physical plant, and facilities for the Constituent Institutions; which all share the same campus. UCD and AHEC are in separate retention areas.
6. The Auraria Executive Council is an executive committee consisting of the presidents of Metro and CCD, the chancellor of UCD and Dean Wolf, the Executive Vice President for Operations of AHEC (“the Executive Council”). The Executive Council meets every other week and makes recommendations to the Auraria Board.
7. The Media Center, among other duties, maintains the Auraria campus’ audio/visual equipment, trains faculty in the use of that equipment and provides support to over 200 classrooms in which media equipment has been installed. These classrooms are commonly referred to as “smart classrooms.”
8. Smart classrooms are classrooms in which, prior to 2002 and through capital construction funding, equipment was installed to increase the technological capabilities of classrooms, including the installation of upgraded media equipment (VHS, DVD, audio and projection systems) and internet capability. Prior to the installation of this equipment, audio/visual equipment was delivered, when needed, to classrooms by the Media Center staff.
9. From 1981 until April 14, 2002, the Media Center was administered by UCD and operated as a part of the Auraria Library. Since April 15, 2002, the Media Center has been administered by AHEC as part of AHEC’s Division of Facilities Planning and Use.
10. The operating funds for the Media Center are generated from the three Constituent Institutions. In the past, the Constituent Institutions would negotiate, every three years, a base budget agreement for the operation of the Media Center and the Library.
11. The base budget agreement would set forth the calculations for determining each Constituent Institution’s contribution to the Media Center’s operating funds. Historically, UCD and Metro would each pay 45% of the Media Center’s costs and CCD would pay the remaining 10%.

Layoff by Respondent University of Colorado at Denver

12. In 2001, during an Executive Council meeting, President Sheila Kaplan of Metro stated that Metro’s actual costs for the Media Center were too high. A committee was set up, comprised of representatives from each of the Constituent Institutions and AHEC, to investigate and assess the Media Center’s costs (the “Media Center Assessment Committee”).
13. The Media Center Assessment Committee met throughout Spring and Summer 2001 and then made its report to the Executive Council. The committee’s initial recommendation was to transfer maintenance of all aspects of the Media Center to AHEC, with the exception of the

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production studios that would be left under UCD's control.

14. The Executive Council discussed the committee's recommendation throughout the 2001 Fall Semester. It also discussed the option of transferring all of the Media Center functions to AHEC.
15. Throughout the discussion of the various options for the Media Center, various parties referred to the potential restructuring of the Media Center as a "reorganization."
16. At the October 8, 2001 Executive Council meeting, the Media Center Assessment Committee made a final recommendation to the Executive Council that all of the Media Center functions be transferred to AHEC. The Executive Council then determined that operation of the Media Center was a facilities issue and, therefore, should appropriately be placed under AHEC.
17. Given the rumors concerning the future of the Media Center, beginning in October 2001, UCD and AHEC coordinated weekly meetings with the Media Center employees to answer their questions and explain the process that was taking place around the Media Center reorganization. The human resources directors for UCD and AHEC, UCD's Chancellor, the Dean of the Auraria Library and UCD's legal counsel attended those meetings.
18. Initially, during the weekly meetings, the Media Center employees were told that no jobs would be lost as a result of the Media Center's reorganization. In early January 2002, they were told that some positions would be eliminated, but there was no discussion as to which positions. In late January 2002, at an Executive Council meeting, there was a discussion about the potential for a savings of \$500,000 from the transfer of the Media Center operations to AHEC and that, given that 80-85% of the Media Center's budget was personnel costs, most of that savings would be in the personnel area.
19. Sometime towards the end of November 2001 and prior to UCD deciding to layoff all of the Media Center employees, Doug Kassyon, a UCD Human Resources Manager, prepared a draft document setting forth the seniority of the various classified Media Center employees. He did this in anticipation of UCD laying off only some of the Media Center employees. Given the ultimate decision to layoff everyone, Kassyon did not use this draft document.
20. On February 28, 2002, a meeting was held with all of the Media Center employees. Also present at the meeting were UCD's Chancellor Lesh-Laurie, AHEC's Wolf, UCD's Kassyon, and Cynthia Hier (AHEC's Human Resources Director).
21. During the February 28, 2002 meeting, all of the employees of the Media Center, including the Complainants, were given written notice that they were laid off, effective April 14 2002, due to lack of work and lack of funds (the "Layoff Notices").
22. The Layoff Notices were signed by David Gleim, Dean of the Auraria Library, were on Auraria Library letterhead with UCD's, CCD's and Metro's full names listed directly below the "Auraria Library" heading. AHEC is not mentioned anywhere in the Layoff Notices. In

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addition, the Layoff Notices state, “this letter is . . . your official notification of retention rights with the University of Colorado at Denver.” (emphasis added).

23. At the February 28, 2002 meeting, Kassyon gave the Media Center employees a blank notice of intention to exercise retention rights for them to complete and return to him if they wished to exercise their retention rights with the University of Colorado at Denver.
24. At the same February 28, 2002 meeting, the AHEC personnel distributed to the Media Center employees the postings for the fourteen AHEC positions at the Media Center and the Position Description Questionnaires (“PDQs”) for those positions.
25. At the February 28, 2002 meeting, Wells signed a notice of intention to exercise retention rights.
26. In late February 2002, Rice asked Kassyon if he had any retention rights. Kassyon told him that that he did not have any retention rights within UCD. Rice did not sign any type of notice of intention to exercise his retention rights.
27. Jim Langstaff, a GPV and one of the employees working at the Media Center under UCD, exercised his retention rights and is now working in UCD’s Bursar Office.
28. On March 11, 2002, the Auraria Board unanimously approved a memorandum of understanding that transferred the Media Center operations to AHEC (the “MOU”). UCD, CCD, Metro and AHEC executed the MOU on March 19, 2002.
29. The MOU provided for the assumption of the management of the Media Center by AHEC after the “implementation of the [Media Center] restructuring plan.” In addition, under the MOU, UCD would no longer be in receipt of the funds from the other Constituent Institutions necessary for the operation of the Media Center. Instead, the Constituent Institutions would contribute those funds directly to AHEC.
30. Under the MOU, the efficiencies realized by the transfer of the Media Center functions were expected to result in an overall reduction in the Media Center’s budget of approximately \$612, 600, of which UCD would realize an approximate 45% savings on an annualized basis.
31. Towards the end of January 2002, the Auraria Board reviewed a draft of the MOU that stated that the transfer of the Media Center operations would result in a cost savings of approximately \$500,000. This figure was different from the final MOU because Wolf did not identify which positions would be eliminated until after the initial draft of the MOU.
32. Prior to the signing of the MOU, Wolf told the Executive Council which positions AHEC would fill when it took over the Media Center operations.
33. UCD retained title to the Media Center equipment because transferring it would have been

administratively difficult and would also have meant that AHEC would have had to pay fair market value for that equipment.

Structure of the Media Center under AHEC

34. Wolf assigned the Media Center's operations to AHEC's Division of Facilities Planning and Use, overseen by Dick Feuerborn, Division Director. Feuerborn reported to Dean Wolf, AHEC's Executive Vice-President for Administration.
35. Sometime after mid-February 2002, Feuerborn approached Randy Tatroe about the position of Director of the Media Center at AHEC. At the time of the interview, Tatroe was not a UCD classified employee but was working under a contract with UCD that would have expired June 30, 2002. Tatroe resigned from UCD effective at the end of March. He was the only person AHEC interviewed for the Director's position and was hired by AHEC effective April 1, 2002.
36. From mid- to late February 2002, Tatroe worked with Feuerborn on calculating the number and types of positions that would be needed to adequately staff the Media Center. They also prepared an organizational chart for the Media Center.
37. Both Wolf and Feuerborn were concerned with having too many AHEC positions in the Media Center as that would possibly mean layoffs in the future, which would mean additional expenses for AHEC in the form of unemployment benefits and payouts for accrued leave benefits.
38. Sometime after mid-February 2002 and prior to the end of February 2002, while still working for UCD, Tatroe prepared the PDQs for the new Media Center positions under AHEC. He based the new PDQs on the positions existing at the old Media Center and after extensive discussions with UCD Media Center staff and Feuerborn regarding the level of staffing that would be needed at the new Media Center.
39. One February 20, 2002, Feuerborn and other AHEC personnel signed the request for the PDQs for the AHEC Media Center positions to be reviewed. It was approved by the Department of Personnel and Administration on February 25, 2002.
40. On February 28, 2002, Wolf posted AHEC's Media Center organization chart (prepared by Tatroe and Feuerborn) in the Media Center and gave copies of it to the Media Center employees. The organization chart showed that, under AHEC, the staffing of the Media Center would decrease from 27 FTE to 15 FTE.
41. Under the organization plan for the AHEC Media Center, Tatroe's Director position was exempt and the remaining fourteen positions were classified positions. Two of the positions were classified as Media Specialist Is (Complainant Wells' classification at UCD) and two of the positions were classified as Telecommunication/Electronic Specialist IIs (Complainant Rice's

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classification at UCD).

Hiring by Respondent AHEC

42. Sometime during November 2001, AHEC requested copies of all of the Media Center's employees' performance plans in order to evaluate the provision of media services to the Constituent Institutions. At no time did AHEC inquire about the retention rights of any of the Media Center employees.
43. Soon after Tatroe was offered the Director position at the AHEC Media Center, Mark Rose and Andre Smith, both UCD employees at the UCD Media Center, were recruited to assist Feuerborn and Tatroe with the application and hiring process for the AHEC positions at the Media Center. During the application and hiring process they both continued to be employed by UCD.
44. All of the classified positions for the Media Center under AHEC were posted as transfer notices on or around February 28, 2002, with an application deadline of March 8, 2002. A copy of those transfer notices were delivered to the Media Center employees at the February 28, 2002 layoff meeting.
45. Cynthia Hier, AHEC's Human Resources Director, prepared the transfer notices. Hier created them by reviewing the PDQs for the AHEC positions. The transfer notices outline the primary duties the transferee would be expected to perform and state that an application is required.
46. Given the application deadline of March 8, 2002, hiring decisions for the AHEC positions were not made until after the Complainants had filed their appeals on March 8, 2002. None of the Media Center's employees' UCD personnel files were reviewed during AHEC's application and hiring process. A major factor for the hiring group in making the hiring decisions was the talent and skills of the various individuals. The applicants' seniority or prior performance evaluations were not considered and all hiring decisions were made without regard to retention rights.
47. On March 19, 2002, Feuerborn, on behalf of AHEC, gave written job offer letters (the "Job Offer Letters") to fourteen of the laid-off UCD Media Center employees, including Mark Rose and Andre Smith. All of the new AHEC Media Center positions were filled with laid off UCD Media Center employees.
48. All of the Job Offer Letters set April 15, 2003 (the day after the April 14, 2002 effective date for the layoffs) as the start date for the AHEC positions. The personnel files for each of the Media Center employees hired by AHEC were sent by UCD to AHEC after April 15th.
49. The transferred Media Center employees suffered no effect on their seniority rights or benefits. In addition, their annual and sick leave transferred with them to AHEC. They also

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maintained the same salary except for one employee, whose salary was lowered minimally. The new hires were not considered new state employees.

50. Three of the new AHEC Media Center hires were the lowest salaried employees in their classifications when the Media Center was under UCD; three were the highest salaried employees in their UCD Media Center classifications; seven were the only salaried employees in their UCD Media Center classifications and one was the second highest within his UCD Media Center.
51. None of the AHEC positions at the Media Center required any qualifications in addition to those required for the UCD positions. Only one of the fourteen AHEC positions was reclassified, the Electronics Engineer II position, from its UCD classification of Electronics Engineer III.
52. David Lipman applied for the only Media Specialist II position at the AHEC Media Center. He was not interviewed for the position, he was simply called into an office and told he had been retained.
53. Mark Nichols and William Janssen were offered and accepted the two Media Specialist I positions at the AHEC Media Center. Both of them had less than two years of seniority in the Media Specialist I classification and were the lowest salaried employees of six in that classification at UCD. Complainant Wells had twenty plus years of experience in the Media Specialist I classification and was the highest salaried employee of six in that classification at UCD.
54. Randy Williams and Mike Wisnowski were offered and accepted the two Telecommunication/Electronic Specialist II positions at the AHEC Media Center. Williams and Wisnowski each had approximately two years of seniority in the Telecommunication/Electronic Specialist II classification. Complainant Rice had over three years of seniority in the same classification. There were four Telecommunication Electronic Specialist IIs at the UCD Media Center. Rice and Wisnowski were the two highest salaried employees in that class at UCD Media Center; Williams was the second highest salaried employee.
55. Rice applied for two positions at the Media Center under AHEC, a Media Specialist I position and a Telecommunications/Electronic Specialist II position. He was not interviewed for either position.
56. Rice was not chosen for the Telecommunications/Electronic Specialist II position because, while he could install AMX (a type of software), he could not write the code for that software. This skill was not included in the transfer notice as a either a duty or a minimum requirement.
57. Wells did not apply for any of the jobs that AHEC posted because he was concerned that any such applications would jeopardize his chances to exercise his retention rights. Since being laid off, Wells has looked for jobs, but has not submitted any job applications.

58. Since being laid off, Rice has applied for numerous positions but has only been able to obtain one temporary position.

DISCUSSION

I. GENERAL

A. Burden of Proof

In this proceeding regarding an administrative action, the Complainants have the burden to prove by preponderant evidence that Respondents UCD and/or AHEC's acts were arbitrary, capricious or contrary to rule or law. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994) and Section 24-50-103(6), C.R.S.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused 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; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised 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. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

B. Layoffs

Under Colorado's state personnel system, certified state employees have a property right in their positions during efficient service. Colo. Const., art. XII, Section 13(8). The legislature recognized this constitutional principle in a statute regarding reductions in the state workforce. § 24-50-124, C.R.S. The State Personnel Board further upheld this principle in its promulgation of Board Rules regarding layoffs. Board Rules R-7-7 through 7-20, 4 CCR 801.

By statute and Board rule, if there is a reduction in workforce due to lack of work or funds or reorganization, consideration must be given to both performance and seniority to determine which employees should be retained. § 24-50-124(1), C.R.S. and R-7-7 and R-7-8, 4 CCR 801. These principles allow for a balancing of state agencies' needs in managing state services and resources against certified state employees' property rights.

The State Personnel Board rules apply "to any reduction in force that results in elimination of one or more positions regardless of the reason for the layoff." R-7-7, 4 CCR 801. However, if a layoff is due to a reorganization there are additional requirements.

a. General Layoff Procedures

No matter which of the three permissible reasons is used for a layoff, there are two general steps in the process that the State Personnel Board has mandated. Those steps are: (1) giving written notice of the layoff; and (2) allowing employees to exercise retention rights to current or previously certified classifications and positions. R-7-12, 7-13 and 7-18, 4 CCR 801.

In determining retention rights, consideration must be given to seniority and performance evaluations. §24-50-124, C.R.S. and R-7-8, 4 CCR 801. Employees are ranked by seniority, into three-year time bands. Board Rule R-7-14, 4 CCR 801. Within a time band, each employee is ranked in a matrix based upon various weighted factors, fifty-one percent of which must be based upon an average of the employee's last three years of performance ratings. R-7-16 and R-7-17, 4 CCR 801. Employees have retention rights only within their retention areas. §24-50-124, C.R.S. and R-7-13, 4 CCR 801.

b. Reorganization Layoff Procedures

A reorganization is “a change in the fundamental structure, positions, and/or functions. . .” R-7-7(A), 4 CCR 801. In addition to the layoff procedures set forth above, prior to a reorganization layoff, a business plan must be posted, prior to issuing layoff notices. R-7-7(A), 4 CCR 801. That business plan must contain five key elements: (1) an organizational chart; (2) the reasons for the change; (3) the anticipated benefits and results; (4) a general description of the expected changes; and (5) their effects on employees. R-7-7, 4 CCR 801.

In a case that factually resembles the circumstances in this matter, the Colorado Court of Appeals reviewed an ALJ's order, affirmed by the State Personnel Board, granting summary judgment against the complainant employees. *Bardsley v. Colorado Dept. of Public Safety*, 870 P.2d 641 (Colo. Ct. App. 1994). In the *Bardsley* case, the Governor, in response to a budget shortfall, issued two executive orders that eliminated a division in the Department of Public Safety (“DPS”) and created an office under the Department of Local Affairs (“DOLA”). The principal functions of the eliminated division and the created office included preparation of a state disaster plan and coordination of the local, state and federal activities regarding disasters. Thirty-one DPS employees were laid off as a result of the elimination of the division. The new DOLA office hired twenty employees, several of whom were former DPS employees in the eliminated division. The qualifications and responsibilities for the new positions were substantially similar. All of the former DPS employees who were hired by DOLA were treated as new employees, with regards to annual and sick leave accruals (having been paid for accrued benefits when they were laid off by DPS), and had to serve a probationary period.

The *Bardsley* court, based upon over seventy years of case law, held that neither the legislative nor the executive branch of the government could abrogate certified state employees' tenure rights under Colorado's Constitution, art. XII, Section 13 (the “Civil Service Amendment”). The court stated, “a certified position may not be abolished and the incumbent employee terminated if a new position is created with substantially the same duties and responsibilities as the old position,

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but filled by another employee.” *Bardsley*, 870 P.2d at 647. The *Bardsley* court, in remanding the matter back for further proceedings, held that a key factor in determining whether the complainant employees’ tenure rights had been violated was a determination of whether the new and old positions were substantially similar. *Id.* at 648. If there was substantial similarity then the complainant employees’ tenure rights were violated. *Id.* at 648.

II. HEARING ISSUES

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by 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) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by 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. *Lawley v. Dep’t of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

The administrative transfer of the Media Center from UCD to AHEC is not a “reorganization,” as contemplated by the Board rules. In order to be characterized as such, there would have to have been a fundamental change to the Media Center’s structure, positions and/or functions. Board Rule R-7-7(A), 4 CCR 801. There was no such fundamental change. The Media Center continued to provide the same services after transfer of administrative control. The overall structure was modified only in light of the reduction in the number of positions. The positions themselves, under UCD and, then AHEC, continued to be substantially similar. None of these changes were fundamental to the extent that AHEC would have been required to comply with the additional requirements of a reorganization layoff.

A. Respondent University of Colorado at Denver’s actions were not arbitrary, capricious, or contrary to rule or law.

As set forth above, layoffs may occur for one of three reasons - lack of work, lack of funds or a reorganization. §24-50-124, C.R.S. and Board Rule R-7-7, 4 CCR 801. As the basis for the layoff, UCD stated that there was a lack of work and/or lack of funds. The credible evidence substantially supported this stated basis.

Once the MOU was in place, UCD was no longer in receipt of the funds, from the other two Constituent Institutions, necessary to operate the Media Center. In addition, UCD no longer had administrative control over the operation of the Media Center itself. Given these circumstances, UCD no longer had the funding or the work for its employees working within the Media Center.

UCD did not retain either of the Complainants. During his tenure within the state personnel system, Rice had only been certified as a Telecommunication/Electronic Specialist II; Wells had only been certified as a Media Specialist I. The only retention rights that either of the Complainants possessed must be exercised within the retention area from which they were laid off. Board Rule R-7-18, 4 CCR 801. Aside from the positions within the Media Center while it

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was under UCD, there were no other Telecommunication/Electronic Specialist II or Media Specialist I positions within the UCD retention area. Therefore, neither Complainant was able to exercise his retention rights.

Respondent UCD gave the employees notice of the layoffs, the basis for those layoffs and informed those employees of their retention rights within UCD. Given the dearth of positions within the UCD retention area, neither of the Complainants was able to exercise their retention rights. Complainants have not met their burden of showing that UCD, in finding that there was a lack of funds and a lack of work and in not retaining the Complainants, acted arbitrarily, capriciously, or contrary to rule or law.

B. Respondent Auraria Higher Education Center's actions were arbitrary, capricious, or contrary to rule or law with regards to Complainant Rice, but not with regards to Complainant Wells.

Complainants argue that, by not hiring either of them, AHEC violated their tenure rights. AHEC argues that the Board lacks subject matter jurisdiction because neither of the Complainants were employed by AHEC and therefore they have no appeal rights against AHEC; Complainants only had retention rights within the separate UCD retention area; neither of them filed an appeal or grievance against AHEC specifying what AHEC decision they are appealing; and there is no legal basis for challenging the transfer of the Media Center. AHEC distinguishes the *Bardsley* case, stating that its holding is narrow and substantially limited by the factual and procedural posture of that case. AHEC makes this distinction by arguing that the *Bardsley* court did not provide for a right of appeal against the entity that oversaw the newly created office nor did it involve entities that were wholly independent of each other, as both of the departments reported to the Governor. Finally, AHEC argues that, given each of the Complainants actions upon receiving notice of the layoff, neither one is entitled to reinstatement.

In the *Bardsley* case, as in this action, the functions, responsibilities and services provided by the eliminated division and the created office did not change. There was a reduction in the number of positions from the eliminated division to the newly created office. The *Bardsley* court held that the question of the similarity in positions was the “decisive question” that had to be addressed on remand of the case to the State Personnel Board, in order to determine whether the complainants’ denial of their transfers violated the Colorado constitution. *Bardsley*, 870 P.2d at 648.

The largely uncontested evidence presented at hearing established that Respondent AHEC created the PDQs for the fourteen new classified positions at the AHEC Media Center, reviewed and, in some cases, interviewed the applicants for those positions and, ultimately, hired, through the transfer process, fourteen of the laid off UCD employees to fill those positions. AHEC did not consider seniority or prior performance of any of the applicants when making its hiring decisions. The substantial evidence also showed that the duties and minimum requirements of the old UCD positions and the new AHEC positions, were substantially similar. The only difference in those positions was that there were fewer of them at AHEC than there had been at UCD. Finally, the credible evidence established that the Media Center, all of its functions and responsibilities and the

services it provided to the Constituent Institutions under UCD's administration, and that it currently provides under AHEC's administration, has not changed. Through the installation of the equipment in the "smart classrooms," it has been updated, but it has not changed.

While the Board layoff rules and state statutes do not provide for the specific circumstances of this action (transfer of an entity from one retention area to another), they do, when viewed in light of constitutional provisions and the *Bardsley* case, provide guidance. A common theme throughout the Colorado constitution, state statutes, Board rules and the *Bardsley* case is a recognition of certified state employees' tenure rights and a protection of those rights. Tenure rights are a broader concept than the retention rights encompassed by Board rule. Retention rights are rights, based upon seniority, within a retention area. Board Rules, R-7-7 through R-7-20, 4 CCR 801. Tenure rights are rights, based on seniority, throughout the state personnel system.

The framework of the tenure rights jurisprudence set forth provides for notice to the employees of the action implicating their tenure rights and an opportunity to protect those tenure rights. The general principle of notice of an action implicating tenure rights is set out at the beginning of Chapter 7, "Separation" of the Board Rules, 4 CCR 801. Under that principle, appointing authorities must communicate or make a good faith effort to communicate either orally or in writing with an employee before conducting any involuntary separation. Board Rule R-7-1, 4 CCR 801.

The substantial evidence provides that for at least four months prior to the Layoff Notices on February 28, 2002, there were frequent meetings between the employees and UCD and AHEC officials to discuss the events affecting the Media Center. The employees knew as early as late 2001 that the Media Center's functions would be transferred to AHEC's administrative control. As early as January 2002, in one of the meetings with the Media Center employees, UCD and AHEC informed them that some positions would be eliminated. On February 28, 2002, when UCD gave the Layoff Notices to the employees, AHEC gave them copies of the transfer posting notices for the new positions at AHEC. Based on all of this evidence, Complainants received notice that their tenure rights were implicated. Given this notice by AHEC to the Complainants, the issue becomes whether or not they were provided with an opportunity to protect their tenure rights.

In response to Complainants' allegations that their tenure rights were violated AHEC argues that because Complainant Wells signed a notice to UCD that he wished to exercise his retention rights but did not apply for a transfer to AHEC he should be denied the relief of reinstatement. AHEC also argues that because Complainant Rice did not sign a notice that he wished to exercise his retention rights, he cannot request that his seniority rights be considered in conjunction with his application for the positions at AHEC. In essence, AHEC is arguing that both of the Complainants should have gone through a two step process in order to protect their tenure rights – sign a written notice of their desire to exercise their retention rights within UCD's retention area and apply for the new positions at AHEC.

The fallacy in AHEC's argument is that any notice by Complainants that they wish to exercise their retention rights would only provide them with the opportunity to exercise their

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retention rights within UCD's retention area. Board Rule R-7-13, 4 CCR 801. Given the lack of any available UCD positions within their classifications, Wells and Rice, regardless of their desires, would have been unable to exercise their retention rights to a UCD position.

However, Complainants, after learning of the action implicating their tenure rights, had to affirmatively give notice to the implicating entity (AHEC) that they wanted to protect their tenure rights. Complainant Rice did this by applying for an AHEC position. Complainant Wells did not.

Rice applied for two types of positions with AHEC, as a Media Specialist I and as a Telecommunication/Electronic Specialist II. Rice only had certification to one of those classifications, Telecommunication/Electronic Specialist II, and therefore, would have only had retention rights, and by analogy, tenure rights to a Telecommunication/Electronic Specialist II position. Board Rule R-7-18, 4 CCR 801.

During the hiring process Rice was never contacted or interviewed with regards to his applications. The repeated testimony of both Complainants' and Respondents' witnesses was that AHEC did not consider seniority in its hiring decisions for the Media Center positions. During the hiring process, AHEC did not interview all of the applicants for the various positions, a missed opportunity to possibly learn about some applicants' seniority rights. By the admission of their own witnesses, AHEC, during the hiring process, did not review the personnel files of any of the UCD employees. It was only after the transfer of the Media Center to AHEC's control that AHEC obtained any personnel files, and then it was only the files of those employees that AHEC had hired. Overall, AHEC turned a blind eye and a deaf ear to any possibility of being aware of any of the applicants' tenure rights. AHEC's actions, with regards to Complainant Rice, were arbitrary, capricious and/or contrary to rule or law.

Wells did not apply for an AHEC position because he did not want to jeopardize his retention rights. However, as stated in the Layoff Notices, those retention rights only applied to UCD. If an employee wishes to transfer to a position in another retention area, either the employee or the appointing authority may initiate that process. Director's Procedure P-4-5, 4 CCR 801. Under Wells logic he would not have been able to apply for a transfer to any other Media Specialist I position anywhere within the state personnel system. There is no constitutional principle, statute, Board rule or case law which suggests, much less mandates, a loss of retention rights through a transfer application. By not applying for an AHEC position, Wells did not provide notice of his intent to protect his tenure rights. Therefore, AHEC did not violate Complainant Wells' rights.

Respondent AHEC's arguments regarding *Bardsley* are not persuasive. Respondent argues that the governor controlled the two departments and there is no common control in this action. There is, however, a strong nexus between AHEC and UCD, both statutorily and in operation. AHEC, as set forth above, is created solely to handle the administration of the physical facilities that UCD, along with the other two Constituent Institutions, utilizes. Oversight of AHEC, via the nine member Auraria Board, is shared amongst the Constituent Institutions.

The MOU was a mutually agreed upon document between the Constituent Institutions and

AHEC. During the process of transferring control over the Media Center's operations from UCD to AHEC, there was a high level of cooperation between the two entities, from the investigation by the Media Center Assessment Committee to the time Tatroe, Rose and Smith spent, while still UCD employees, on setting up the AHEC Media Center, preparing PDQs and handling the hiring for the AHEC Media Center. Without this high level of cooperation, it would not have been possible for the transfer to have smoothly occurred. Therefore, it is not persuasive to argue that there is not a nexus of some type between the two entities. Even if, for the sake of argument, there were no nexus whatsoever, the *Bardsley* case did not turn on whether there was such a nexus but on whether there was a similarity between the abolished and the created positions.

The argument that the *Bardsley* case did not create a right of appeal against the entity under which the new entity is created is also unpersuasive because, taken to its logical conclusion, it would render a remedy in the *Bardsley* case impossible. If, upon remand, there was a finding that the positions were substantially similar, then it is logical to assume that the complainants would have been placed in the newly created positions, given that the abolished positions no longer existed. AHEC is correct when it points out in its closing argument that the Department of Local Affairs (the department to which the functions were transferred) was not named as a party in *Bardsley*. However, upon remand in the *Bardsley* case, there was an evidentiary hearing regarding one of the *Bardsley* complainants, naming the Department of Local Affairs as the respondent. The State Personnel Board ALJ, after finding that the positions were substantially similar, ordered the Department of Local Affairs to appoint the complainant to the requested position and awarded back pay and benefits. *David H. Lawton v. Department of Local Affairs, Division of Local Government*, 92B112R, Colorado State Personnel Board.

AHEC argues that it had no notice that the Complainants wished to appeal or even grieve AHEC's actions. However, this ignores the extended prehearing filings made and the discovery process available to AHEC in this matter. After AHEC was joined as an indispensable party to this action, AHEC was given, by the other parties in this matter, a complete copy of all the pleadings filed in this matter. In addition, AHEC was allowed to conduct discovery as provided for within Board rules during the three month period following its joinder and prior to the first day of the evidentiary hearing in this matter. AHEC has been provided with ample opportunity to learn that the Complainants wish to be reinstated to their positions with the Media Center.

C. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Each of the four parties presented evidence that supported their claims and/or legal arguments. There was no evidence presented which would lead to the conclusion that Complainants pursued their constitutional rights to a hearing in order to annoy, harass, abuse, be stubbornly

litigious or disrespectful of the truth. In addition, Respondents presented rational arguments and competent evidence to support their actions. In sum, there was no credible evidence nor any legal arguments presented which would warrant an award of attorney fees against any of the parties.

CONCLUSIONS OF LAW

1. Respondent University of Colorado at Denver's actions were not arbitrary, capricious, or contrary to rule or law.
2. Respondent Auraria Higher Education Center's actions, with regards to Complainant Wells, were not arbitrary, capricious, or contrary to rule or law.
3. Respondent Auraria Higher Education Center's actions, with regards to Complainant Rice, were arbitrary, capricious, or contrary to rule or law.
4. Attorney's fees are not warranted.

ORDER

Respondent University of Colorado at Denver's actions are affirmed. Respondent Auraria Higher Education Center's actions, with regards to Complainant Wells are affirmed. Respondent Auraria Higher Education Center is ordered to appoint Complainant Rice to a Telecommunication/Electronic Specialist II position. Respondent AHEC is ordered to pay Complainant Rice back pay and benefits, with an offset for any unemployment compensation or other type of compensation received, from April 15, 2002 to the date of reinstatement. Attorney fees and costs are not awarded.

Dated this 23rd day of June, 2003.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-894-2136

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 the Board does not receive a written notice of appeal 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 1/2 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.

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CERTIFICATE OF SERVICE

This is to certify that on the ____ day of June, 2003, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Mark A. Schwane
Colorado Federation of Public Employees
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and in the interagency mail, to:

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Andrea C. Woods