

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PATRICIA JONES,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

THIS MATTER came on for hearing on October 10 and 11, 2005. The record remained open until October 31, 2005 for the purpose of accepting supplemental authority from the parties. Complainant appeared through counsel, Mark Gerganoff, of Frank & Finger P.C. Respondent appeared through Christopher Puckett, Assistant Attorney General.

MATTER APPEALED

Complainant Patricia Jones ("Jones" or "Complainant") appeals the abolishment of her position by Respondent Department of Corrections ("DOC" or "Respondent"). She requests reinstatement, back pay, an award of attorney fees and costs, and sanctions against her appointing authority.

For the reasons set forth below, Respondent's action is **rescinded**.

ISSUES

1. Whether Respondent's abolishment of Complainant's position was arbitrary, capricious, or contrary to rule or law;
2. Whether Respondent retaliated against Complainant in violation of the Colorado Employee Protection Act;
3. Whether Respondent retaliated against Complainant for filing an appeal of her layoff;
4. Whether Complainant is entitled to an award of attorney fees and costs.

APPLICABLE LAW

Section 24-50-124, C.R.S. (“the layoff statute”) states:

“Reduction of employees. (1) When certified employees are separated from state service due to lack of work, lack of funds, or reorganization, they shall be separated or demoted according to procedures established by rule. Such procedure shall require that consideration be given to performance evaluations of the employees and seniority within the total state service. Such employees shall have retention rights throughout the principal department in which they are employed. . . .”

State Personnel Board Rule R-7-7¹ states, “The only reasons for layoff are lack of funds, lack of work, or reorganization. These rules apply to any reduction in force that results in the elimination of one or more positions regardless of the reason for the layoff.

A. Reorganization means a change in the fundamental structure, positions, and/or functions accountable to one or more appointing authorities. The department shall post a business plan documenting the reorganization in a conspicuous place before issuing the first layoff notice. This plan must include an organizational chart, the reasons for the change, the anticipated benefits and results, and a general description of the expected changes and their effects on employee[s]. . . .”

FINDINGS OF FACT

1. Complainant Jones commenced employment with Respondent in February 1999 in the Human Resources Office, as a Human Resources Specialist. Jones has a Bachelor of Science degree in Business Administration and a Master’s degree in Organizational Management.
2. In March 2001, Complainant promoted into the position of Budget Analyst (BA) II in the Division of Finance and Administration, Business Operations Unit. The Business Operations Unit has three areas: Budgeting, Purchasing, and Accounting. Jones worked in the Budgeting section of the Unit.
3. The Division of Finance and Administration is located at DOC headquarters in Colorado Springs. It contains three sub-Units: Business Operations, Correctional Industries, and Business Technology and Communication. Each Unit is managed by a different appointing authority and has a separate line item in the budget appropriation by the General Assembly.
4. As a Budget Analyst II, Complainant assisted management in the preparation of

¹ The Board Rules cited herein are those in effect at the time of the incidents at issue.

DOC's annual budget request for submission to the legislature; analyzed and formulated responses to questions from the Governor's Office of State Planning and Budget and the Legislature regarding DOC's annual budget request; monitored department-wide operating expenditures throughout the fiscal year for appropriateness and accuracy; advised executive staff regarding operating budget status; and made recommendations for expending fund balances or correcting budget deficiencies. Jones reviewed financial data and legislative budget information on a daily basis.

5. Jones performed functions and services that were central to the core mission of the Business Operations Unit.

Jones' Performance and Planned Promotion

6. At the time of Complainant's promotion to BA II, Karen Walker was Director of the Business Operations Unit and Complainant's appointing authority. Dixie Reed was a BA IV in the Assistant Director position.
7. Walker rated Complainant at the Peak Performer level for the 2000/2001 rating period, and at the Commendable level for the 2001/2002 rating period.
8. On July 15, 2003, DOC HR Director Madline SaBell issued a letter of commendation to Jones for her "hard work and devotion to the Pay for Performance project." SaBell praised her willingness to be the "hub" of the committee and credited her leadership for the project's timely completion.
9. In 2002, Walker informed Jones and the other BA II in the Unit, Carla Stephenson, that she intended to promote them both to Budget and Policy Analyst III's by December 2002. Walker directed them to submit revised Position Description Questionnaires (PDQ's).
10. Dixie Reed, BA IV, and Fred Sabus, BA III, did not believe Jones and Stephenson were functioning at a BA III level and they opposed the reallocation.
11. Walker approved the revised PDQ's and submitted a request to reallocate their positions to BA III to DOC's Human Resources (HR) Office for review.
12. The HR office conducted a job evaluation and on March 17, 2003 determined that the two BA II positions were currently functional at the BA III level. HR approved the request for reallocation on that date.
13. In January 2003, DOC Executive Director Joe Ortiz and Division Director Richard Schweigert met with budget staff. At the meeting, Ortiz directed the Business Operations staff to keep an eye out for and report any unnecessary spending at DOC.

14. A few days after this meeting, Jones reported to Ortiz that the training academy had spent \$44,000 on furniture. Schweigert followed up by having Sabus check on it. The expenditure was ultimately confirmed to have been appropriate.
15. In April 2003, Karen Walker left the Business Operations Unit.
16. Dixie Reed assumed the Acting Budget Director position and became appointing authority over the Budgeting area of the Business Operations Unit.
17. Soon thereafter, HR Director Madline SaBell sent an email to Reed asking why the reallocations to BA III had not been implemented.
18. Reed posted the proposed reallocations to BA III on the DOC computer bulletin board. Three days later, without informing Jones or Stephenson, Reed pulled the posted positions and cancelled the reallocation requests.
19. Four other high level DOC employees' positions were reallocated in April 2003, resulting in significant pay increases.
20. After the promotions were cancelled, Jones sent an email to SaBell, Schweigert, and Ortiz, noting the humiliation of having the promotions cancelled in such a public manner. She asked for compassion towards DOC employees in similar situations in the future. Schweigert later apologized to Jones and Stephenson in a meeting.

Reed and Jones

21. In 2002, Reed gave Complainant a budget assignment that necessitated that Complainant anticipate the dollar amount of benefits DOC employees would use in the next fiscal year. Complainant determined that Reed had underestimated the amount needed. Jones approached Reed, stating she had a question about the dollar amount. She then explained her concerns to Reed. Reed responded, "If you want to argue then I don't know why you asked."
22. On another occasion, Complainant came to work on a Saturday to assure that budget documents were ready for a legislative meeting the following week. She had balanced certain budget figures when she had last worked on the documents, but found now that the figures did not match.
23. When Complainant inquired about the figures not matching, she learned that a Decision Item had been approved, resulting in a change in a key figure. In addition, she learned that a Medicare increase had been denied, resulting in the modification of another figure. After using the two new figures, she was able to balance the numbers again.
24. Stephenson, the other BA II, also had not been informed of these two significant

budget issues.

25. The following Monday, Complainant mentioned the experience to Reed, and requested that in the future Reed inform her and the other budget analysts in the office of when such decisions were made. Reed responded, "It is not my responsibility to babysit."
26. In April 2003, Jones was calculating the projections in the DOC budget request for PERA payouts. She determined that the wrong rate had been used in the calculation, resulting in a request for \$750,000 more than was needed. She pointed this out to Reed and Sabus in an email. Reed received the email.
27. Reed made the appropriate modification in the budget request.

The Budgeting Section of the Business Operations Unit

28. The Business Operations Unit contains three areas, Accounting, Purchasing, and Budgeting. As of April 2003, Reed had appointing authority over the Budgeting section.
29. The Budgeting section of the Unit is the center of all budget management for DOC (including formulation of the budget, fiscal and policy analysis of budget proposals' impact on operations, etc.). It also houses Business Offices located throughout the state. The primary function of those Offices is to act as an internal auditing bureau, assuring that moneys appropriated to DOC facilities are spent as intended. This oversight function is a highly independent one that must be performed by individuals employed outside the prison facilities they audit; hence, they are administratively housed in the Business Operations Unit at Headquarters. Each Business Office is led by a GP III Business Manager, who in turn must have the assistance of Accounting Technicians under their supervision in order to fully function.
30. Prior to the 2003 budget cuts, the Budgeting section of the Business Operations Unit at DOC Headquarters in Colorado Springs had thirty-five Full Time Equivalent (FTE) positions and one new part-time position, whose functions were directly related to the core mission and primary services of the Unit.
31. The thirty-six Business Operations Unit positions that related to the core mission of the Unit prior to layoff consisted of the following:
 - twelve GP III positions: ten encumbered; one vacant; one held by Mary Ellison in Canon City who would retire at the beginning of fiscal year 2003;
 - seven Budget Analyst positions: the BA V held by Reed; a vacant BA IV formerly held by Reed which she planned not to fill; three BA III's, one of which was vacant and Reed planned not to fill; and two BA II's,

encumbered by Jones and Stephenson;

- fourteen Accounting Technician positions: two vacant Accounting Tech I's; four Accounting Tech II's, one of which (a part-time position) was vacant; and eight Accounting Tech III's, one of which was vacant;
- three encumbered Administrative Assistant II positions.

Positions Funded by Business Operation Unit Unrelated to Core Functions

32. Of the over 120 positions in the entire Business Operations Unit, there were four that did not relate to the Unit's core mission or its primary services. One was housed in the Budget section: an Information Technology (IT) Tech II position held by Joyce Hill. Another was an IT Tech II position held by Molly Hamilton.
33. The two others were a GP V held by Mike Jordan and an Accountant III position held by Don Ruckles. Jordan and Ruckles performed work for the Correctional Industries Unit.
34. At the time Jones was laid off, the Correctional Industries Unit had two vacancies for positions that could have been filled by Jordan and Ruckles. Those vacancies were at the GP V and GP VII levels. Jones was aware of this because one of her jobs was to track funds appropriated for personal services to assure they were spent as intended.

2003 Budget Cuts and Management Directives Regarding Layoffs

35. In 2003, the Colorado legislature imposed significant reductions on state agencies' budgets. DOC was forced to implement serious budget reductions in its fiscal year 2003 budget (July 1, 2003 through June 30, 2004).
36. DOC submitted its proposed budget in early 2003 to the Joint Budget Committee (JBC), utilizing only vacancy savings to demonstrate the budget cuts. The JBC rejected this budget, mandating the DOC use an average FTE salary level to accompany the cuts. In other words, the JBC required DOC to cut FTE as well as dollars.
37. After Reed and others at DOC received this legislative directive, they had to re-visit their budgets and match FTE to their proposed cuts in spending.
38. DOC's top managers held meetings with appointing authorities at DOC regarding the development of their reduced budgets. In these meetings, DOC leadership issued the following policy directives to the appointing authorities:
 - A) in developing their reduced budgets, prior to determining what, if any, positions to eliminate, examine the mission of the work unit and assure

that the core functions will be performed and services will not be diminished; and

- B) abolish vacant positions before encumbered positions.

Personnel Action Review Committee

- 39. In 2003, Governor Bill Owens mandated that with regard to all vacant classified positions in the State of Colorado, any request by an agency to fill a position must be approved by the Office of Management and Budget (OMB).
- 40. DOC established a Personnel Action Review Committee for the purpose of reviewing and then approving any requests to fill vacant positions, which would then be forwarded to the Governor's OMB.

Reed's Layoff Decision

- 41. Division Director Rich Schweigert ordered Reed to implement a budget reduction plan resulting in the abolishment of 5.6 FTE's in the Budgeting section of the Business Operations Unit. Schweigert ordered Reed to implement the reduction in force (RIF) in the manner that best assured the mission of the Business Operations Unit was achieved. He mandated that she maximize services and Unit operations, and that she not permit Unit services to drop.
- 42. Reed had just been appointed Acting Budget Manager in April 2003. She was new to the role of appointing authority and had no prior experience or training in implementing a RIF.
- 43. At the time Reed was forced to make the 5.6 FTE reduction in her budget, she had seven Budget Analyst positions in her budget. Two of them were vacant: her previous BA IV position and a BA III position.
- 44. Reed had long planned to abolish those two vacant BA positions, and she did so in May 2003. At that time, Reed and the four Budget Analysts under her supervision (two BA III's plus Jones and Stephenson) were severely overworked, due to the fact the BA IV and BA III positions had not been filled.
- 45. In addressing her remaining budget cuts, Reed looked at all outlying Business Offices throughout the state to determine what positions had to be filled in order to assure core services and functions continued.
- 46. Reed moved employees around, transferring a GP III Business Manager position from one location to another. She equalized staffing in the outlying offices, to assure she had two Accounting Tech positions reporting to each GP III Business Manager.

47. In addition to abolishing the two vacant BA positions, Ms. Reed abolished one vacant GP III Business Manager position, one vacant Accounting Technician III position, and one vacant Accounting Technician I position.
48. Reed left two vacant positions in the Unit budget, both of which were Administrative Technician I positions in the Denver area complex, which handled three prison facilities.
49. Ms. Reed did not apply to the Personnel Action Review Committee to fill the vacant positions she did not abolish.
50. The last position under consideration was a GP III Business Manager position in Canon City held by Mary Ellison, at a salary of \$64,9980. Ellison accepted DOC's early retirement offer and planned to vacate the position in the beginning of fiscal year 2003.
51. Jones' salary was \$52,000.
52. Reed ultimately planned to eliminate the GP III position held by Ellison, downgrading it to a lower level position at an approximate vacancy savings of \$30,000.
53. Reed had the option of abolishing Ellison's GP III position and transferring the Business Manager functions to Jones and others. Fred Sabus, BA III, had previously taken on the GP III Business Manager functions vacated by a Denver GP III, for approximately one year.
54. Abolishing Ellison's vacant GP III position would have saved Jones' encumbered BA II position.
55. Reed abolished Jones' encumbered BA II position and left the vacant GP III position, soon to be downgraded, vacant.
56. Reed did transfer the Territorial Correctional Facility functions to a different GP III. She did not reassign the remaining Canon Minimum Center functions at that time.
57. Jones' was the only encumbered position Reed abolished. Sabus assumed most of Jones' duties after her departure from the Business Operations Unit.

June 2003 Changes to Division Management

58. In May 2003, Mr. Schweigert left his position as Director of the Division of Finance and Administration.
59. In May 2003, L.D. Hay assumed the position of Director of the Division of

Finance and Administration, having previously served as Assistant Director. In addition, Mr. Hay was given most of the duties previously performed by Gerald Gasko, former Director of Programs at DOC, who retired at that time.

May 5, 2003 Meeting to Discuss Layoff of Jones

60. Reed made the decision to abolish Jones' position in April 2003. She did not have any meetings or discussions with Jones about alternatives to layoff prior to making her decision. Reed planned to be on vacation at the time layoff notices were issued, so she informed Jones of her impending layoff prior to her departure.
61. On May 5, 2003, Respondent issued the layoff notice letter to Jones. The letter stated in part, "The purpose of this letter is to advise you that your position, position #3387, as a BUD ANALYST II has been identified for abolishment, effective close of business June 30, 2003, due to a lack of funds. This letter satisfies State Personnel Rules, which requires at least a 45-day notice of the abolishment of your position. Effective, close of business on June 30, 2003, you will be laid off and your name will be placed on a BUD ANALYST II reemployment list for a maximum of one (1) year unless you are reemployed in a position in your current class before the one-year period expires."
62. On or about May 13, 2003, Jones met with Mr. Hay and a DOC Human Resources staff member. Hay handed Jones her layoff letter.
63. Jones was an expert in tracking personal services line funding because it was one of her job duties in the Unit. Therefore, prior to the meeting, she printed out Business Operations Unit budget information demonstrating that the Unit was absorbing the salaries of four individuals whose positions were unrelated to the mission of the Unit (two of whom, Jordan and Ruckles, were performing Correctional Industries jobs). She also brought a print-out of the Correctional Industries Unit budget, showing the two high level GP vacancies that could have absorbed Jordan and Ruckles' positions.
64. At the meeting, Jones showed Mr. Hay the Business Operations Unit budget document and circled the names of Mike Jordan and Don Ruckles, the Correctional Industries Unit employees whose positions were funded out of the Business Operations Unit.
65. She then showed Hay the Correctional Industries Unit staffing chart, which showed the two vacancies (GP V and GP VII) in that Unit which could have absorbed Jordan and Ruckles' positions.
66. Jones suggested to Hay that instead of abolishing her position, he could simply move the funding for Jordan and Ruckles' positions back to the Correctional Industries Unit line of funding, where they legitimately belonged.

67. Hay said no, one of the positions had already been filled, the GP VII.
68. Jones stated to Hay that because several positions funded by the Unit were not legitimately Business Operations positions, those positions should be eliminated prior to hers, which was directly related to the mission of the Unit.
69. Jones also pointed out that the GP III position in Canyon City currently encumbered by Mary Ellison, at slightly above her BA II salary, would soon be vacant, because Ellison planned to retire. She pointed out that abolishing that GP III position could save her position.
70. Jones also stated to Hay that Joyce Hill and Molly Hamilton's IT positions were unrelated to Business Operations, and should not be funded through the Unit at a time when it resulted in the abolishment of her position, which was related to the mission of the Unit.
71. Jones also pointed out that DOC management had just ordered that all IT staff be combined and consolidated.
72. Hay responded, "I can do whatever I want with my FTE."
73. Jones asked Hay not to abolish her position. He did not agree to do so. Hay did not engage in a discussion with Jones about alternatives to the abolishment of her position.
74. At this meeting, Hay informed Jones that he was immediately reassigning her to Canyon City, to work on Time Computation. Time Computation consists of retrieving physical files and entering into the computer the inmates' remaining time to serve their sentences. Time computation is menial work.
75. Complainant and other staff from Headquarters had recently volunteered to assist with the Time Computation work on a part-time basis, because the Canyon City staff had had a backlog.
76. At the time Hay transferred Jones to Canyon City to perform Time Computation work on a full-time basis, the backlog had been almost entirely eliminated.
77. Jones' computer access was revoked at the time she was transferred to Time Computation work in Canyon City, without her prior knowledge.

Shirley Divido Replaces Jones

78. During the month of May or June 2003 and prior to the effective date of Complainant's layoff from her BA II position on June 30, 2003, Mr. Hay informed Reed that he was going to bring Shirley Divido, a GP V, into the Business

Operations Unit and that the Unit's budget would have to incur her gross annual salary of \$78,000. Reed would be Divido's appointing authority.

79. Jones' gross annual salary as a BA II was \$52,000.
80. Reed agreed to incur the cost of Divido's salary in the 2003 fiscal year budget. She did not raise the issue with Hay of how the Unit would pay her salary.
81. Reed testified at hearing that at the time Hay mandated that she incur Divido's salary in her fiscal year 2003 budget, she knew she would be able to make it work throughout the year through anticipated vacancy savings from retirements.
82. At the time Reed and Hay abolished Jones's position which cost the Unit \$52,000, they knew the Unit would be covering a new position for Divido at a cost of \$78,000.
83. On August 7, 2003, Ms. Divido moved into Complainant's old office and took her place on the Unit's organizational chart. Her placement on this chart was exactly the same as Jones' previous position; the only difference noted is the name and classification.
84. Commencing on August 31, 2003, the Business Operations Unit paid Ms. Divido's salary.
85. Divido's work did not change after she was paid out of the Unit's budget. Her work did not relate to the mission or services of the Unit.
86. Divido's position had previously been funded through the Education and Facility Services Management funding lines for several years.

Jones' Appeals

87. Jones timely appealed her layoff. She stated that she believed her layoff was one of a series of retaliatory actions by DOC, including Hay's reassignment of her to Time Computation on May 13, 2003. She stated she believed these actions were taken as a result of her having raised issues such as: the \$44,000 furniture expenditure, and the "hidden FTE" in various sub-program budgets, such as the Correctional Industries and IT employees funded by the Business Operations Unit.
88. On June 2, 2003, Respondent offered Complainant retention rights in the form of a demotion to Ellison's GP III position in Canon City. Jones accepted, and timely appealed, again alleging retaliation. Her salary remained the same, due to saved pay rules.

August 15, 2003 Memo

89. On August 15, 2003, Nolin Renfroe, Director of Prisons, issued an email to all DOC wardens, directing them not to re-hire any employees displaced by the layoffs who appealed their layoff, unless they agreed to drop their cases against DOC.

90. The email, entitled, "Job Offers," stated,

"Please be aware that one of the conditions of offering displaced staff a position in your facility is that they MUST drop their cases against us. Offering a person a position at the same pay and grade means their pay, tenure and status have not been adversely affected, therefore; (sic) they had no standing and allowing them to continue their appeals will just clog up the DPA with cases that have no merit. I will have Holly e-mail a list of staff that has filed appeals against the department."

91. On August 19, 2003, Mr. Renfroe's assistant emailed the list to the same group. The list contained the names, facility, State Personnel Board case number, basis for appeal, and ALJ decision. Jones' name was on the list, with the basis of appeal listed as "retaliation."

92. Reed did not receive this email.

93. Mr. Hay was at the management meetings where the policy in the email was discussed and formulated, and was familiar with the policy.

Jones' Employment Since Her Layoff

94. After her meeting with Hay in May 2003, Jones collected her personal belongings and left DOC Headquarters.

95. She performed Time Computation functions until the effective date of her layoff, June 30, 2003.

96. Jones resided in Colorado Springs, and therefore had to commute to her new assignment.

97. When Reed returned from vacation and learned that Hay had reassigned Jones to Time Computation duties in Canon City, she wrote a letter to Jones dated May 23, stating, "I know things have been difficult and I have not had a chance to speak with you since I returned from vacationIf you need to talk, I am always available. . . ."

98. Reed also stated in the letter that she had been informed Jones had removed files belonging to the State from the budget office when she cleared out her desk,

and asked for their immediate return.

99. Jones responded by letter on May 29, stating she had not removed any state property from her desk when she left. She also noted that she was incurring mileage and overtime expenses due to the commute every day from Colorado Springs, and requested reimbursement.
100. On June 18, 2003, Reed sent a letter to Jones confirming that Jones had not removed any DOC files from her desk when she left, and that she would be reimbursed for mileage accumulated on her personal vehicle. Jones was reimbursed for those commuting expenses through June 30, 2003, the effective date of her layoff.
101. Reed's May 23 letter is in Jones' permanent personnel file; the letter absolving her of taking state property is not.
102. Reed continued to allow Jones to work a four-day, ten-hour work schedule. This enabled Jones to keep her second job.
103. Commencing on July 1, 2003, Jones started work as a GP III Business Manager in Canon City. The position was a demotion but she suffered no loss in pay due to saved pay. She was no longer reimbursed for the costs incurred in the commute.
104. Jones remained in the GP III position through October 2004. During the period July 2003 through October 2003, she commuted 21,712 miles in her personal vehicle.
105. In November 2004, Jones accepted a BA II position in Denver at the Colorado Civil Rights Division. She holds that position through the present.

The Business Operations Unit in Fiscal Year 2003

106. Immediately after July 1, 2003, Joyce Hill, IT Tech II, at a gross annual salary of \$60,000, was moved out of the Business Operations Unit funding line.
107. During fiscal year 2003, Kathryn Adams, Budget Analyst III in the Unit, retired. Complainant was on the reemployment list for that position and had already been approved for reallocation to the BA III position.
108. Instead of posting the position and filling it, Reed modified Adams' position to a GP IV. Complainant was not eligible for a GP IV position.
109. Reed hired Laurie Gephart as a transfer without posting or announcing the position. Reed had arranged for Gephart to be trained for this position for a long period prior to her appointment. As of the time of hearing, Gephart's position

was that of BA III.

110. In January 2004, Reed posted Carla Stephenson's position as a reallocated BA III. Reed interviewed Jones for the position and hired Stephenson. Stephenson had more experience than Jones.
111. Jones has applied for several positions at DOC for which she is qualified but has not been hired.
112. Jones has not appealed Respondent's failure to hire her into any of the positions for which she applied.
113. After Jones' layoff, the majority of her job duties were given to Fred Sabus, BA III, who was already functioning at 150 to 175% of a full-time position.
114. Reed was generally not credible. She gave conflicting answers at hearing. She testified that Divido was not paid out of the Business Operations budget until April of 2004; however, when confronted with a line item budget document on cross-examination, she admitted that Divido was paid out of Business Operations starting on August 31, 2003.

DISCUSSION

A. Burden of Proof

In this *de novo* proceeding, Complainant has the burden to prove that the abolishment of her position and offer of retention rights were arbitrary, capricious, or contrary to rule or law. *Velasquez v. Department of Higher Education*, 93 P.3d 540 (Colo. App. 2004). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

B. Respondent's action was arbitrary, capricious, or contrary to rule or law.

There was no lack of funds necessitating the abolishment of Complainant's position; therefore, the layoff was contrary to state law and Board Rule R-7-7.

The Colorado Civil Service Amendment, Colo. Const. art. XII, Section 13, establishes the state personnel system. It provides that "[p]ersons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." Colo. Const. art. XII, Section 13(8). The state personnel system is defined by section 24-50-101, *et seq.*, C.R.S.

Under Section 24-50-124(1), C.R.S., "When certified employees are separated from state service because of lack of work, lack of funds, or reorganization, they shall be separated according to procedures established by Personnel Board rules."

State Personnel Board Rule R-7-7, in effect at the time of the events herein, states, “The only reasons for layoff are lack of funds, lack of work, or reorganization. These rules apply to any reduction in force that results in the elimination of one or more positions regardless of the reason for the layoff.”

Complainant has demonstrated by preponderant evidence that there was no lack of funds necessitating the abolishment of her position. See *Bardsley v. Colorado Dept. of Public Safety*, 870 P.2d 641 (Colo.App. 1994) and *Brennan v. Dept. of Local Affairs*, 786 P.2d 426 (Colo.App. 1980). In *Brennan*, a state agency issued a notice of layoff to an employee whose salary was funded primarily through a grant. After the layoff notice had been issued, but prior to the employee’s layoff date, the agency learned that the grant for the employee’s position had been extended for an additional period of time. The agency decided to use the extended grant money for a different purpose and proceeded with the layoff based on a purported lack of funds. The ALJ found there was no true lack of funds and concluded the layoff was arbitrary and capricious and an abuse of discretion, reinstating the employee to her position through the exhaustion of the grant funds. The State Personnel Board overturned the ALJ.

The Colorado Court of Appeals reversed the Board and reinstated the ALJ’s order. The Court reasoned that an agency cannot separate an employee through the layoff procedures based on lack of funds by “divert[ing] otherwise available funds away from existing personnel costs.” *Id.* at 427. Rejecting the agency’s argument that the layoff should be sustained as a legitimate “management decision,” the Court held that because the layoff notice to Brennan stated that the layoff was due to “the lack of funds resulting from the grant close-out,” the agency was accordingly “bound by the terms of that notice and cannot sustain the layoff on other grounds.” *Id.* The Court stated, “the determinative factual issue is whether funds were available from which the Department could have paid Brennan’s salary from October 1, 1981 through December 31, 1981. . . . The record supports the [ALJ’s finding] that there were more than sufficient funds available to pay Brennan’s salary and fringe benefits for the balance of the year.” *Id.*

This case is similar to *Brennan*. Here, Respondent knew at the time of Complainant’s layoff on June 30, 2003, that it had funding available for a different purpose: paying Shirley Divido, a GP V, at a \$78,000 annual salary level. Respondent replaced Jones with Divido. Under *Brennan*, Respondent cannot divert otherwise available funds away from existing personnel costs, namely, Jones’ salary, under the guise of a lack of funds, in order to pay the salary of Divido. As in *Brennan*, Complainant has proven there was no true lack of funds necessitating her layoff.

Bardsley v. Colorado Department of Public Safety, 870 P.2d 641 (Colo.App. 1994) also governs this case. *Bardsley*, and the long line of cases cited therein, stand for the proposition that it is a violation of the Colorado Civil Service Amendment to eliminate one classified position and to replace it with another, filled by a different employee. *Bardsley*, 870 P.2d at 647 – 648; *People ex rel. Kelly v. Milliken*, 223 P. 40 (Colo. 1923); *People ex rel. Fulton v. O’Ryan*, 204 P. 86 (Colo. 1922).

In *Bardsley*, the Governor adopted a budget reduction plan that eliminated a work unit in a state agency, involving thirty-one employees. The Governor later created a new work unit in a different state agency, which was nearly identical to that which he had eliminated. All of the displaced employees of the eliminated unit were denied transfer rights to the new positions in the new unit.

The Colorado Court of Appeals struck the legislation, holding, “our supreme court, for more than 70 years, has made clear that neither the executive branch nor the legislature can deny to certified state employees the tenure rights granted to them by the Civil Service Amendment. Hence, 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, but filled by another employee.” *Id.* at 647.

The Court also discussed *People ex rel. Fulton v. O’Ryan*, 204 P.86 (Colo. 1922), in which the legislature cut funding for an existing position but created a new position that had substantially the same responsibilities as the old one, filling it with a new employee. The Colorado Supreme Court in *O’Ryan* held that the legislation violated the Civil Service Amendment, because “if the Legislature may merely change [the] title of an office and attach the duties and salary of the old name to a new one, the Civil Service Amendment is a nullity.” *Bardsley*, 870 P.2d at 648, citing *O’Ryan*, 204 P. at 87. *Bardsley* also cited *Milliken, supra*, in which the General Assembly attempted to abolish several old offices and to create new ones with substantially the same duties. The Supreme Court ruled that the new offices were required to be filled by the former employees, “holding that the Civil Service Amendment creates tenure rights that cannot be infringed.” *Id.*

The *Bardsley* line of cases applies directly to this case. The Business Operations Unit cannot eliminate one position based on purported lack of funds, and then substitute a different position held by a different individual in its place, funded from the exact same source. Such a mere change in title of an office renders the Civil Service Amendment, the layoff statute and Board Rule R-7-7, a nullity.

Complainant has proven by preponderant evidence that there was no lack of funds necessitating that her position be abolished. Respondent had ample funds to pay Divido a \$26,000 higher salary than Jones out of the exact same budget line. Therefore, the layoff premised on lack of funds was contrary to section 24-50-124, C.R.S., Board Rule R-7-7, and the Civil Service Amendment.

Respondent argues that it is permitted to replace Jones with Divido under *Department of Human Services v. May*, 1 P.3d 159 (Colo. 2000). It argues that legitimate business reasons support its actions herein, and that under *May*, “State government faces an ever-changing array of social problems, and agencies must have the flexibility to create solutions to those problems. . . DHS has considerable latitude to make assignments and transfers to effectuate its goals.” *May*, 1 P.3d at 168.

Respondent's reliance on *May* is misplaced. *May* was not a layoff case. It involved no abolishment of any classified positions. See, *May*, 1 P.3d at 168 (discussing the line of personnel cases involving reorganizations) and *Rice v. Auraria Higher Education Center*, 2005 WL 1404876, (Colo.App. 2005), Slip Opinion at page 7 (holding *May* inapposite in the layoff context because "in *May*, no classified employees were involuntarily separated from their positions or forced out of the civil service system.")

Respondent's layoff notice to Jones cited only "lack of funds" as grounds to abolish her position. As in *Brennan*, therefore, Respondent is "bound by the terms of that notice and cannot sustain the layoff on other grounds." *Brennan*, 786 P.2d at 427. Here, as in *Brennan*, "the determinative factual issue is whether funds were available from which the" Business Operations Unit "could have paid" Jones' salary during fiscal year 2003. *Id.* Jones proved by preponderant evidence that the Unit could have paid her salary with ease, as evidenced by Hay's and Reed's intent to pay Divido at a salary level exceeding Jones' by \$26,000 during fiscal year 2003.

May is also distinguishable because that case involved a large-scale, meticulously planned reorganization, designed to better accomplish a core agency mission of educating incarcerated youth. In the instant matter, Respondent has produced no evidence of any type of plan or goals at all giving rise to its decision to replace Jones with Divido (and no reorganization plan as required by Rule R-7-7A). To the contrary, the evidence demonstrated that Divido's functions never changed and were unrelated to the core mission or services of the Business Operations Unit. Therefore, replacing Jones with Divido was detrimental to the Unit, not helpful to the mission of the Unit. Hence, assuming *arguendo* that a *May* analysis applied herein, there is no evidence in the record explaining or justifying Respondent's decision to replace Jones with Divido.

Respondent's violation of its own layoff directives was arbitrary and capricious under *Lawley*

Arbitrary and capricious exercise of agency discretion can occur in one of three ways: if they 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). DOC's abolishment of Jones's position was arbitrary and capricious under the *Lawley* standard.

Respondent's layoff of Jones was arbitrary and capricious for several reasons. As stated above, no lack of funds necessitated her layoff and Respondent had no business reason for replacing her with Divido. The lack of any rationale or business

purpose for that decision alone renders the decision arbitrary and capricious under *Lawley*.

In addition, the Business Operations Unit violated DOC's own policy directives governing its budget reduction process in laying off Jones: 1) to place the mission and services of each work Unit first in implementing layoffs, and 2) to abolish vacant positions prior to encumbered positions.

The Business Operations Unit violated the first directive by replacing Jones, whose BA II functions were central to the Unit's mission, with Divido, a GP V whose job functions had no relation to the Unit's mission or services. This decision was arbitrary and capricious under *Lawley*. Further, it also violates Section 24-50-116, C.R.S., which states, "Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority." Reed and Hay violated the specific standards prescribed by DOC management in replacing Jones with Divido.

Respondent also violated the first directive by abolishing Jones' position at a time when the Unit was sustaining the salaries of four employees performing functions that did not serve the core mission of the Unit. Jones proved at hearing that there was at least one GP V vacancy in the Correctional Industries line of funding that could have absorbed either Jordon or Ruckles' position; Jones shared that evidence with Hay at the May 13 meeting. Respondent offered no evidence in rebuttal of these facts. Respondent was duty bound by its own policy directives to eliminate non-essential functions prior to core functions. It failed to do so and offered no explanation justifying the decision.

Lastly, Business Operations Unit managers violated DOC second layoff directive, which was to eliminate vacant positions prior to encumbered ones. Under this mandate, Respondent was required to abolish the GP III position in Canon City, which Reed planned to downgrade anyway. This would have proven simple in the case of Jones: the evidence demonstrated that Reed transferred the Territorial Correctional Facility portion of those duties to another GP III. Reed was required by DOC policy to transfer the remainder of those duties to Jones and others, in lieu of abolishing Jones' encumbered BA II position.

C. Respondent did not violate the Employee Protection Act.

Complainant asserts that Respondent retaliated against her in violation of the Colorado Employee Protection Act, section 24-50.5-101, et seq, C.R.S. (whistleblower act). The whistleblower act prohibits appointing authorities and supervisors from initiating or administering any disciplinary action against state employees "on account of the employee's disclosure of information." Section 24-50.5-103(1), C.R.S.

The act defines "disclosures of information" as, "The written provision of evidence to any person, or the testimony before any committee of the general assembly

regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority or mismanagement of any state agency.” Section 24-50.5-102(2), C.R.S.

The Act requires an employee to first disclose the information to a supervisor or appointing authority or member of the general assembly, prior to disclosing it to “any person” or in testimony before a committee of the general assembly. Section 24-50-103(2), C.R.S. The disclosure need not be written. *Ward v. Industrial Com’n*, 699 P.2d 960 (Colo. 1985).

To prevail in a whistleblower claim, an employee must prove that his or her protected disclosures were a substantial or motivating factor in the agency’s adverse actions taken against the employee. *Ward, supra*.

Complainant Jones contends that her disclosures to top managers regarding the training academy’s \$44,000 furniture expenditure were a causal factor in the cancellation of her reallocation and the abolishment of her position. Complainant informed Ortiz and Schweigert about the \$44,000 furniture expenditure. She therefore made a protected disclosure under the Act. However, Complainant failed to prove that Reed ever knew about her disclosures. Further, the evidence pertaining to Schweigert on this issue was sketchy; he ordered Fred Sabus to check into the matter, and the expenditure was deemed to have been appropriate. Complainant has failed to establish a causal connection between this disclosure and the decisions to cancel the reallocation of and to abolish her position.

Complainant also asserts that Respondent abolished her position due to her complaints about the four FTE that were inappropriately funded through the Business Operations Unit. The only evidence of such disclosures at hearing was Jones’ discussion of the issue with Hay on May 13, 2003. As of that date, Respondent had already made the decision to abolish her position. Therefore, Complainant has failed to establish a causal connection between this disclosure and the abolishment of her position.

Respondent did not violate the Employee Protection Act in abolishing Complainant’s position.

D. Respondent Retaliated Against Complainant for Filing an Appeal of Her Layoff

Complainant asserts that Respondent retaliated against her for filing an appeal of her layoff. Complainant proved at hearing that Mr. Hay was at the meetings where DOC managers decided on the policy enunciated in the August 15, 2003 memo. Hay knew that the memo reflected official DOC policy.

Hay’s response to Jones’ actions at the May 13, 2003 meeting is highly relevant to the question of whether Respondent retaliated against her for appealing her layoff.

At that meeting, Hay delivered the layoff notice letter to Jones. In response, Jones questioned the legality of her layoff, and offered concrete alternatives to the abolishment of her position. She noted that four positions unrelated to the Unit remained on the payroll, noted that Correctional Industries had two vacancies to cover two of those positions, and noted that it would be far easier for Jones to remain in the BA II position and to eliminate the GP III position in Canon City soon to be vacated by Ellison.

Hay responded to Jones' advocacy with swift and sure punishment. He immediately transferred her to a clerical job in Canon City. Respondent offered no explanation or business rationale for this action at hearing.

Hay's actions on May 13 are consistent with the official policy of the August 15, 2003 memo. Respondent will retaliate against employees who challenge, e.g., appeal, the agency's decision to abolish their positions.

After Jones relocated to Canon City, two Budget Analyst positions opened up. The first was Carla Stephenson's position. The evidence demonstrates that because Stephenson was senior to Jones, it was to be expected that Respondent would hire Stephenson into her reallocated BA III position. This decision was not retaliatory.

When the other BA III position was vacated by Kathryn Adams during fiscal year 2003, Reed engaged in conduct leading to an inference of retaliatory failure to hire Jones. Instead of taking the normal course of action, which would be to post the position as a BA III, Reed went out of her way to avoid having to even interview Jones. Reed modified the position to a classification Jones was not qualified for, a GP IV. She then transferred Laurie Gephart into the position without announcing or posting it. Reed had previously arranged for Gephart to be trained for the position. Respondent retaliated against Jones by eliminating that BA III position from her reach.

Jones did not appeal either of these employment decisions, or any other about which she testified. Therefore, she is not entitled to any relief in connection with those decisions.

E. An Award of Attorney Fees and Costs to Complainant is Mandated

Section 24-50-125.5, C.R.S. states,

"Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action **shall be liable** for any attorney fees and other costs incurred by the employee or agency against whom such appeal or

personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . ." (Emphasis added.)

Respondent's abolishment of Complainant's position based on a purported lack of funds was groundless. A personnel action is groundless if a party "fails to offer or produce any competent evidence to support such an action or defense." Board Rule R-8-38(A)(3), 4 CCR 801. At the time Complainant's position was abolished, Business Operations Unit managers planned to replace her position with Divido at a salary level \$26,000 higher than her own. These facts demonstrate conclusively that Respondent had no factual basis upon which to base the abolishment of her position based on lack of funds. In addition, the evidence demonstrated that DOC's policy of abolishing vacant positions first mandated that the GP III position in Canyon City should have been abolished; this position had a salary level exceeding that of Complainant. Therefore, no lack of funds mandated abolishment of the BA II position.

Respondent's action was also made in bad faith. Under Rule R-8-38(A)(2), "A personnel action is made in bad faith if the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth. Here, Respondent's action was disrespectful of the truth." The managers responsible for layoff decisions in the Business Operations Unit ignored the fact that if they could fund Divido's position, they could fund Jones' position. They also disregarded DOC's two central mandates in implementing a layoff: eliminate non-essential functions first; and eliminate vacant positions first. Had the managers complied with those two directives, they would not have abolished Jones' position and replaced her with Divido. Respondent's failure to consider any alternatives to Jones' layoff, such as moving Jordon or Ruckles to Correctional Industries, or abolishing Ellison's vacant GP III position, also demonstrates bad faith.

E. Complainant is Not Entitled to All of the Remedies She Seeks

When an employee is wrongfully separated from employment, he or she is entitled to receive an amount of damages which will make him or her whole. *Lanes v. O'Brien*, 746 P.2d 1366 (Colo.App. 1987). A wrongfully separated employee is never, however, entitled to an economic windfall. *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984).

Complainant seeks reimbursement for the mileage incurred on her personal vehicle in commuting from Colorado Springs to Canyon City, from the period July 1, 2003, when she assumed the GP III position, through October 2004, the time she left that position. When the legal injury is of an economic character, compensation should be equal to the injury. *Donahue, supra*; *Lanes v. State Auditor's Office*, 797 P.2d 764 (Colo.App. 1990). Had Respondent not wrongfully abolished her position, she would not have incurred the commuting costs. Complainant is entitled to this reimbursement in order to make her whole.

Complainant also seeks reimbursement for mileage incurred from Colorado

Springs to Denver from November 2004 through the present. However, Complainant made the decision to take a new position in Denver unilaterally; Respondent was not responsible for this action. Therefore, Complainant is not entitled to relief in connection with her decision to work in Denver.

Complainant also seeks a retroactive appointment to the position of BA III, effective January 2004. At that time, she interviewed for the reallocated position that was ultimately offered to Carla Stephenson, the incumbent. Complainant never appealed that failure to hire decision; therefore, the Board is without jurisdiction to grant any relief in connection with it. Further, the decision to cancel the promotional reallocation of Complainant's BA II position in 2003 is not on appeal herein; therefore, the Board has no authority to grant relief relating to that decision.

Complainant is entitled to reinstatement to her BA II position at Respondent's headquarters in Colorado Springs effective July 1, 2003, and any back pay and benefits that may apply. Since Complainant has not suffered any loss of salary, it appears there is no back pay owed to her.

Lastly, Complainant seeks an order imposing sanctions against Reed and Hay under section 24-50-129, C.R.S. That provision states, "If any appointment is willfully made contrary to the provisions of this part 1, the appointing authority shall be personally responsible for any salary liability incurred." This provision applies to appointments. Neither Reed nor Hay made any appointments in this case. Therefore, the provision does not apply to this case.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious, and contrary to rule and law;
2. Respondent did not violate the Employee Protection Act;
3. Respondent retaliated against Complainant for appealing her layoff;
4. Complainant is entitled to an award of attorney fees and costs.

ORDER

Complainant is reinstated to the BA II position she occupied at Headquarters in Colorado Springs, retroactive to July 1, 2003; Respondent is to pay Complainant's attorney fees and costs incurred in this action; Respondent is to refrain from any further retaliation against Complainant for filing this appeal; Respondent is to rescind the August 15, 2003 memorandum.

Dated this ____st day
of December, 2005, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
633 17th Street, Suite 1320
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the _____ day of **December 2005**, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and **NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Mark Gerganoff
Frank & Finger, P.C.
29025-D Upper Bear Creek Road
P.O. Box 1477
Evergreen, CO 80437-1477

and in the interagency mail to:

Christopher Puckett
Assistant Attorney General
Employment Section
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Andrea C. Woods