STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2005G094(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LYNN REDDEN and WILLIAM J. KABERLEIN,

Complainants,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on May 23, 2006, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Complainants appeared and represented themselves. First Assistant Attorney General Jill M.M. Gallet represented Respondent Department of Labor and Employment (DOLE or Respondent). Respondent's advisory witness was Michael T. Cullen, Director of the Office of Unemployment Insurance at DOLE.

MATTER APPEALED

Complainants, Lynn Redden (Redden or Complainant) and William Kaberlein (Kaberlein or Complainant) appeal the selection process utilized by Respondent for filling multiple vacancies for the Labor and Employment Specialist III (L & E III) position. Complainants seek an order invalidating the promotions (with the exception of the number 3 ranked candidate) and mandating that Respondent conduct the selection process again, in accordance with the Rule of Three as set forth in the Colorado Constitution, article XII, Section 13(5), and C.R.S. §24-50-112.5(b)(2).[1]

For the reasons set forth below, Respondent's action is **rescinded.**

ISSUES

1. Whether Respondent violated the Colorado Constitution, article XII, Section 13(5) and C.R.S. §24-50-112.5(2)(b) in making the selections for L & E III;

2. Whether Respondent violated former Director's Procedure P-4-17 in making the selections;

[1] Complainants' grievances also requested other relief relating to the testing instruments utilized for filling the L & E III positions. Complainants presented no evidence or argument on this issue at hearing and have abandoned this request for relief.

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

PROCEDURAL HISTORY

Complainants filed separate petitions for hearing. The petitions were assigned to two different Administrative Law Judges (ALJ's) for preliminary review as to whether a discretionary Board hearing should be granted. The ALJ's issued Preliminary Recommendations (PR's) granting a hearing. The State Personnel Board affirmed the PR's and entered an order to show cause as to why the two matters should not be consolidated for hearing. Neither party objected to consolidation.

The Administrative Law Judge consolidated the cases and issued a procedural order permitting the Department of Personnel and Administration (DPA), the author of Director's Procedure P-4-17 (later amended to P-4-24), to intervene.

On December 16, 2005, DPA moved to limit the issues at hearing, or, in the alternative, to intervene. The motion noted that one of the PR's found that Director's Procedure P-4-17 was invalid because it violates the Colorado Constitution, and therefore reached the facial constitutionality of the Procedure. DPA asserted that under *Horrell v. Dep't of Administration*, 861 P.2d 1194 (Colo. 1993), the State Personnel Board has no authority to determine whether a state statute is unconstitutional on its face, but may determine whether an otherwise constitutional statute has been unconstitutionally applied in a given case.

DPA argued that if the Board intended to rule on the facial constitutionality of its Procedure, it should be given leave to intervene to defend the procedure. The motion further indicated, "If this Board granted a hearing to determine only the issue whether the respondent department properly applied P-4-17, or whether P-4-17 was constitutional as applied, then DPA would not have a stake in the issue and would not seek to intervene." Following an extension of time, Complainants filed an objection to DPA's motion to intervene.

On January 26, 2006, the ALJ denied DPA's motion to narrow the issues for hearing and granted its motion to intervene. In denying the motion, the Order noted that *Horrell, supra*, applied to the Board's consideration of a state statute, not a Director's Procedure. The Order discussed the Director's role as administrator of the personnel system "under this constitution and laws enacted pursuant thereto and the rules adopted thereunder by the state personnel board." Colo. Const. article XII, Section 14(4). *See also, CAPE v. Lamm*, 677 P.2d 1350, 1355 (Colo. 1984)("The laws of the General assembly and the rules of the Board have coordinate authority over the Director's administration of the personnel system.") In addition, the Order noted that article XII, Section 13(5) of the Colorado Constitution vests exclusive rulemaking authority over multiple appointments in the Board; therefore, as overseer of the classified system, the Board has a duty to conduct a broad review of the Procedure.

The Order also took administrative notice of the fact that on January 9, 2006, the Legislative Legal Services Committee of the Colorado General Assembly voted to reject Administrative Procedure P-4-24, and, that in the January/February 2006 issue of Stateline[2], DPA Executive Director, Mr. Jeff Wells, announced that he had vacated Procedure P-4-24.

Acknowledging possible mootness concerns, the January 26, 2006 Order mandated that the parties file status reports regarding the current legal status of P-4-24, whether the appointments made under P-4-24 had been declared invalid, and whether Respondent DOLE had granted any of the relief requested by Complainants.

The parties' Status Reports indicated that none of the appointments made under P-4-24 had been declared invalid, that those individuals appointed to the L & E III positions had not been removed from their positions, and that none of the relief requested by Complainants had been granted.

On February 10, 2006, DPA filed a motion to dismiss on grounds it had amended P-4-24 to remove the contested language concerning multiple vacancies. It therefore asserted that the facial constitutionality of the former procedure was moot, since no judgment, if entered, could have a practical effect on a procedure that no longer exists. DPA requested an order dismissing it as a party to the case. The ALJ granted the motion and dismissed DPA as a party.

FINDINGS OF FACT

General Background

1. Complainants are certified Labor and Employment Specialist (L & E) II's in the Office of Unemployment Insurance (UI) within DOLE's Division of Employment and Training (the Division).

2. The UI office processes and adjudicates unemployment insurance claims. It is a multi-functional environment whose tasks include interviewing claimants to assist them in filing claims by interpreting and explaining laws, regulations and procedures; gathering facts and data pertinent to job separation; reviewing claim data; determining maximum benefits payable and types of awards given; computing benefits and processing documents for payment of benefits; and reviewing claims and making determinations on eligibility and entitlement for UI benefits (adjudicating). (Stipulated Fact)

3. In April 2003, Michael T. Cullen became Director of Unemployment Insurance. (Stipulated Fact)

4. In the spring of 2003, Donald Pietersen, Division Director, along with Cullen, designed and began to implement a functional reorganization of the Division.

[2] the Publication for Colorado State Employees

Among the changes made at that time was the decision to reinstitute the functions of the Labor & Employment Specialist III classification within the UI Office.

5. According to the Class Series Description for the L & E class, the L & E III functions as work leader or staff authority, acknowledged by peers and agency management as an authority in the application, implementation and adaptation of policies, practices and other guidelines pertaining to all facets of unemployment insurance. (Stipulated Fact)

6. Customarily, one L & E III is assigned to act as team leader over one multi-functional team of L & E II's.

7. In 2003, there were seven multi-functional teams. During this period, Cullen and the Executive Director of DOLE, Mr. Jeff Wells, had several discussions about expanding the Division staff to include ten teams, consisting of thirty L & E II's, overseen by ten L & E III's.

February 2004 Job Announcement

8. In February 2004, DOLE announced nine L & E III Benefits positions. (Stipulated Fact)

9. DOLE utilized one written test for the L & E III position. Appointing authority Cullen was not involved in designing the test.

10. Most of the fifty-eight applicants took the written exam that was administered on April 24, 2004, with one candidate testing on April 27, 2004. (Stipulated Fact)

11. Director's Procedure P-4-17 allowed for three referrals for the first vacancy, and one additional referral for each additional vacancy. It stated in part, "Upon receipt of a request to fill a vacancy, referrals of the three highest ranking candidates will be made in alphabetical order from the appropriate employment lists. . . For multiple vacancies, one additional name will be referred to the same appointing authority for each additional position except when there are tied scores."

12. A referral list of fourteen (due to tied scores) was generated on May 19, 2004 in anticipation of selecting nine for promotion. (Stipulated Fact)

13. Three individuals who were not able to be present for the April 24, 2004 exam took a make-up test on May 29, 2004. (Stipulated Fact)

14. The make-up exams were scored on June 3, 2004, and those individuals were added to the ranked list of candidates. (Stipulated Fact)

Cancellation of May 19, 2004 Referral List

15. Mr. Wells, Executive Director of both DOLE and DPA, made the decision to delay the selection process for the L & E III positions, pending his review of P-4-17 and its applicability to multiple vacancies.

16. Respondent then cancelled the May 19, 2004 referral list. This action gave DPA time to consider a change to Director's Procedure P-4-17, permitting more candidates to be referred when filling multiple vacancies.

Amendment of Director's Procedure P-4-17

17. On July 7, 2004, Mr. Wells sent an e-mail message to Respondent employees explaining the reason for the delay in filling the L & E III positions. He stated in part, "Yesterday while I was at 251 [the UI office] I met with a couple of UI benefits employees for almost two hours. During this discussion a concern was raised that I believe needs to be addressed. The expressed concern was basically - - - that the selection of the 13 L & E III positions has been delayed because the supervisors 'friends' didn't make it to the top of the list and therefore the interview has been held up so that more names could be included on the list. Let me assure you that not one supervisor, or upper level UI management for that matter, contacted me about delaying the interview, that was completely my decision."

18. Mr. Wells explained, "I made the decision to delay because of DPA's present interpretation of the 'rule' of 3. When one vacancy is posted the final selection is made from a list created of one person for the vacancy plus 2. Thus 3 people or the 'rule' of 3. When there are two vacant positions then HR forwards four names one person for each vacancy plus 2. In the present case the interpretation of that rule would be to submit 13 names for the 13 positions plus two, or 15 names total."

19. Mr. Wells further explained, "The selection process for all contested positions generally has two components. A written test where subject knowledge and written communication skills are evaluated by one set of reviewers, followed by an interview process where verbal communication skills are presented to a different set of evaluators. In the case of lead worker or supervisor positions verbal communication skills are clearly important. If the second set of evaluators are only provided 15 names for 13 positions they must essentially defer to the evaluators of the written test and little emphasis on verbal presentation could be considered. I thought this result was particularly unfair to the many qualified applicants who may be excellent verbal communicators but may not have been in the top 15 for written communication. As DPA executive director I have asked DPA staff to review DPA's rule not only for this promotion, but for all future promotions in all departments."

20. DPA approved a modification of Director's Procedure P-4-17. On December 1, 2004, it became effective. The new Procedure 4-17 stated in pertinent part,

> "Upon receipt of a request to fill a vacancy, referrals of the three highest ranking candidates will be made from the appropriate employment lists. For requests to fill multiple vacancies by the same appointing authority, a list of candidates containing no fewer than the number of vacancies plus two up to no more than three names for each vacancy to be filled will be referred to the appointing authority. The appointing authority shall determine the number of candidates to be referred at the time the vacancies are announced. If the total number of candidates is less than the minimum or less than the number requested by the appointing authority, the total number of candidates shall be referred. All those referred must be notified of their referral, and may be considered for appointment. Such consideration may include record review, interview, additional screening to determine final interviews, or other merit-based criteria. The person(s) appointed shall be any of the persons referred regardless of rank on the appropriate eligible list."

21. On January 14, 2005, DPA's Division of Human Resources issued a bulletin entitled, Technical Assistance – Multiple Referrals, to guide appointing authorities and Human Resources departments in implementing P-4-17, as amended. The bulletin's major points include the following:

- "A change to Director's Administrative Procedure P-4-17 was implemented on December 1, 2004 to correct an overly restrictive procedure when filling more than one vacancy from a single list. The revised P-4-17 provides parameters for applying the rule of three when dealing with multiple vacancies. . .

- "At the time of the vacancy announcement the appointing authority must decide how many applicants are to be referred per vacancy from the eligible list and notify the HR office of the requested number. The appointing authority has the option of being referred one name per vacancy plus two additional names or up to three names per vacancy. . .

- "The number of applicants requested cannot exceed three times the number of actual vacancies to be filled at the time of the announcement. For example, if there are four vacant Administrative Assistant I positions with the same qualifications and competencies, the appointing authority may request a referral of a minimum of six names (one name per vacancy plus two additional names) or as many as twelve names (three per vacancy). . .

- "At the time of referral the HR office must reaffirm the number of positions to be filled before generating the referral. Once the referral is made, the number of vacancies to be filled cannot change without running the risk of referring too many names or limiting the appointing authority's discretion."

22. At some point between the February 2004 announcement and December 2004, the appointing authority decided on the plan to fill ten, instead of nine, positions. (Stipulated Fact)

January 2005 Referral List for Ten Vacancies

23. On January 20, 2005, a new alphabetical referral list containing thirty names for the ten openings was generated and sent to Mr. Cullen. (Stipulated Fact)

24. On January 21, 2005, Mr. Wells, Executive Director of DOLE and DPA, announced that DOLE had the budget to fill ten positions. (Stipulated Fact)

25. Because one individual no longer worked at DOLE and another was no longer interested in the position, two more names were needed for the referral list. (Stipulated Fact)

26. On January 25, 2005, DOLE's Office of Human Resources generated a second alphabetical referral list containing thirty-three names and sent it to the appointing authority, Mr. Cullen. This brought the list to a total of thirty-three names due to a tie for rank thirty-two. (Stipulated Fact)

27. Mr. Cullen received the referral list in alphabetical order.

28. Mr. Cullen did not know the rank of any of the thirty-three individuals on the referral list for the ten L & E III positions.

29. Between January 21 and 25, 2005, Respondent interviewed thirty-one individuals for the ten L & E III positions. Mr. Cullen did not participate in those interviews.

Decision to Fill Seven Vacancies

30. Some time in February 2005, Mr. Cullen made the decision to fill only seven L & E III positions at that time. Mr. Cullen did not communicate his decision to the Human Resources Office, prior to making his selections of seven individuals from the referral list for ten vacancies.

31. Mr. Cullen's decision to fill seven positions in February 2005 was based on several factors, including budget constraints and current business needs. There were only seven multi-functional teams because DOLE had not backfilled many positions and had consolidated teams. Therefore, UI only needed seven L & E III's at that time.

32. In addition, DOLE was having difficulty with its information technology vendor and anticipated sustaining increased, unbudgeted costs during the pendency of that contract dispute. At the time Mr. Cullen made the seven selections in

February 2005, he had no idea how long the contract negotiations with the vendor would continue, and did not know how much of a fiscal burden those negotiations would place on his budget.

33. At the time Mr. Cullen selected the seven L & E III's from the referral list for ten positions, he planned to fill the three remaining positions "in the out years."

34. On March 3, 2005, DOLE announced the selection of seven individuals who were chosen from the thirty-one referrals. (Stipulated Fact)

35. The seven selected individuals had rankings of: 15, 17, 20, 20 (a tie), 22, 28, and 31. (Stipulated Fact)

36. None of the seven individuals promoted to L & E III effective March 1, 2005 ranked between 1 and 14. (Stipulated Fact)

37. Complainants were on the January 25, 2005 referral list and ranked in the top nine. (Stipulated Fact)

38. Neither Complainant was selected for an L & E III position.

39. Upon learning of the selections on March 3, 2005, Complainant Redden inquired of her Deputy Director, Ms. Cathy Hurd, as to why there had been more than twenty-one candidates interviewed for the seven positions actually filled. (Stipulated Fact)

Complainants' Grievances

40. In March 2005, Complainants filed grievances concerning the selection process. (Stipulated Fact)

41. Complainant Redden's March 18, 2005 grievance challenged the selection process as violative of the state constitution and statute governing selection, P-4-17 as amended, and the Technical Assistance – Multiple Referrals document. She asserted that referring more than 9 candidates for seven filled positions violates the constitution's mandate of hiring from the top ranked three candidates. She further argued that referring over thirty-one candidates rather than 21, to fill seven positions, violates P-4-17 as amended. She also contended that the selection process was arbitrary, capricious, and contrary to rule and law.

42. Mr. Kaberlein's grievance was similar to Redden's.

43. Upon receipt of Ms. Redden's grievance, Cathy Hurd inquired of DOLE Human Resources (HR) staff as to whether any of the selected candidates was above the number 21.

44. Upon learning that two candidates were ranked 22 and 28, Ms. Hurd expressed deep concern in a March 11, 2005 email to HR and copied to Cullen, HR Director Glenda Barry, and others. She indicated, "Not the news I was hoping for, but we should have caught this upfront. As the saying goes, 'haste makes waste' & we simply rushed through this process too quickly. So now I will 'de-offer' the positions to these individuals [numbers 22 and 28] & we'll need a new referral list for just 7 benefits positions. Thanks."

45. Mr. Cullen responded to this email on March 11, 2005, "No . . . we requested the lists based on 10 positions . . . I believe we have adequate justification through the reorganization not to fill all 10."

HR Meeting

46. In March 2005, Mr. Cullen met with DOLE HR Director Glenda Barry and two of the senior level HR staff who were responsible for all phases of the L & E III selection process, including the referral lists. Mr. Cullen was aware that he was running the risk of violating Procedure P-4-17 and the Technical Assistance bulletin governing multiple appointments by selecting seven individuals off a referral list for ten vacancies. They all discussed this issue, and the state constitutional and statutory requirements governing selection, at this meeting.

47. At the meeting, Cullen and the others decided that it would be unfair to rescind the offers that had been made to the seven L & E III's.

Response to Grievances

48. On March 14, 2005, Mr. Cullen met with Complainants separately to discuss their grievances. He then issued a March 15, 2005 grievance decision denying any relief. In the letter, he noted, "UI Operations originally requested and received referrals to fill 10 benefit specials positions in this class, but ended up only filling 7 positions due to significant organizational changes since the positions were announced nearly 1 year ago."

49. Complainants filed petitions for hearing with the State Personnel Board. After the petitions were filed, on May 18, 2005, Mr. Cullen issued Step II grievance responses to both grievances. Mr. Cullen denied the relief requested with the exception that he agreed to review testing procedures utilized by other professional testing organizations for future use at DOLE.

50. In Mr. Cullen's May 18, 2005 letters to the Complainants, he provided the background for the amendment to P-4-17 and for his decision to hire seven L & E III's in February 2005, instead of ten. He stated in part,

> "As background I would like to include some historical information in my response. For a number of years the Division of Employment and

Training had not used the L & E III classification in Unemployment Insurance. That decision was reversed in the summer of 2003 and Unemployment Insurance Operations sought to fill team L E III positions in the spring of 2004. A promotional announcement was published and a list developed based on testing. However, Jeff Wells, the CDLE Executive Director was concerned that the rule of three, as applied to filling multiple positions, severely limited the ability of the appointing authority to select the best-qualified. As written, it meant that for the 10 positions we were filling only 12 names would be forwarded. To correct this inequity, he sought a rule change to allow three names to be forwarded for each vacancy. This would allow the appointing authority, in this case, to receive a referral list of 30 names rather than 12. That rule change was approved.

"A significant amount of time passed in the interim and in January 2005 we moved to fill the vacancies from the list produced the previous spring. We quickly conducted our interviews, selected the best-qualified and made offers. However, the organization had changed significantly over the preceding year. Because of budget constraints we had not backfilled many positions and had consolidated teams so that now only 7 teams in the Customer Contact Center had vacancies for L & E III's. I had not had the opportunity to discuss our future hiring plans regarding reconstituting those teams with Bill Beveridge until after we had made our selections. Bill and I decided that the funding was not available to hire enough staff to reconstitute the teams and that we would only need 7 instead of 10 L & E III's. Expansion of the Customer Contact Center would have to be done in the out years."

51. Redden's grievance had asserted that referring more than 9 candidates for seven vacancies violated the constitution. Mr. Cullen's response to this argument was that he could not change the state personnel rules, and she should raise her concerns with the DPA Executive Director.

52. Mr. Cullen responded to the Complainants' allegation that Respondent had violated P-4-17 as follows: although he was unaware of how many of the selected applicants had ranked below 21, he knew that at least one individual offered a position fell outside of the top 21 applicants and would not have been referred if the agency had requested a referral list for only 7 positions. He stated that he "consulted with Human Resources and decided it would be unfair to withdraw an offer made, when we applied the principle of selecting the 'best qualified.'"

53. Complainants did submit their grievances to DPA for a review. On June 10, 2005, the review concluded that DOLE had not acted in a manner that was arbitrary, capricious, or contrary to rule or law.

Rescission of P-4-24 Multiple Vacancy Provision

54. On January 9, 2006, the Colorado General Assembly's Legislative Legal Services Committee recommended that P-4-24 (formerly P-4-17) not be extended, due to the language regarding multiple vacancies.

55. On January 13, 2006, DPA adopted emergency rules to repeal the language in Procedure P-4-24 that applied to multiple vacancies.

February 2006 Selection of Three L & E III's

56. DOLE HR Director, Ms. Barry, extended the January 2005 eligibility list for the L & E III position, containing over thirty names.

57. In February 2006, Respondent hired three additional individuals for the L & E III position, from the January 2005 list.

58. The three individuals appointed ranked 3, 29, and 32 on the eligibility list.

59. After these three L & E III's were hired, each transferred to positions other than MFT leader. One transferred to the training department; one transferred to the telephone operations unit; and one remained in the interstate unit where he or she had worked for eight months previous to the appointment.

DISCUSSION

I. GENERAL

The State Personnel Board's review authority appears at §24-50-103(6), C.R.S. Under that provision, "An action of the state personnel director or an appointing authority which is appealable to the board pursuant to this article or the state constitution may be reversed or modified on appeal to the board only if at least three members of the board find the action to have been arbitrary, capricious, or contrary to rule or law."

Complainants appeal an administrative decision by Respondent and therefore bear the burden of proving Respondent's action was arbitrary, capricious, or contrary to rule or law. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); *Renteria v State Dept. of Personnel*, 811 P.2d 797 (Colo. 1991).

II. HEARING ISSUES

A. Overview of the Merit System and the Rule of Three

Article XII, sections 13, 14, and 15 of the Colorado Constitution, establishes the

state personnel system. This system is further developed statutorily by sections 24-50-101 to -145, C.R.S. (2005). *CAPE v. Department of Highways*, 809 P.2d 988, 991 (Colo. 1991). That system includes all appointive public officers and employees of the state with certain enumerated exceptions. *Id.*

The Civil Service Amendment was originally adopted in 1918 in response to legislative hostility towards a merit-based civil service. *Id.* "The voters sought to safeguard the merit system by incorporating it into the state constitution." *Id.* The Civil Service Amendment was amended to its present form in 1970. *Id.*, note 3.

The basic purpose of the civil service laws is to secure efficient public servants for positions in government. *Id.* "Two central features of the Civil Service Amendment are appointment and promotion 'according to merit and fitness,' Colo. Const. art. XII, §13(1), and discharge or other discipline only for just cause. *Id.* at §13(8)." *Id.*

"The personnel system promotes competence in government by requiring the selection of public employees according to merit and fitness as ascertained by competitive tests of competence. Colo. Const. art. XII, 13(1). Merit based selection and promotion requirements free the state personnel system from political pressures and thereby curtail political patronage." *CAPE v. Dept. of Highways*, 809 P.2d at 991–92 (Colo. 1991). "The plain purpose of the civil service law and the intent of the legislature and the people in enacting it was to substitute the merit system for the old doctrine of 'to the victor belongs the spoils,' in the civil service of the state." *People ex rel Walker v. Capp*, 158 P.143, 145 (Colo. 1916).

Two constitutional provisions govern merit-based selection in Colorado:

> "Appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence without regard to race, creed, or color, or political affiliation." Colo. Const. art. XII, Section 13(1).
>
> "The person to be appointed to any position under the personnel system shall be one of the three persons ranking highest on the eligible list for such position, or such lesser number as qualify, as determined from competitive tests of competence, subject to limitations set forth in rules of the state personnel board applicable to multiple appointments from any such list." Colo. Const. art. XII, Section 13(5).

As the PR's herein discussed at length, the Rule of Three balances two competing interests: the public policy of assuring selections are made based solely on merit, free of political influence, and the managerial interest of giving appointing authorities some discretion in making selection decisions.

The Rule of Three was formerly a Rule of One. Under the Rule of One, the

appointing authority was compelled to fill any vacancy with the applicant obtaining the highest score on the eligibility test. *Conde v. Colorado State Dep't. of Personnel*, 872 P.2d 1381, 1388 (Colo.App. 1994). In 1970, the voters of Colorado "deliberately introduced an element of discretion into the final selection process" by modifying Article XII, Section 13(5) to the current Rule of Three. *Id.*

"A 'necessary ingredient' of the 'rule of three' is the appointing authority's right to select any of the highest three applicants. *Id.* "That selection cannot be overturned unless there is a violation of the constitution, statute, regulation, or other illegality." *Id.*

B. <u>An Analysis of the Language of article XII, Section 13(5)</u>

Complainants contend that the selections for L & E III were made in violation of the Colorado Constitution, article XII, Section 13(5).

The Colorado Supreme Court has, "[s]ince the initial adoption of the Civil Service Amendment, . . . zealously protected the integrity of the state personnel system and has not hesitated to strike down statutes authorizing employment or promotion inconsistent with the merit system. *See, e.g., CAPE v. Regents*, 804 P.2d 138 (Colo. 1990)(statute purporting to eliminate 2,000 civil service jobs incident to reorganization of University Hospital as a private corporation); [*CAPE v.] Lamm,* 677 P.2d [1350] at 1359-60 (statute allowing 'upward allocation of a position' along with employee without competitive tests of competence); [*CAPE v.] Love*, 167 Colo. 436, 448 P.2d 624 (1968)(statute purporting to exclude certain state employees from civil service as part of reorganization of executive branch." *CAPE v. Dept. of Highways*, 809 P.2d 988, 992 (Colo. 1991).

The *CAPE v. Highways* line of cases just cited involved facial challenges to the constitutionality of state statutes. In such cases, the party challenging the facial constitutionality of a statute bears the burden of establishing its unconstitutionality beyond a reasonable doubt. *CAPE v. Lamm,* 677 P.2d at 1353. Because DPA has rescinded Director's Procedure P-4-24, this case does not involve a review of the facial constitutionality of P-4-24. Complainants herein must prove by preponderant evidence that Respondent violated the constitution in applying P-4-24 to them.

Notwithstanding the different standard of proof, the Colorado Supreme Court's analysis of the language of the Civil Service Amendment in the *CAPE v. Highways* line of cases is controlling here. In each of those cases, the Court held that the language of the Civil Service Amendment, article XII, Section 13, is "plain" and "clear," and therefore it must be "declared and enforced as written." *CAPE v. Lamm*, 677 P.2d 1350, 1355 (Colo. 1984).

In *CAPE v. Lamm,* the Court stated, "The provisions of Article XII of the Colorado Constitution set forth in detail the principles under which the state personnel system is to operate. While the General Assembly can supplement the provisions of Article XII, no legislation contrary to the express or implicit requirements of that Article can survive a constitutional challenge. [citations omitted]" *Id.*

In *CAPE v. Love*, the Court set forth as its threshold inquiry, "What is the meaning of Colo. Const. Article XII, Section 13?" *CAPE v. Love*, 448 P.2d at 627. In answering that question, the *Love* Court stated, "We hold that rules of construction are not applicable, because the language of the amendment leaves no reasonable doubt as to its meaning." *Id.* "The language used in the Civil Service Amendment is plain, its meaning clear, and no absurdity is involved. Hence, it must be declared and enforced as written. . . ." *Id.*

Applying these principles herein, the threshold question before the Board is, "What is the meaning of Article XII, Section 13(5)?" The provision consists of three parts. Each part will be analyzed in turn.

The First Phrase. The first part states: "The person to be appointed to **any position** under the personnel system **shall be one of the three persons ranking highest on the eligible list for such position, or such lesser number as qualify . . .**" The plain meaning of this phrase is simple: the person appointed to "any" position in the personnel system must be one of the top three ranked on the eligibility list. "Any" position means just that, any and all positions filled. "Shall" means that the provision is a constitutional mandate. Lastly, the phrase, "or such lesser number as qualify," places a cap on the number of candidates to be considered, prohibiting appointing authorities from considering any more than the top three ranked individuals for "any" position.

Because the Civil Service Amendment is self-executing,[3] this provision creates a constitutional right to be considered for a position when an individual ranks in the top three on the competitive test for that position. *See, Conde, supra,* and *Haines, supra.* As a practical matter, this language requires that the appointing authority know, at the time he or she makes each appointment, who the top three ranked candidates on the eligible list are. The only means of achieving this goal is to give the appointing authority only those three names from which to choose. Then, he or she has discretion to choose from among those top three candidates in making the final selection. *See Conde, supra.*

The Second Phrase. The second part of Section 13(5) states, "as determined from competitive tests of competence." This language is equally plain and requires that the eligibility list rankings be determined through the use of competitive tests of competence. Section 13(1) reinforces this requirement. This provision requires that state agencies design the competitive tests so as to assure that the top three ranking candidates are the best qualified for the position being filled.

The Third Phrase. The third part of Section 13(5) states, "subject to limitations set forth in rules of the state personnel board applicable to multiple appointments from any such list." This language is procedural in nature. It is a delegation of constitutional rulemaking authority to the State Personnel Board. It accords with the other general

[3] see, *People v. Bradley*, 179 P. 871 (Colo. 1919)(civil service amendment is self executing because it is capable of fulfillment without the aid of any legislative enactment).

delegation of rulemaking authority to the Board at article XII, Section 14(3)("The state personnel board shall adopt . . . rules to implement the provisions of this section and sections 13 and 15 of this article, as amended, and laws enacted pursuant thereto, including but not limited to rules concerning . . . the conduct of competitive examinations of competence . . . ").

Because this language is conditional, it is not triggered into effect unless and until the State Personnel Board promulgates rules "applicable to multiple appointments." The constitution does not define what such rules governing multiple appointments might, or should, be. It leaves the matter open to the General Assembly to define (under whose direction the Board would have to act and promulgate a rule); or, in the absence of legislative action, the Board is free to promulgate a rule on its own.

Significantly, this third part of Section 13(5) recognizes that it is constitutionally permissible to establish a different rule, other than the Rule of Three, that would apply to filling multiple vacancies. However, neither the General Assembly nor the Board has passed a law or promulgated a rule governing multiple appointments.[4]

The current policy of the Colorado General Assembly is that the Rule of Three applies to all appointments, without distinguishing between multiple and single vacancies. It appears at C.R.S. § 24-50-112.5(2)(b), and is identical to article XII, Section 13(5): "The person to be appointed to any position under the state personnel system shall be one of the three persons ranking highest on the eligible list or such lesser number as qualify."

In the absence of a state statute or Board rule governing multiple appointments, promulgated in accordance with the framework established in Section 13(5), there is no current legal authority for treating multiple vacancy appointments differently from single vacancy appointments. In other words, the entire body of law currently governing "any" and all appointments is the Rule of Three. Section 13(5); §24-50-112.5(b)(b), C.R.S.

C. Respondent Violated the Rule of Three

Based on the above analysis, it is clear that Respondent violated Complainants' right to be considered for the L & E III positions under article XII, Section 13(5) and state statute. The Rule of Three, as applied to multiple vacancies, requires that for the first vacancy, the top three ranked candidates be considered for appointment. Then, for the second vacancy, the remaining top two candidates, plus the next highest ranking

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[4] In the 1970's the Board had a multiple appointment Rule, 4-7-2(b), identical to Director's Procedure P-4-17, prior to its December 1, 2004 amendment. Under the Rule, one additional name was referred for each additional vacancy, so that the appointing authority always had three top ranked names from the eligible list from which to make the appointment. *Haines v. Colorado State Personnel Board*, 566 P.2d 1088 (Colo.App. 1977). In *Haines*, the Colorado Court of Appeals noted that the language in Section 13(5) governing multiple appointments is susceptible to different interpretations, and held that the intent of the amendment from the Rule of One to the Rule of Three in 1970 was to permit a choice among three candidates in multiple appointment, as well as in single appointment, situations. Hence, it upheld Rule 4-7-2(b) as comporting with article XII, Section 13(5). That holding is consistent with the decision herein.

candidate (the #4) would comprise the next constitutionally mandated pool of the top three ranked candidates. Under this process, a new candidate would be added for each of the seven February 2005 selections, resulting in consideration of the top nine candidates.

The top ranking nine candidates had a constitutional right under the Rule of Three, and under section 24-50-112.5(b)(2), C.R.S., to be considered for the L & E III position in February 2005. Complainants both tested into the top nine rankings on the L & E III test.

The undisputed evidence demonstrates that Mr. Cullen was never informed of the rankings of any of the candidates in making his selections for the L & E III positions in February 2005. He therefore never actually considered any of the top three ranking candidates in making any of the L & E III selections at that time.

Instead, Mr. Cullen considered the top thirty-three ranked candidates in filling each of the seven positions. Mr. Cullen appointed none of the top nine ranked candidates in February 2005. Therefore, Respondent violated the constitutional rights of all nine top ranked candidates in the February 2005 selection process. *Conde, supra; Haines, supra.*

In addition, in February 2006, Respondent again did not consider the top three candidates when making the three appointments. Instead, Respondent used the entire January 2005 referral list, containing at least twenty-five of the original thirty-three candidates, to select three L & E III's, resulting in the hiring of those ranked 28, 32, and 3. Hence, Respondent violated the Rule of Three in making the February 2006 selections as well.

The only appropriate remedy for the deprivation of Complainants' constitutional right to be considered for the L & E III position is to rescind all of the appointments made, with the exception of the number 3 ranked individual selected in February 2006. The selection process must be performed again, this time applying the Rule of Three as set forth above, and as approved in *Haines.*

Respondent asserts that the constitution permits its consideration of three candidates for each of the positions filled. It contends that the Rule of Three, as applied to multiple vacancies, unduly infringes on state managers' ability to choose the best candidate. Respondent's interpretation of Section 13(5) would eviscerate the merit system, defeating the central purpose of the Civil Service Amendment. *See, Conde, supra; CAPE v. Highways, supra.* Further, this novel reading of the Amendment is counter to Colorado case law enforcing the Rule of Three. As *Conde* pointed out, under the previous Rule of One, the appointing authority was compelled to fill any vacancy with the applicant obtaining the highest score on the eligibility test. *Conde*, 872 P.2d at 1388. In 1970, the voters of Colorado "deliberately introduced an element of discretion into the final selection process" by modifying Article XII, Section 13(5) to the current Rule of Three. *Id. Conde* makes it clear that the full extent of appointing authorities'

discretion over appointments runs to the top three ranked candidates, and no further. *Haines, supra*, confirms that for multiple appointments, the process of starting with the top three names and adding the next highest ranking individual for each additional appointment is the regime that complies with the constitution.

Respondent's arguments are aimed more at the utility of its own testing processes, rather than at the constitution. Respondent's argument is essentially this: under the competitive testing regime mandated by the Rule of Three, it is impossible to create a desirable pool of candidates for multiple selections. Specifically, Respondent asserts that written tests of competence are an insufficient means of generating an excellent pool of candidates, because interviews are a superior means of ascertaining competence for the L & E III team leader class.

This argument creates a problem where none exists. No rule or law prohibits Respondent or any state agency from utilizing interviews as part of the competitive tests of competence that result in a final ranking of the top three candidates. An oral test designed to assess interpersonal skills and supervisory decision making talents can be designed, if desired. P-4-17 itself permitted the utilization of interviews as part of the competitive tests. See Finding of Fact #20 for the full text of the Procedure. Director's Procedure P-4-14, in effect in May 2005 and through the present, states, "Examinations may include, but are not limited to, one or more of the following: record review, **structured interviews**, written tests, performance, **oral**, physical, training evaluations . . . ." (Emphasis added). (Director's Procedure P-4-11, which preceded P-4-14, permitted "oral" examinations among those utilized to create eligible lists.) Appointing authorities are free to give the requisite weight to the examination components as they deem appropriate.

If Respondent perceives a problem in the competitive testing regime it utilizes, Respondent is free to improve that process as it deems appropriate. However, a violation of the Rule of Three is not a permissible solution to its professed difficulty with competitive testing.

Respondent argues that it would be unfair to rescind the selections made for the L & E III position. However, given the gravity of the constitutional injury to Complainants, the remedy of repeating the selection process must go forward. Further, State Personnel Board Rule 4-28, 4 CCR 801, provides that employees who promote to a position remain in trial service during the pendency of any selection appeal.

D. <u>Respondent violated P-4-17</u>

Complainants assert that Respondent violated Procedure P-4-17 by failing to narrow the list of candidates to 21 prior to hiring seven L & E III's in February 2005. Procedure 4-17 prohibits the consideration of more than three referrals per vacancy. In addition, the Procedure mandates, "The appointing authority shall determine the number of candidates to be referred at the time the vacancies are announced."

Respondent contends that because it planned to eventually fill all ten positions "at the time the [ten] vacancies" were announced, and did in fact fill them one year later, it did not violate P-4-17. Respondent points out that unanticipated budgetary factors and changed business needs led to its decision to delay the selection of the three remaining L & E II candidates.

Respondent's arguments fail because DPA clarified in its Technical Assistance bulletin, "Once the referral is made, the number of vacancies to be filled **cannot change** without running the risk of referring too many names or limiting the appointing authority's discretion." (Emphasis added.) DPA further required in its Technical Assistance guide, "At the time of referral the HR office must reaffirm the number of positions to be filled before generating the referral." DPA, as administrator of the selection process, was undoubtedly aware that agency hiring needs are subject to unanticipated changes, due to budgetary and business related factors. DPA therefore assured that appointing authorities were on notice that it would be a violation of P-4-17 to utilize a referral list for more vacancies than are actually filled.

Respondent asserts that it has complied with the letter and spirit of P-4-17 by filling the remaining three L & E III positions in February 2006. However, the plain language of the Procedure and the Technical Assistance guide requires that the correct number of vacancies be determined "at the time" the vacancies are announced. In this case, that would translate to January 2005, because that is the time the referral list actually utilized for the L & E III selections was generated. The evidence at hearing demonstrated that Mr. Cullen had no intention of filling three of the ten positions until "the out years," and in fact took an additional year to do so. A plan to fill positions "in the out years" is not the equivalent of "at the time the vacancies are announced."

Procedure P-4-17, in conjunction with the Technical Assistance guide, mandated that when Mr. Cullen made the decision to select only seven L & E III's, he contact the HR office, inform them he was filling only seven vacancies at that time, and request a new referral list containing twenty-one names. He did not do so, in violation of the Procedure.

E. <u>Respondent's action was arbitrary, capricious, or contrary to rule or law</u>

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).

Complainants assert that Respondent's actions herein were arbitrary and capricious in several ways. First, they contend that Respondent unreasonably relied on a Procedure that obviously violated the Colorado Constitution, at article XII, Section 13(5). Complainants assert that no reasonable appointing authority would accept the authority of a Director's Procedure that so clearly conflicts with the plain language of the Colorado Constitution and state statute setting forth the Rule of Three.

Respondent counters that it was reasonable for it to rely on a Procedure that was promulgated by DPA in accordance with Section 13(5). Respondent asserts that DPA had the authority under Section 13(5) and C.R.S. §24-50-112.5(1)(a), to promulgate a procedure governing multiple appointments. Therefore, it was not arbitrary and capricious for DOLE to rely on and apply this procedure in making the L & E III selections.

Respondent's argument ignores the clear language of Section 13(5), which delegates exclusive rulemaking jurisdiction over "multiple appointments" to the State Personnel Board. Section 24-50-112.5(1)(a), C.R.S. states, "The state personnel director shall establish procedures and directives necessary to implement a merit-based statewide selection system to be used uniformly by all principal departments." This statute does not confer rulemaking authority over multiple appointments to the Director of DPA.

The Colorado Supreme Court clarified the scope and content of the Director's administrative role in *CAPE v. Lamm, supra*. The Director issues administrative directives or procedures which must be followed by executive managers throughout the personnel system. "The Director in turn is governed by the rules promulgated by the Board under its constitutional authority." *Id*, 677 P.2d at 1355. "The Board promulgates rules; the Director establishes administrative procedures to carry the rules into effect." *Id.*

The Court noted, "We acknowledge that there may be administrative directives that impermissibly infringe on the Board's rulemaking authority. Clearly, the Director must implement the rules of the Board. Furthermore, there is an area where proper administrative directives leave off and rulemaking begins, and there is no litmus to identify whether a particular administrative directive that is within this borderline area intrudes on rulemaking. This must necessarily be resolved in the context of particular directives on a case-by case basis." *Id.*, 677 P.2d at 1356.

In the instant matter, no litmus test is necessary, because the constitution expressly delegates exclusive rulemaking authority to the Board over the issue of multiple appointments. *See, Haines*, 566 P.2d at 1090 ("the amendment [Section 13(5)] vests the Board with the responsibility of adopting limitations on the rule [of three]").

The Board could delegate its authority over multiple appointments to the Director by promulgating a rule directing DPA to implement a Procedure on the matter. Former Director's Procedure P-4-17, which comported with former Board Rule 4-7-2(b), is an

example of the Director issuing a Procedure that implemented Board policy governing multiple appointments. At the present time, however, the Board has not promulgated such a rule.

The question before the Board herein, however, is whether state managers, faced with a grievance contending that the application of a procedure violates the state constitution, can reasonably be expected to resolve the constitutional issue at the grievance level. Complainants assert that when there is a perceived conflict between the constitution and an agency procedure, as here, it is incumbent on the appointing authority to resolve this conflict. They argue that Mr. Cullen should have unilaterally resolved that conflict by simply requesting a referral list containing nine names in February 2005. They point out that Procedure 4-17 permitted, but did not require, the referral of "up to" three names per vacancy.

Under the circumstances presented herein, it was reasonable for DOLE to rely on the Procedure promulgated by DPA. The two agencies shared the same Executive Director. That Director was personally involved in delaying the selection of the L & E III's in order to assure that the new Procedure, P-4-17, would enable DOLE to greatly expand the pool of eligible candidates for the position. In this context, it was not arbitrary and capricious for Mr. Cullen and the DOLE HR staff to defer to the policy directive of the Executive Director.

However, it was arbitrary and capricious for Respondent to violate P-4-17 by hiring seven L & E III's from a referral list generated for ten vacancies. This action was a clear violation of the very purpose of P-4-17: to permit the consideration of "up to three" candidates per vacancy. Mr. Cullen unilaterally determined he would hire only seven L & E III's off of the referral list of thirty-three, when P-4-17 and the Technical Assistance guide prohibited this conduct. Under these circumstances, it was arbitrary and capricious for Respondent to fail to request a referral list of twenty-one applicants, in order to comply with the new Procedure.

In addition, it was arbitrary and capricious for Respondent to fail to nullify the referrals made, and start the selection process over with a list of twenty-one names, once it received Complainants' grievances. Within a few weeks of the erroneous appointments, Complainants pointed out that it was a violation of P-4-17 to consider over thirty candidates for seven positions. UI Deputy Director Hurd had the appropriate response, stating in her March 11, 2005 e-mail to Cullen, HR Director Barry, and others, "As the saying goes, 'haste makes waste' & we simply rushed through this process too quickly. So now I will 'de-offer' the positions to these individuals [numbers 22 and 28] & we'll need a new referral list for just 7 benefits positions." See, Finding of Fact #44. By ignoring Ms. Hurd's appropriate response and its violation of Procedure P-4-17, Respondent violated the standards set forth in *Lawley, supra.*

F. <u>Respondent is not liable under C.R.S. §24-50-129</u>

Complainants request relief under the Colorado Personnel Systems Act, at §24-

50-129, which 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." There is no evidence in the record that salary liability has been incurred. Therefore, this provision is inapplicable herein.

G. Complainants are not entitled to back pay

Complainants also requested an order granting them back pay. However, the remedy provided does not include their selection to the L & E III position. The remedy provides that they must, as a matter of law, be considered for the L & E III position. Therefore, there is no basis for an award of back pay.

CONCLUSIONS OF LAW

1. Respondent violated the Colorado Constitution, article XII, Section 13(5), and Section 24-50-112.5(2)(b), C.R.S.;

2. Respondent violated former Director's Procedure P-4-17;

3. Respondent's action was arbitrary and capricious.

ORDER

Respondent's action is **rescinded**. Respondent shall invalidate the promotions of the nine individuals promoted to L & E III who did not rank #3. Respondent shall make the remaining selections to the L & E III positions from the January 2005 referral list based on the three highest ranking for each position. The first selection shall be made from the top three ranked individuals on the referral list (#1, #2, and #4); for each additional selection, the next highest ranking individual's name (#5) will be referred to the appointing authority, until all selections have been made.

Dated this 6th day of July, 2006

Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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.); Board Rule 8-68, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board 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).

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is **$50.00**. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

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 appellant may file a reply brief within five days. An original and 8 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. Board Rule 8-73, 4 Code of Colo. Reg. 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. Board Rule 8-75, 4 Code of Colo. Reg. 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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. Board Rule 8-65

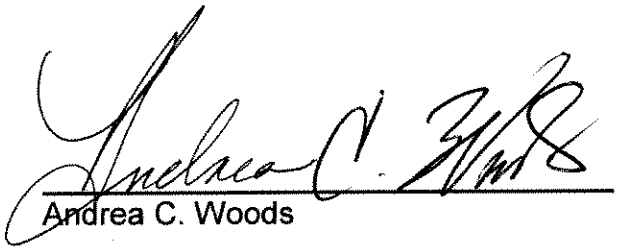
CERTIFICATE OF SERVICE

This is to certify that on the 7th day of July, 2006, 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:

Lynn Redden[5] —
William J. Kaberlein
2503 South Pagosa Court
Aurora, CO 80013

and in the interagency mail

Jill M.M. Gallet
First Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203



Andrea C. Woods

[5] Ms. Redden has requested that her address appear on no pleadings; her request was granted. Therefore, her copy of the Initial Decision is being sent to her in the care of Mr. Kaberlein.