

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DENNIS J. YATES,

Complainant,

vs.

DEPARTMENT OF REVENUE, INFORMATION TECHNOLOGY DIVISION,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on April 10, 2002 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Jill Gallett represented Respondent. Respondent's advisory witness was David Deluhery, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Dennis J. Yates ("Complainant" or "Yates") appeals his layoff by Respondent, Department of Revenue, Information Technology Division ("Respondent" or "DOR"). Complainant seeks reinstatement.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUE

The sole issue for purposes of this hearing is whether Respondent's action was arbitrary, capricious or contrary to rule or law;

FINDINGS OF FACT

Reclassification of Positions

1. In 1993, there was a statewide change in the classification system.
2. The Computer Programmer series, in which Complainant's position was classified

prior to 1993, was changed to the Applications Programmer class series.

3. The Applications Programmer class series does programming work and doing analysis for maintenance work. The class series description states that positions in this series do applications programming work.
4. Prior to 1993 there were three levels in the Computer Programmer series. The “A” level was the entry level, followed by the “B” level (developmental level) and the “C” level (journey level). After 1993, the “A” level became the Intern level in the Applications Programmer class series; the “B” level became the Applications Programmer I level; and the “C” level became the Applications Programmer II level.
5. Positions such as systems analysts positions were changed to the Programmer/Analyst class series in 1993. In 1999, the Department of Personnel conducted a statewide study of the classes in the Professional series. There were no changes made to the Applications Programmer class series, however the Programmer/Analyst class series was changed to the IT Professional class.
6. The IT Professional class does systems and business analysis work. At DOR, this series works with the various divisions of the three DOR business groups planning for agency needs, works with databases, does programming and provides daily operational support.

Budget History for DOR’s Information Technology Division

7. On July 1, 2001, David Deluhery became the Chief Information Officer for DOR, overseeing the IT Division that provides services to DOR’s three business groups – the Motor Vehicle, Tax, and Gaming and Liquor Enforcement Groups.
8. During July 2001, Deluhery learned there was already a budget deficit of \$150,000 in personal services. He was told that his budget had to be in balance by the end of the fiscal year, June 30, 2002. He hoped to accomplish this through attrition.
9. As the fiscal year progressed it became apparent that there would not be enough attrition within the IT Division to make up the budget deficit. In addition, Deluhery learned that the Joint Budget Committee (“JBC”) for the state legislature would be imposing budget cuts.
10. During November 2001, Deluhery met with the IT Division management and then the IT Division staff to explain the deficit. He asked for everyone to volunteer to take one day off each month, through June 2002, without pay. Only sixty percent of the staff volunteered to participate in this furlough option and, of those who volunteered, not everyone would agree to take a day off every month.
11. When Deluhery realized that there would not be enough volunteers for the

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furloughing option to cover the budget deficit, he asked the other business groups within DOR if they would help cover the deficit in the IT Division's personal services budget by transferring excess personal services funds from their budgets to the IT Division budget.

12. Before February 2002, the IT Division received \$65,000 in personal services funds from DOR's three other business groups.
13. From November 2001 to February 2002, there were four resignations and two retirements from the IT Division resulting in an additional savings of approximately \$48,000.
14. On January 5, 2002, Deluhery was told that there would be a mandatory cut of one percent in personal services for the IT Division for the entire fiscal year.
15. On February 1, 2002, the matrix posted by DOR on February 4, 2000, was amended and reposted. It explained the calculation of the three-year time bands for determining seniority and the matrix, based upon performance evaluations (90%) and job experience (10%), for calculating seniority with the time bands.
16. In February 2002, after reviewing the various budgetary transfers and savings, Deluhery calculated that the IT division had realised a cost savings of over \$200,000 but still had an insurmountable deficit for the remainder of fiscal year 2002 of \$42,373.
17. After realizing that there was a budget deficit, on February 11, 2002, Deluhery gave notice to the staff of the IT Division that some positions would be abolished by the end of the month. He explained that the determination of which positions would be abolished would be based upon an analysis of the IT Division's priorities.
18. Deluhery stated that these priorities were, first of all, keeping DOR's operations solvent (e.g. the tax and motor vehicle operations which provided income), then strategic projects that improved DOR's services (e.g. improvement of DOR's technological infrastructure), and, last, routine maintenance that supported the various business groups. The most important priority was keeping DOR's operations solvent.
19. Keeping these priorities in mind, Deluhery decided that four positions needed to be eliminated. Those positions were held by Complainant (Applications Programmer II); Jane Pawling (IT Professional II); Jim Nelson (IT Professional II); and Alan Eldridge (IT Professional II).

Complainant's Job History

20. Complainant started in 1988 with DOR, classified as a Computer Programmer C.
21. During the statewide reclassification in 1993, the audit of Complainant's position (Position # 1762) proposed a classification of Programmer Analyst I.

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22. After the review process was completed on Complainant's position, it was reclassified as an Applications Programmer II, effective September 1, 1993.
23. In July 1999, Complainant applied for and was notified that he met the minimum qualifications for an IT Professional III with Colorado Information Technology Services and would be able to continue in the examination process for the IT Professional III position.
24. On February 21, 2001, Complainant was given his 45-day notification that his position as an Application Programmer II was being abolished, as of April 6, 2002, due to a lack of funds, and advising him of his retention rights under the state personnel rules.
25. On February 22, 2002, Complainant, following the instructions in his 45-day notification letter, notified Neil Peters, Director of DOR's Human Resources Office, during a telephone conversation, that he wished to exercise his retention rights. He confirmed this conversation with a letter to Peters dated March 5, 2002.
26. Prior to the layoff, there were two positions at DOR in the Applications Programmer series – Complainant's (classified as an Applications Programmer II) and another position that was classified as an Applications Programmer I.
27. On March 14, 2002, Peters gave notice to Complainant that there were no other Application Programmer II positions, either vacant or occupied, within DOR and, therefore, Complainant did not have retention rights to any other Applications Programmer II position.
28. Peters also explained that because Complainant had not ever been certified as an Applications Programmer I, he did not have retention rights to the one Applications Programmer I position within DOR.
29. Complainant timely filed his appeal on March 1, 2002.

DISCUSSION

I. BURDEN OF PROOF

In this appeal of an administrative action, the Complainant bears the burden of proving by a preponderance of the evidence that the action of DOR was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo. 1991) and *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The Board may reverse respondent's decision only if the action is found to be *arbitrary*, capricious or contrary to rule or law. §24-50-103(6), C.R.S. In determining whether the agency's decision was arbitrary or capricious, it must be determined whether a reasonable

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person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

II. HEARING ISSUE

A. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

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. *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703 (Colo. 1936) and *Lawley v. Dep't of Higher Educ.*, No. 00SC473, slip op. (Colo. December 3, 2001).

Layoff of a certified employee may only occur when there is a lack of work, lack of funds, or reorganization. § 24-50-124, C.R.S. and Board Rule R-7-8, 4 CCR 801. The evidence presented by the Respondent, and unrefuted by the Complainant, establishes that the proffered reason for abolishing Complainant's position, lack of funds, was true.

Complainant argues that the manner in which the Respondent calculated his retention rights must be reviewed. He presents three arguments in support of this claim. First, he argues that he was previously certified as a Programmer Analyst I, thereby qualifying him for retention rights to such positions. Second, he argues that the type of work he was performing at the time of the layoff should be reviewed and he should have retention rights to a position that encompasses that type of work. Finally, he argues that because he has, in the past, met the minimum qualifications for an IT Professional III position, he should have retention rights to such a position at DOR.

Complainant's argument regarding his certification as a Programmer Analyst I fails for a lack of evidence. A review of Complainant's personnel files shows that Complainant was certified as a Computer Programmer C in 1989 and his position was reclassified in 1993 as an Applications Programmer II. This is consistent throughout the evidence that was presented. While it is true that it was proposed that Complainant be classified as a Programmer Analyst I in 1993, during the reclassification process, after the review process was completed he was classified as an Applications Programmer II. In addition, there was no credible evidence presented that, at any time after the reclassification, Complainant or anyone else within DOR initiated an individual position review, as set forth in Director's Procedures P-2-4 through P2-9, 4 CCR 801.

Complainant's argument that the type of work he was performing should factor into

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his retention rights also fails. In order to displace another DOR employee, Complainant must have been certified in the class. Board Rule R-7-17, 4 CCR 801. There is no statutory or Board rule exception to this unless there is a vacant position. Board Rule R-7-2, 4 CCR 801. If there is such a position, it is within the appointing authority's discretion as to whether to implement such an alternative. There was no evidence presented that there was such a vacant position.

It has very little bearing on this case that Complainant, in June 1999, met the minimum qualifications for an IT Professional III position within another state agency. By meeting the minimum qualifications for that position, Complainant was eligible to compete for the position. Because, as set forth above, he was never certified to such a position, this does not equate to retention rights on the part of Complainant to an IT Professional III position within DOR. At the most, it would equate to the possibility of consideration, at the appointing authority's discretion, to move Complainant into a vacant IT Professional III position within DOR. Board Rule R-7-2, 4 CCR 801.

It is very understandable that Complainant is upset about being laid off after working for DOR for over thirteen years. However, the credible evidence shows that Deluhery pursued his decision thoughtfully. He explored options to reduce the deficit and attempted to "implement innovative alternatives to minimize or avoid the need for layoffs" as provided for in Board Rule R-7-2, 4 CCR 801. By requesting transfers in personal services funds from DOR's other business groups and realizing a cost savings through resignations and retirements and other budgetary measurements, Deluhery was able to reduce his deficit by over \$200,000, thereby minimizing the number of potential layoffs in February 2002. However, the cost savings was not enough. After implementing a number of options, Deluhery was still faced with having to layoff some of DOR's IT Division employees. In determining which positions to abolish he appropriately analysed DOR's and the IT Division's priorities. Unfortunately, C's position was not connected with one of the higher priorities.

Respondent's implementation of the February 2002 layoff of Complainant was reasonable, not arbitrary, capricious or contrary to rule or law. The basis for the layoff was a lack of funds. In addition, the calculation of Complainant's retention rights did not violate Board rules.

CONCLUSION OF LAW

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

ORDER

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

Dated this 7th day of May, 2002.

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 May, 2002, 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:

Dennis J. Yates
11441 West Temple Avenue
Littleton, Colorado 80127

and in the interagency mail, to:

Jill M.M. Gallett
Assistant Attorney General
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Denver, Colorado 80203

Andrea C. Woods