

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**ANDREA NAJAR,**

Complainant,

vs.

**DEPARTMENT OF CORRECTIONS,**

Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on November 24, 2003, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Andrea Najjar ("Najar" or "Complainant") represented herself. Assistant Attorney General Melissa Mequi represented Respondent Department of Corrections ("DOC").

**MATTER APPEALED**

Complainant appeals the retention rights offered to her by DOC following layoff. Respondent moves for attorney fees and costs.

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

**ISSUES**

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether Respondent is entitled to an award of attorney fees and costs.

**FINDINGS OF FACT**

1. Andrea Najjar held the position of Program Assistant I at DOC. She enjoyed this position.
2. In January 2003, someone at DOC informed Complainant that her job was being abolished. When Complainant questioned her appointing authority about it, she was informed that it had been taken care of and she had nothing to worry about.
3. In the spring of 2003, DOC gave Complainant official written notice that her position would

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be abolished due to lack of funds, effective June 30, 2003. Because she had been informed verbally that her position was not in jeopardy, Complainant was surprised by this news.

4. For a period of two or three months, Najjar received no information from DOC regarding retention rights. This was difficult for her.
5. On June 12, 2003, DOC sent Complainant a letter informing her of her retention rights.
6. On June 20, 2003, DOC sent Complainant a second letter, rescinding the initial retention rights offer, and tendering a second retention rights offer, consisting of the following: an Encumbered Program Assistant I position outside a fifty mile radius, and a Vacant Administrative Assistant III position within a fifty mile radius.
7. On June 25, 2003, Complainant wrote DOC and accepted the Administrative Assistant III ("AA III") position, because it was within a fifty mile radius. Although the position was a demotion, her pay did not decrease.
8. In her June 25, 2003 letter, Complainant raised a number of questions relating to how her retention rights had been calculated, and recited a Board rule governing retention rights. Najjar requested verification that there were no other similarly situated individuals within a fifty mile radius, whom she might be eligible to bump. She also asked DOC to inform her whether there were others in her time band, and, if so, what was the tie breaker that led to her not receiving a lateral retention offer within a fifty mile radius.
9. DOC never provided a response to Najjar's request.
10. After assuming the AA III position, Complainant learned that another AA III's position was being reallocated upward to Program Assistant I. Complainant did not apply for that position when it was posted. At hearing, Complainant testified that it is unfair for another employee to promote during a time she suffered a demotion.
11. Complainant's appeal form filed with the State Personnel Board noted her belief that there were Program Assistant I's that were junior to her within a fifty mile radius, whom she should have been able to bump. At hearing, however, she did not prove this.
12. Complainant feels it was unfair for DOC to wait a period of months to advise her of her retention rights.

### **DISCUSSION**

Complainant bears the burden of proof in this appeal of a layoff. *Velasquez v. Department of Higher Education*, 2003 WL 22097754, Colo.App., September 11, 2003. The Board may reverse the Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

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In Colorado, arbitrary and capricious agency action is defined as:

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

*Lawley v. Dep't of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Najar first contends that it was unfair and wrong for DOC to wait a period of months prior to informing her of her retention rights. Enduring a layoff is an extremely difficult experience for any state employee. Agency delay in determining and notifying employees of their retention rights only exacerbates the stress of the experience. While it is readily understandable why Najar feels the process was unfair, she has not proven a violation of any rule or law. A review of the Board rules and Director's procedures governing retention rights reveals that no rule mandates a time period within which agencies must determine and notify employees of retention rights. *See* State Personnel Board Rules, Chapter 7, R-7-7 through R-7-19, 4 CCR 801. Further, Najar offered no evidence proving that the agency's action in determining her retention rights was somehow arbitrary or capricious.

Complainant also argues that it was unfair for DOC to reallocate co-worker up to her Program Assistant I position, during the same time period in which she was laid off and ultimately suffered a demoted. Had Najar applied for the reallocated position at the time it was posted, the Board would have taken a close look at that hiring decision. However, Najar forfeited any potential claim to that position by not applying for it.

Lastly, Najar argued in her appeal form that there were other Program Assistant I's junior to her within a fifty mile radius, whom she should have had the opportunity to bump. However, she offered no evidence in support of this theory at hearing.

In conclusion, Complainant has failed to demonstrate that DOC's offer of retention rights was arbitrary, capricious or contrary to rule or law.

Attorney fees. Respondent requests attorney fees against Complainant for bringing this case to hearing. It argues that Complainant offered no evidence in support of her claims.

Attorney fees "shall" be awarded if it is found that a personnel action or appeal thereof was instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S.; Board Rule R-8-38, 4 CCR 801. Board Rule R-8-38(A)(3) defines a groundless action as one in which "despite having a valid legal theory, a party fails to

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offer or produce any competent evidence to support such an action or defense." Such was not the case herein.

Najar has not failed to produce any competent evidence to support her appeal. Her experience of the layoff process was a poor one, fraught with incorrect and conflicting information, and then, upon learning that she was indeed to be laid off, a delay of a period of months to learn of what, if any, retention rights she would receive. Once she received retention rights, her written request for an explanation as to why she was not able to bump another Program Assistant I went unanswered. It is not surprising that Najar perceived the agency's acts and omissions as being unfair. The fact that she failed to prove the agency's conduct rose to the level of a rule violation does not render her appeal groundless.

### **CONCLUSIONS OF LAW**

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
2. Attorney's fees and costs are not warranted.

### **ORDER**

Respondent's action is **affirmed**. Respondent's motion for attorney fees and costs is denied.

Dated this \_\_\_\_ day of January, 2004.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203

## **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

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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.

**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_ day of January, 2004, 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:

Andrea Najar  
1825 E. 8<sup>th</sup> Street  
Pueblo, CO 81001

and in the interagency mail, to:

Christian Ricciardiello  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods