

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2004B093**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KENNETH SCHULTER,

Complainant,

vs.

DEPARTMENT OF PERSONNEL AND ADMINISTRATION, DIVISION OF CENTRAL SERVICES,

Respondent.

The State Personnel Board's Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on February 25, 2004; June 15, 16 and 28, 2004; and July 14, 27 and 29, 2004 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado.¹ Assistants Attorney General Colleen O'Laughlin and then Joseph Haughain represented Respondent. Respondent's advisory witness was Linda Summers, the appointing authority. Complainant appeared and was represented by Cecilia Serna. After various requests for extensions of time and the timely filing of written closing arguments, the record in this matter was closed on September 20, 2004.

MATTER APPEALED

Complainant, Kenneth Schulter ("Complainant" or "Schulter") appeals his layoff, including the determination of his retention rights, by Respondent, Department of Personnel and Administration ("Respondent" or "DPA"). Complainant seeks reinstatement, back pay and benefits and attorney fees and costs. Respondent has requested affirmance of the appointing authority's action.

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

¹ The State Personnel Board is located, administratively, in the Department of Personnel and Administration. It is a separately constituted and authorized body under the Colorado Constitution and state statutes, and employs its own administrative law judges and staff. As such, the Board's administrative law judges are independent adjudicators of actions brought by persons in the state personnel system.

ISSUES

1. Whether Respondent's layoff and determination of Complainant's retention rights was arbitrary, capricious or contrary to rule or law; and
2. Whether an award of attorney fees to Complainant is warranted.

FINDINGS OF FACT

General Background

1. Complainant was a General Professional VI ("GPVI") within the Division of Central Services ("DCS") in the Department of Personnel and Administration ("DPA") and had worked for the state for fourteen years at the time of his layoff.
2. Complainant began his employment with DCS in May 1989 as a Management Analyst.
3. After taking into consideration any and all classification consolidations occurring during Complainant's tenure with the State of Colorado, Complainant has been certified to three classes within the General Professional class series: GPIV; GPV; and GPVI.
4. DCS provides various services for other state agencies, including data conversion, data entry, buildings and grounds maintenance, the state's motor pool and statewide travel. The Document Solutions Group ("DSG") is housed within DCS and provides various document services, including imaging, microfilming scanning and data entry to state agencies. The Fleet Management Group is also housed in DCS and oversees the state's motor pool.
5. In February 2003, via email, Troy Eid, Executive Director of DPA, announced that Linda Summers had been appointed the Division Director for DCS. In April 2002, Summers had been appointed the Deputy Division Director for DCS. Both positions were filled through the state personnel system's competitive process. Rick Malinowski, the then Division Director for DSG, recommended Summers for both positions.
6. With regards to the State of Colorado's budgetary process, the term "fiscal year" refers to the time period of July 1st through June 30th, e.g. Fiscal Year 2004 ("FY04") refers to July 1, 2003 through June 30, 2004.

Complainant's Transfers from Fleet Manager to IDF and DSG

7. In October 2001, while he was Director of DCS, Malinowski moved Complainant from the Fleet Manager position in Fleet Management to a DCS Administration position. In his new position, Complainant worked on rate setting for groups within Integrated Document Factory ("IDF"), a unit within DCS that oversees document reproduction, mail

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services, graphic design and copier management.

8. Complainant was concerned about this transfer and called Eid to complain. Paul Farley, DPA's Deputy Executive Director, called Complainant back and stated that, as long as Complainant's pay, status or tenure was not affected, Complainant could be transferred. Complainant did not grieve his transfer.
9. Early in 2002, Summers told Complainant that he was being transferred to Imaging Microfilm Unit ("IMU"), as a GPVI. Summers transferred Complainant, in part, because of his rate setting experience in IDF.
10. Complainant was pleased with the IMU transfer, as he felt unchallenged in his IDF work. He was unaware, at the time of his transfer, that IMU had been losing money for ten years.
11. Immediately after his appointment to IMU, Complainant began to work on customer relations and the merger of IMU with Pueblo Data Entry Center ("PDEC"), another DCS unit.
12. During the late summer and early fall of 2002, Summers asked Complainant to look at IMU's rates and profitability. When Complainant looked at IMU's rates he thought they were set appropriately but that the problem was not having a "captive" customer base.

Merger of IMU and PDEC

13. Sections 24-30-1108(2) and (3), C.R.S. require that rates charged by DCS for the services it provides to other state agencies must be both competitive with the private sector and cover costs of the service provided.
14. PDEC originally operated under DPA's Division of Information Technology ("DOIT"). It primarily handles data entry but it also does scanning and data conversion. Cindy Nardini, an Operations Manager within the IT classification series, managed PDEC.
15. PDEC was cash funded and billed on an allocated basis. A cash funded agency may only spend what it earns. When billing on an allocated basis, an entity will total its costs each month, calculate the percentage of total usage by other agencies of the services from the previous year and then bill the costs each month based upon that percentage of usage. The net result is a year-end profit and loss statement showing no profits and that all costs have been covered. The problem with allocated billing is that it does not accurately reflect the cost of services provided.
16. In the first half of 2002, PDEC was moved from DOIT to DCS.
17. IMU operated under DPA's DCS, handling scanning, microfilm and document

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reduction and, was managed by Complainant (a GPVI).

18. IMU was cash funded and billed on a cost basis. When billing on a cost basis, the total costs for operating an entity are divided by the units of work provided in order to arrive at a rate that is charged for each unit of work performed.
19. A March 1994 audit of DCS performed by the State Auditor (the "March 1994 Audit") stated that the IMU group had lost money from Fiscal Year 1990 through the first five months of Fiscal Year 1994. The March 1994 Audit made various recommendations and ended by stating that, if the IMU could not, after a specific time period, become both profitable and competitive, the unit should be abolished. DPA responded to the March 1994 Audit by stating that, if DPA could not return IMU to profitability by the end of Fiscal Year 1996, it would consider closing the IMU.
20. IMU had losses in Fiscal Year 2000 (\$154,927); Fiscal Year 2002 (\$284,345); Fiscal Year 2003 (\$183,229) and through November of Fiscal Year 2004 (\$116, 929). It had a profit in Fiscal Year 2001 of \$62,658.
21. In April 2002, Summers sent an email stating that, with the addition of PDEC to DCS, the IMU section was being reorganized and Complainant would be placed "in the position of manager of the new IMU/PDEC organization."
22. As a result of PDEC's move to DCS, IMU and PDEC were combined within DCS and referred to as the Document Solutions Group Denver ("DSG-Denver") and Pueblo ("DSG-Pueblo").
23. On July 1, 2002, after a request by Eid, the Colorado Legislature moved PDEC's budget from DOIT to DCS. Through Fiscal Year 2003, PDEC and IMU were separate budget items on Colorado's budgetary bill (the "Long Bill"). For Fiscal Year 2004, the budgets for these two groups were combined. However, DPA continued to prepare separate profit and loss statements for DSG-Denver and DSG-Pueblo.
24. During the Summer of 2002, because of ongoing communication issues which were affecting the merger of the IMU and PDEC Units, Summers decided to appoint Nardini as the overall manager of DSG. She chose Nardini rather than Complainant because Nardini was in a higher classification, had a higher pay grade, had more IT experience, and had managed a larger group of employees. Complainant did not grieve this decision.
25. During the Summer of 2002, Complainant negotiated, on behalf of DSG, a \$500,000 job with the Secretary of State ("SOS"). DSG-Pueblo did all of the work on the SOS job. Summers and Jennifer Oakes, DPA's Chief Financial Officer, thought that a portion of the revenue should be allocated to DSG-Denver because Complainant had negotiated much of the contract. However, Eric Meyers, the JBC's budget analyst for DPA, instructed that the revenue be allocated completely to DSG-Pueblo as that was where

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the work was performed.

26. In early 2003, when Eid appointed Summers Division Director, he also announced his appointment of Scott Madsen as DCS's Deputy Division Director and Bill Taylor as DCS's Associate Deputy Director. In that announcement, Eid explained that Madsen would continue to serve as Fleet Manager for the state's motor pool. As part of the Deputy Division Director appointment, Eid stated that Madsen would be overseeing DSG's operations and Taylor would be overseeing DCS's Administrative Unit and "the transition of a new Fleet Manager."
27. Upon Madsen's appointment as DCS's Deputy Division Director, the day-to-day duties for managing the Fleet Unit were delegated to Larry Wergyzen, a GPIII, who was given a pay differential of \$1000 per month for handling the additional duties. Madsen, however, continued to handle the overall duties and responsibilities of Fleet Manager.
28. Madsen was told that he would handle the overall Fleet Manager duties until December 2003. In December 2003, Madsen was told that, because of the budget shortfall, he would continue to handle the overall Fleet Manager duties until December 2005. To date, Wergyzen continues to handle the day-to-day duties of Fleet Manager and receives a pay differential for handling those duties.

Reorganization of DSG and Complainant's Layoff

29. During the Spring of 2003, DPA administered a layoff that focused on general funded, rather than cash funded, positions.
30. In March 2003, in an email to Madsen, Summers stated that she had asked Monica Cortez-Sangster, DPA's Director of Human Resources to review "what it would look like if we were to layoff the GPVI [Complainant] in DSG." Complainant, who was in a cash funded position, was not laid off by DPA in early 2003.
31. A May 2003 audit of DCS performed by the State Auditor (the "May 2003 Audit"), again addressed the continuing lack of profitability of DSG-Denver and pointed out that, statutorily, such services could only be provided if the revenue generated covered the costs of the services and that the rates were competitive with the private sector. The report ended by stating that, if the statutory mandate could not be met, DPA should consider eliminating the service. DPA responded to the May 2003 Audit by agreeing to review service delivery changes if new rates that it had implemented were not complying with the statutory mandate.
32. Soon after Madsen's appointment as Deputy Division Director, Summers asked Madsen to review the setting of rates by DSG-Denver and make recommendations for how to more accurately set those rates. Based upon Madsen's recommendations, DSG-Denver increased its rates in July 2003 (the beginning of Fiscal Year 2004).

33. Because of the July 2003 rate increase, the Department of Revenue (“DOR”) pulled a major project (microfilming business tax returns) from DSG-Denver, as the project was based upon the rates charged in FY03.
34. DOR was DSG-Denver’s largest customer. Therefore, the withdrawal of its business substantially decreased DSG-Denver’s volume and resulted in a loss for the first three months of Fiscal Year 2004 (July, August and September 2003). DSG-Denver, as a stopgap measure, agreed to provide DOR with the old rate while it investigated how to resolve its rate structure problems.
35. Once again, Madsen reviewed the process for setting rates for DSG-Denver. He discovered that, in the past, Complainant’s salary had not been included in DSG-Denver’s costs. This discovery made him realize, for the first time, that, in order to set competitive rates, there would have to be a drastic reduction in costs.
36. Madsen discussed his findings with Summers. The two of them then began to explore how to make DSG-Denver’s rates competitive.
37. While investigating DSG-Denver’s rates, Summers and Madsen understood that they would either have to increase the DSG-Denver volume to cover its costs or reduce the current costs so that, with the current volume, it could cover the costs. However, Summers and Madsen came to the conclusion that, even if all of the DSG-Denver employees were producing work full time, the rates that would have to be charged for that work would not be competitive. Summers and Madsen concluded that they needed to bring down DSG-Denver’s costs by approximately \$200,000 in order to lower its rates to a competitive level.
38. Summers and Madsen decided that the reduction in costs, in order to have any impact, would have to be personnel related, as all possible cuts in non-personnel costs (combining software licensing, eliminating square footage and/or equipment, etc.) did not eliminate enough in the way of overall costs. However, in order to maintain as high a level of production as possible (thereby generating income), those personnel cuts would have to be mostly in DSG-Denver’s non-production personnel. There were three non-production positions at DSG-Denver, those held by Complainant, John Robinson and Chris Wood (whose position was both a production and non-production position).
39. In calculating what costs would need to be cut, Madsen and Summers calculated what rates would need to be charged to DOR if there was a DSG-Denver reorganization and if there wasn’t a DSG-Denver reorganization. They found that, if they reorganized DSG-Denver by eliminating some positions and redistributing those duties, then DSG-Denver’s costs would be brought down to a point where the rates charged to cover its costs would be competitive.
40. In late October 2003, Summers decided to reorganize DSG-Denver and reduce its costs by eliminating three DSG-Denver positions and redistributing those positions’

duties amongst remaining personnel.

41. There were a number of factors affecting Summers' decision. One of those factors was the March 1994 and May 2003 Audits. In addition, Summers discussed the reorganization with the upper level management in DPA's Executive Director's Office, including Oakes. Finally, she considered the briefing document that the JBC's staff had submitted to the JBC as preparation for the JBC's hearing on November 19, 2003 on DPA's budget. That briefing discussed DSG-Denver's continuing losses and suggested the JBC ask DPA to explore reduction in personnel and operating costs and what DPA's business plan was for making DSG-Denver viable.
42. During a DSG-Denver staff meeting on November 3, 2003, Summers asked the DSG-Denver employees to complete blank job applications setting out their employment histories.
43. On November 12, 2003, Summers issued a memo to all of the DSG employees entitled "Unit Reorganization Plan for DSG" ("DSG Reorganization Plan"). The DSG Reorganization Plan included an organizational chart and stated:
 - a) The reason for the reorganization was "to reduce costs to the State and improve service to customers."
 - b) The reorganization would allow DSG to reduce costs to the extent that it would be able to charge competitive rates.
 - c) That there would be a realignment of management and support for DSG-Denver in that Complainant's position and a Production V position (John Robinson's position) would be abolished on January 16, 2004, the positions' duties would be absorbed by existing personnel, and DSG-Denver employees would report to management in DSG-Pueblo.
 - d) Scanning functions would be moved to DSG-Pueblo by the end of June 2004 and the existing DSG-Pueblo resources would absorb the work. In addition, if DSG was successful in a bid to do DOR microfilm work, DSG-Denver employees who currently did both scanning and microfilm work would solely do the microfilm work at DSG-Denver. Finally, if those employees (2-3 total) wanted to move to DSG-Pueblo, they would be able to do so.
44. There were also plans to abolish a third position, Chris Woods' position, in June 2004. However, to date, that position has not been abolished nor have the scanning functions been consolidated to DSG-Pueblo.
45. As of November 2003, according to internal DPA profit and loss statements, DSG-Denver had already lost over \$116,000.

46. On November 19, 2003, after Summers issued the DSG Reorganization Plan and during a JBC meeting on DPA's budget, the JBC Chair, Brad Young, expressed concern about the ongoing losses at DSG-Denver.
47. On December 1, 2003, Complainant received a letter from Summers stating that Complainant would be laid off effective January 16, 2004 and that he had no retention opportunities at DPA to vacant or occupied positions in his current class, previously certified class or class series (the "Layoff Notice"). The Layoff Notice informed Complainant of his appeal rights to the State Personnel Board.
48. Nardini and two of her subordinates have absorbed Complainant's duties since his layoff in January 2004.
49. During December 2003, JJ Jackson, a GPVI who oversaw IDF, gave notice that he would be retiring on January 31, 2004. Bill Taylor, a GPV, took over Jackson's duties when Jackson retired.

Complainant's Educational Background and Work Experience

50. Complainant has a bachelor's degree in industrial engineering and a master's in health care administration.
51. Complainant has been certified as an Automotive Fleet Manager by the National Association of Fleet Administrators.
52. Complainant has over thirty years of work experience in the public and private sectors. Throughout his career, Complainant has worked for various agencies or private entities implementing and enhancing work flows and business operations, sometimes through consultation and other times through training. On occasion this has required, in varying degrees, duties, which include managing budgets, supervisory or personnel management, customer relations, bid development or marketing and implementing IT functions.

General Professional Class Series

53. The General Professional class series extends from GPI to GPVII and then into Management Profile. The class series has an education and experience requirement for each of its classes. The GPI class requires a bachelor's degree in a field of study relating to the work assignment. Each succeeding class (GPII through GPVII) requires both the bachelor's degree and an additional one-year of professional experience for each successive GP level in the occupational field or specialized subject area of the work assigned to the job (e.g. a GPII needs only one year of such experience, whereas a GPVII needs six years).
54. Substitution of work experience is allowed in the GP class series on a year-for-year

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basis for the degree requirement. At an agency's discretion, a master's or doctorate degree may be allowed for the bachelor's and one year of experience or demonstrated proficiency may substitute for the required education and experience.

Determination of Complainant's Retention Rights

55. On December 1, 2003, Complainant was informed in writing, by Jeff Schutt, Director of DPA's Human Resources Division, that due to a lack of funds Complainant's position as a GPVI was to be abolished effective January 16, 2004 and that there were no positions, in either Complainant's current or previously-certified class or class series, into which he could be moved or exercise retention rights ("Notice of Retention Rights").
56. Monica Cortez-Sangster calculated Complainant's retention rights. In reviewing an employee's qualifications and the duties attendant to the various jobs that employee has held in the past, she would look at the employee's past Position Description Questionnaires, for any state jobs, to determine the percentage of time spent on the various duties or, for non-state positions, she asks the employee for estimates.
57. The analysis of Complainant's retention rights is limited to five positions²:
- a. Director of Communications and Legislative Affairs (Position No. 9038);
 - b. Manager of Customer Relations (Position No. 4880);
 - c. Associate Division Director for Central Services (Position No 1876);
 - d. Employee Relations and Communications Specialist (Position No. 9004); and
 - e. Purchasing Agent IV (Position No. 2579).
58. The Director of Communications and Legislative Affairs position (Position No. 9038, a GPVI) is the manager, administrator and primary contact for legislative affairs. As such it has the GP series minimum requirements of a bachelor's degree and five years of professional experience in the specialized subject area of the legislative process, analyzing and implementing public policy; developing and reviewing legislation; and serving as a lobbyist or liaison with the legislature, constituents, a state regulatory board or commission.
59. The Manager of Customer Relations position (Position No. 4880, a GPVI) is the marketing liaison for the Colorado Government Technology Services Division ("CGTS"), handling substantive customer concerns and marketing new services regarding CGTS. The position serves the dual role of being an advocate for CGTS services with its 200-agency customer base and as an advocate, internally, for customers' concerns and issues. This position also has a special entry requirement that applicants have a "working technical and business knowledge of the types of services offered by CGTS."

² The parties stipulated to this fact. Therefore, there are neither findings of fact nor any discussion regarding any other vacant or occupied positions in Complainant's current or previously certified class or class series.

60. The DCS Associate Division Director position (Position No. 1876, a GPV) is the third level managerial position for DCS. The position has three special entry requirements, all of which must be met by an applicant:
- a. A bachelor's degree in facilitation, planning, marketing or related field;
 - b. Three years of professional experience in facilitation, planning, marketing or a related field; and
 - c. Certification with a national facilitation, planning or marketing organization.
61. The Employee Relations and Communications Specialist position (Position No. 9004, a GPIV) involves preparing communications and/or presentations regarding human resources programs, policies, products and services. The minimum requirements include both a bachelor's degree in public administration, public relations, communications, marketing, journalism or closely related field and three years of experience in one of those fields, one year of which must be in a professional human resources setting.
62. The Purchasing Agent V position (Position No. 6123, a GPIV) manages the various programs (including the internet bidding system, vendor outreach program, vendor procurement training program) related to the state's decentralized purchasing process. There is a special entry requirement of public speaking or teaching experience.
63. Complainant timely filed his appeal in this matter on December 12, 2003.

DISCUSSION

I. GENERAL

In an appeal of an administrative action (e.g. an administrative termination due to a layoff) the burden of proof is on the Complainant to show that the Respondent's action was arbitrary, capricious or contrary to rule or law. See Department of Institutions vs. Kinchen, 886 P.2d 700 (Colo. 1994); § 24-50-103(6), C.R.S.

Complainant argues, and bears the burden of proving, that Respondent acted arbitrarily and capricious and contrary to rule or law in laying him off and, as a result of improperly assessing his qualifications, failing to offer him retention rights to positions within DPA.

II. HEARING ISSUES

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

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).

1. The Layoff

The Board rules pertaining to layoffs apply to any reduction in force that results in the elimination of one or more positions. Board Rule R-7-7, 4 CCR 801. The only reasons for a layoff are lack of funds, lack of work, or reorganization. Board Rule R-7-7, 4 CCR 801. A reorganization is a fundamental change in the structure or positions reporting to an appointing authority. Board Rule R-7-7(A), 4 CCR 801.

If an agency administers a layoff through a reorganization, it must post a business plan before issuing the first layoff notice. Board Rule R-7-7(A), 4 CCR 801. The business 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 employees. Board Rule R-7-7(A), 4 CCR 801.

There was no dispute that Respondent was administering a layoff by reorganization. In addition, based upon the arguments raised in Complainant's written closing argument, it does not appear that he is contesting the procedural aspects of the layoff (the posting of the business plan, his receipt of notice of the layoff, etc.). Rather, Complainant disputes, in a number of ways, the Respondent's reasoning in arriving at the decision that there needed to be a reduction in force and that his position was eliminated, arguing that reasoning was arbitrary and capricious.

First, Complainant argues that it was arbitrary and capricious of Respondent to analyze DSG-Denver and DSG-Pueblo separately rather than together, given that they were a combined unit. While the two groups were merged into one unit, they still performed separate functions and were at separate locations. It was reasonable, especially in light of DSG-Denver's history of losing money, to determine whether it was feasible to continue operating the DSG-Denver location under its current structure, given the necessity of complying with the statutory mandate for rate setting. In light of the combination of the

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two units and the potential efficiencies, it was reasonable, albeit painful, to determine how many managers or non-production personnel were needed, much less maintained.

Complainant also argues that it was arbitrary and capricious of Respondent not to include all DSG-Denver income when Madsen analyzed DSG-Denver's rate setting in 2003. While Complainant made this argument, there was no credible evidence that, in light of the loss in excess of \$116,000 by DSG-Denver as of November 2003, the amount of such income would have offset the Complainant's layoff. In addition, there was no credible evidence that, depending on the amount of that income, Complainant's position, rather than John Robinson's position, would have been saved.

Complainant's third argument that the layoff was arbitrary and capricious of Respondent is that Respondent did not include in its financial analysis any analysis of the financial impact on DSG-Pueblo to move the scanning equipment or for the additional cost of employees. While Complainant is correct in making the assertion that Respondent did not include these costs in its financial analysis, there was no evidence as to what that the cost would have been, much less if, but for that cost, Complainant's position would not have been abolished. With regards to the additional cost for employees for scanning in Pueblo, the DSG Reorganization Plan stated that the work function could be handled by existing Pueblo resources, therefore, there would not have been an additional cost of employees.

Complainant's fourth argument that the layoff was arbitrary and capricious is that Respondent did not utilize certain figures for DSG-Denver's costs, because those figures were higher, by \$13,000, than the costs shown in the internal profit and loss statements. However, based upon the evidence in the record, it was necessary for Respondent to reduce its costs by over \$200,000. It was this amount that Summers was trying to address in the DSG Reorganization Plan. While it is arguable that the lower cost figure should have been used, again, bottom line, DSG-Denver would still have experienced another year of loss. Based upon the evidence presented, that loss would still have necessitated a drastic reduction in costs.

In addition, Complainant argues that it was arbitrary and capricious of Respondent not to explain to the JBC that the allocation of the \$300,000 SOS job would have resulted in a profit for DSG-Denver. The Complainant is correct in arguing that the \$300,000 SOS job would have resulted in a profit for DSG-Denver. However, the fact is the SOS job wasn't credited to DSG-Denver, it was credited to DSG-Pueblo on the basis that DSG-Pueblo had performed the work. The decision to do so was not Respondent's decision. Respondent tried to credit at least a portion of the income to DSG-Denver. However, the JBC analyst directed that it be allocated to DSG-Pueblo because that was where the work was done. Complainant did not present adequate evidence to show that this was an arbitrary and capricious directive or that Respondent was arbitrary and capricious to comply with the JBC directive.

Furthermore, Complainant argues that it was arbitrary and capricious of Respondent

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not to transfer funds from another DCS unit to DSG-Denver to cover losses, given that DPA had made such transfers between other units in the past. While this may have been a possibility, Complainant did not present evidence as to where those funds should be transferred from or that it would have been reasonable to make that transfer. In addition, given the long-standing history of DSG-Denver losses, such a solution may have been temporary, at best.

Finally, Complainant argues that it was arbitrary and capricious of Respondent not to follow through on its reorganization plan because it did not move the scanning equipment, nor did it layoff Chris Woods. However, the evidence presented demonstrated that Respondent's rationale for designating Complainant as one of those to be laid off was because he was non-production personnel. Chris Woods was both production and non-production personnel. There was a dearth of evidence regarding Woods retention, simply the assertion that because he was not laid off, Complainant's layoff was arbitrary and capricious. With regards to the move of the scanning equipment, Complainant has not shown that the cost savings of its non-removal would have saved Complainant's position from abolishment. Given the size of the reduction in costs needed and the non-production aspect of Complainant's job, it was well within the realm of possibility that his position would have been abolished.

It is very understandable that Complainant, who has a solid background in industrial engineering and is a fourteen-year employee of the state personnel system, is upset. He points out alternatives for implementing the layoff, including the timing of the layoff, which would have protected him and his tenure of service. Those alternatives are reasonable alternatives. They are not, however, the only alternatives. The choices made by DSG-Denver, while having a severe impact on Complainant, are not unreasonable or beyond the pale. Rather they are choices made in the context of a long history of losses, a state statute mandating costs be covered by the rates charged and the non-production nature of Complainant's position. Those choices were made after consideration of a wide range of facts and were reasonable choices. Therefore, Complainant has not met his burden of demonstrating that Respondent acted arbitrarily and capriciously in abolishing his position.

2. Retention Rights³

An employee who is laid off must meet the minimum qualifications and any bona fide special qualifications in order to have retention rights to a position. Board Rule R-7-18, 4 CCR 801. As stated before, the parties stipulated to consideration of the Complainant's retention rights for five positions. Complainant argues that he meets the minimum and/or special entry requirements for those five General Professional positions within DPA and that Respondent improperly assessed his past experience and job duties.

³ The parties stipulated that Complainant had retention rights to five positions and no claims were made by Complainant that the determination of his priority in the layoff matrix was arbitrary, capricious or contrary to rule or law.

a. Five General Professional Positions

With regards to the Director of Communications and legislative affairs position (GPVI), Complainant also argues that his work with the JBC and the OSPB during his fifteen years with the state meets the minimum requirements for the position. Those minimum requirements are the general GPVI requirements of a bachelor's degree and five years of professional experience in the specialized subject area of the legislative process, analyzing and implementing public policy; developing and reviewing legislation; and serving as a lobbyist or liaison with the legislature, constituents, a state regulatory board or commission. However, Complainant provided no credible evidence of what percentage of his state jobs were allocated to these duties. Complainant's background, while containing some contact with aspects of Colorado's state legislature, does not reflect the breadth nor the longevity of focused legislative experience mandated for the Director of Communications and Legislative Affairs position.

Complainant also argues that he meets the position requirements for the Manager of Customer Relations (GPVI), given his extensive background in integrating business operations and IT functions. However, the position also has a special entry requirement⁴ that applicants have a "working technical and business knowledge of the types of services offered by CGTS." There was little or no substantive evidence offered as to either the specific services offered by CGTS or Complainant's background or experience with those specific services, marketing such services and/or addressing customer concerns around those services. Without such evidence, Complainant's argument fails.

As to the DCS Associate Division Director position (GPV), Complainant does not meet at least two of the special entry requirements for the position – 1) a bachelor's degree in facilitation, planning, marketing or related field; and 2) certification with a national facilitation, planning or marketing organization. Complainant has a bachelor's degree in industrial engineering and a master's in health administration. Complainant argues that he took courses in the areas of facilitation, planning and marketing in order to obtain those degrees and, therefore, meets this special entry requirement. This argument ignores the requirement that an applicant hold a degree in the relevant areas. Coursework broadens the perspective of a degree holder, but it does not denote a concentrated focused study in a particular academic field. It merely indicates that a student has touched generally upon an area.

Complainant argues that his certification as an Automotive Fleet Manager by the National Association of Fleet Administrators meets the special entry requirement for

4 Special entry requirements are those requirements that an applicant must possess at the time s/he obtains the job as they are necessary skills or areas of expertise in order to perform the job and are not skills which may be obtained during the probationary/trial service period. Under Board Rule R-7-18, "[a]n employee must meet the minimum qualifications and any bona fide special qualifications in order to have retention rights to a position." No argument was presented as to whether the special entry requirements were bona fide, therefore the discussion is limited to whether Complainant met the minimum or special entry requirements.

certification with a national facilitation, planning or marketing organization. However, there was little or no substantive evidence provided which demonstrates that such certification demonstrates an expertise in the necessary areas. Complainant's certification, facially, provides evidence of expertise in managing a governmental agency's motor pool. It does not, however, demonstrate an expertise or focus of marketing or planning, much less facilitation.

With regards to the Employee Relations and Communications Specialist position (GP IV), Complainant appears to concede that he does not have the requisite bachelor's degree. However, he argues that he has the work experience to substitute for the minimum requirement of a degree and the subsequent professional work experience, including the requirement of one year working in a professional human resources setting. He argues that he gained the requisite experience by virtue of the fact that one aspect of each of his jobs in the past twenty years covered the areas of public administration, public relations, communications, marketing or journalism. In addition, he argues he obtained the necessary human resources experience through his various jobs.

Complainant clearly has over seven years of experience in public administration. However, there is nothing on his resume that suggests experience in a professional human resources setting. It appears that Complainant is arguing that, given his extensive experience managing people, he meets the requirement of work experience in a professional human resources setting. Under such an argument, anyone who has been a manager for one year would fulfill the requirement. Such an argument ignores the reality of human resources management and the extent of specialization in such an area. Working in a professional human resources setting goes beyond supervising employees and preparing evaluations. It necessitates an understanding and administration of, among other things, compensation methods, employment law, and benefits.

Finally, Complainant argues that he meets the special entry requirement for the Purchasing Agent position (GP IV) of public speaking or teaching experience because he chaired a statewide advisory council, was involved in training when he owned his own business and, as a Senior Consultant for a company, when he did heavy marketing and sales.

While Complainant may meet the special entry requirement for this position, he does not meet the education and experience requirement for a GP IV in this area. GP IVs are required to have a bachelor's degree (a year for year experience substitution is allowed) and three years of professional experience in the field or specialized subject area assigned to the job. There was little or no substantive evidence of Complainant having experience in the area of governmental purchasing and procurement. Complainant's purchasing experience has been in the area of marketing his state agency's services to other state agencies. Government procurement and purchasing is a highly specialized field governed by a separate set of statutes and regulations. Complainant did not demonstrate he had three years of experience focused in this area.

b. Fleet Manager or IDF Director positions

Complainant argues that he is entitled to the Fleet Manager position. However, it is not clear from where this entitlement arises. At the time of Complainant's layoff, the job duties had been split for over nine months between Madsen and Wergyzn. Complainant did not present an analysis or legal argument for why the division of duties between Madsen and Wergyzn was arbitrary, capricious or contrary to rule or law. He merely argued that it was a position into which he should have been moved. Absent some type of legal basis or argument, Complainant's claim to the Fleet Manager position fails.

The same analysis applies to Complainant's argument regarding JJ Jackson's former position overseeing IDF. Complainant argues that, given that Respondent knew that Jackson would be retiring and his position would be vacant two weeks after Complainant was laid off, Complainant's layoff should have been timed so that he was moved into this position. However, Complainant provides no legal analysis of why under state personnel rules, he had a right to be moved into this position. Absent a legal argument, Complainant's claim to this position also fails.

B. 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 (in this case the Complainant) 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. Given the above findings of fact and subsequent discussion, an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

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

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 3rd day of November, 2004.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-764-1472

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 November, 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:

Cecilia M. Serna
The Frickey Law Firm
940 Wadsworth Boulevard, Suite 400
Lakewood, Colorado 80214

and in the interagency mail, to:

Joseph F. Haughain
Assistant Attorney General II
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods