

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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**PAMELA CRESS,**

Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES,**

Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on April 20, 2006 at the State Personnel Board, 633 17<sup>th</sup> Street, Denver, Colorado. Complainant appeared and represented herself. Assistant Attorney General Joseph F. Haughain represented Respondent.

**MATTER APPEALED**

Complainant, Pamela Cress (Complainant or Cress) appeals her non-selection for an Accounting Technician II (AT II) position by Respondent Department of Human Services (Respondent or DHS). Complainant requests appointment to the AT II position or a comparable position with comparable pay or better.

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

**ISSUES**

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether Respondent retaliated against Complainant in not hiring her.

**FINDINGS OF FACT**

1. Complainant worked for Respondent for thirteen years. She held primarily management positions and in 2004 was a General Professional IV.

2. In 2004, Complainant was disciplinarily terminated. She appealed her termination to the State Personnel Board.<sup>1</sup>
3. Complainant's previous appointing authority entered a separation code for Complainant of "70, Would Not Re-hire," on the DHS computer system which tracks employee information.
4. In January of 2005, Complainant applied for an AT II position at DHS. Jim Duff was the appointing authority for this position. Complainant had a previous work history with Duff at DHS. The two had enjoyed a very positive working relationship.
5. Complainant tested into the top three for the AT II position, and was given an interview. Duff delegated the interviews to two managerial subordinates who would directly supervise the AT II position.
6. The two individuals who interviewed Complainant rated her as the top candidate. They recommended to Duff that he hire her for the position.
7. One of the interviewers informed Complainant that they had recommended to Duff that he hire her.
8. Complainant assumed that she would soon be offered the AT II position.
9. Duff decided to hire Complainant and submitted the necessary paperwork.
10. Duff knew Complainant had been terminated by another appointing authority at DHS, but he assumed there had been little factual basis for the termination. During her previous employment, Complainant had often talked to Duff about her poor relationship with her appointing authority. After she was fired, Complainant had told Duff that the reasons for her termination were solely because she had had her dog with her in a state vehicle during working hours, and because she had had a fender bender accident on that same day.
11. After Duff initiated the hiring process, DHS Human Resources (HR) personnel flagged the request to fill the AT II position with Complainant, due to the Code 70 on her name in the computer system. The HR staffer contacted Duff to inform him of Complainant's previous disciplinary termination from the Department. Duff indicated he was aware of the termination, and, based on his favorable history with Complainant, still intended to hire Complainant.
12. The HR staffer informed Duff that prior to hiring Complainant, he was required to meet with Mary Young, HR manager for the southern region of the Department.

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<sup>1</sup> The case went to hearing and the Administrative Law Judge entered an Initial Decision affirming the termination. The State Personnel Board affirmed the Initial Decision. Complainant did not appeal the Board's final agency order affirming her termination.

13. Duff met with Young. Prior to the meeting, Young pulled a copy of Complainant's termination letter from her personnel file. She asked Duff what he believed Complainant had been terminated for. He stated it was having a dog in a state vehicle and getting into a fender bender on the same day. Young determined that it was necessary to provide Duff with the entire basis for termination.
14. Young either read or summarized the contents of the termination letter for Duff. She clarified that the termination letter referenced four separate bases for disciplinary action: 1) after Complainant's dog had mauled another dog at Petsmart, Complainant had not given her name to the owner of the other dog and had lied to that individual, stating she was from out of town; in addition, once her license plate number was traced to her, and the matter was investigated by a state agency investigator, she lied to the investigator by giving him the wrong name of her appointing authority, in order to conceal the incident from her appointing authority; 2) Complainant had failed to prepare Performance Management Plans for her employees during the evaluation period; 3) Complainant had spent excessive time on the internet during work hours doing personal shopping on Ebay and other shopping sites; and 4) Complainant had sent a response to a civil rights claim to the Colorado Civil Rights Division on behalf of DHS without her supervisor's prior approval, and the document was of poor quality.
15. Young informed Duff that she had serious concerns about Complainant's integrity and trustworthiness, based on the discrepancy between what Complainant told Duff about her firing and what was in the termination letter, and based on Complainant's acts of dishonesty which had led to her termination.
16. Young advised Duff against hiring Complainant. Duff responded that Complainant had worked very well in his office and that, notwithstanding the information presented to him, he intended to hire Complainant.
17. Young then stated that before he could proceed to hire Complainant, they needed to have a conference call with the Department-wide Human Resources Director, Peggy Valdez Olivas. She immediately called Valdez Olivas, and the three participated a conference call.
18. Valdez Olivas informed Duff that the Department had an informal policy of never hiring former Department employees who had been terminated for disciplinary reasons. She informed him that the reason for the policy was that it set a bad precedent well beyond the one hiring decision. She indicated it was not good Human Resources practice to re-hire an employee fired for disciplinary reasons, because it adversely affects co-workers' morale. She explained that it sends the wrong message to employees regarding DHS's consistency in enforcing workplace standards and rules.

19. Valdez Olivas informed Duff that the hiring decision was ultimately his to make, but that he would have to obtain the approval of Marva Livingston Hammons, the Executive Director of DHS, to hire Complainant.
20. Duff determined that he would not hire Complainant.
21. On February 4, 2005, one of Duff's subordinates sent Complainant a rejection letter, stating in part, "although your background was impressive, I have chosen another candidate to fill this position. I will, however, keep you in mind for future openings for which you are qualified."
22. Complainant soon learned that the real reason she was not hired was due to her disciplinary termination. She felt that she had been subjected to an unfair hiring process which was a sham. She was particularly concerned that all written documents sent to her by DHS continued to treat her as a fully qualified candidate for future employment. Yet the reality was that she would never be hired again by DHS.
23. After the experience with Duff and Complainant, Valdez Olivas advocated for a formal policy at DHS to prohibit appointing authorities from hiring any former Department employee terminated for disciplinary reasons. She sought to institute a clear policy that would be consistently applied.
24. Executive management approved the policy and it was instituted in early March 2005. The policy adds the following language to all DHS position announcements, "Previous employees of the Colorado Department of Human Services (CDHS) who were disciplinarily terminated, or who resigned in lieu of disciplinary termination, are not eligible to work for CDHS." It mandates that all managers screen applications to assure compliance with the policy.
25. Complainant timely appealed Respondent's decision not to hire her.

### **DISCUSSION**

Complainant bears the burden of proof in this matter to demonstrate that the action taken was arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

The civil service amendment to the Colorado Constitution governs all selection decisions in the classified system. It provides as follows: "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). It further requires, "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 . . ." Colo. Const. art. XII, Section 13(5).

**I. Respondent did not violate Board Rules or Director's Procedures.**

Complainant first asserts that Respondent violated Board Rule R-4-1, which states, "Members of the state's population shall have an equal opportunity for entry into the state personnel system after fair and open competition." She contends that the hiring process proceeded as intended, in a fair and open manner, until the HR managers unfairly interfered with the process and prohibited Duff from hiring her.

It is uncontested that Complainant was one of the three finalists for the TA II position. A necessary ingredient of the rule of three is the appointing authority's right to select any of the highest three applicants. *Conde v. Colorado State Department of Personnel*, 872 P.2d 1381, 1388 (Colo. 1994). The exercise of that discretionary decision "cannot be overturned unless there is a violation of the constitution, statute, regulation or other illegality." *Id.*

In *Conde*, the unsuccessful job applicant challenged the appointing authority's consideration of his prior working experience with the applicant, in making his decision not to hire her. The Court noted that no personnel rule or statute requires appointing authorities to disregard information obtained "from prior working experience with an applicant." *Conde*, 872 P.2d at 1389.

This case bears significant similarities to the *Conde* case. Here, instead of the appointing authority unilaterally relying on his own experience with the job candidate, the Human Resources managers required the appointing authority to give enormous weight to Complainant's disciplinary history with the Department, in exercising his discretion. In the absence of a violation of rule or law, this is permissible.

One of the primary functions of a Human Resources department in a state agency is to advise and guide state managers in making sound human resources decisions. Hiring is one of the most important HR functions performed in the state classified system. It is appropriate for a Human Resources Director to involve him or herself in the hiring process when a formerly terminated employee is under considering for re-hiring.

The evidence at hearing failed to demonstrate that Respondent's collective exercise of discretion in filling the AT II position violated the constitution, statute, or any rule or regulation. *See Conde, supra.*

Complainant also asserts that Respondent violated Rule R-4-2, which states, "Selection is based on the quality of performance and job-related ability as measured by examinations of competency." Complainant's key contention is that her prior history at the Department is not a permissible factor under this rule. If this argument were to prevail, state managers would be legally barred from considering employment history in making hiring decisions. This calls for an absurd result, which would unreasonably limit

state managers' discretion in hiring from the final list of three candidates.

Complainant next contends that Respondent violated Director's Procedure P-4-15, which governs removal from an employment list. This Procedure is inapplicable to this case, as there is no evidence in the record that Complainant was ever removed from the employment list. Complainant also argues that Respondent violated Director's Procedure P-4-16, regarding written notice to persons removed from eligible lists, because she never received such notification. Again, there is no evidence that Complainant was removed from the eligible list. Therefore, neither of the above procedures applies herein.

## **II. Respondent's action was not arbitrary or capricious.**

Complainant argues that Respondent's actions were arbitrary and capricious. 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; or 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).

Complainant argues that it is an abuse of agency authority under *Lawley* to permit an individual to go through the entire hiring process, up to and including being informed that she was the successful candidate, and then to be pulled summarily from consideration at the end, due to an unwritten agency policy.

As a general matter, it is a best practice for all state agencies to publish and enforce all internal procedures that govern selection decisions. Prior notice of those procedures to all job applicants assures that candidates will be treated fairly and uniformly; it also minimizes the potential for abuse.

With this best practice in mind, there is no question that the manner in which Respondent handled Complainant's candidacy for the AT II position was ill advised and unfortunate. For an agency to generate documents that indicate the recipient is considered a viable candidate for employment, and to treat that candidate in completely different manner, presents a serious red flag. However, there is no evidence in the record that Respondent intended to mislead Complainant. The preponderance of evidence demonstrated that the process of filling the TA II position led to the discovery of a glitch in the hiring system that needed to be fixed, and that the Department's HR director took immediate steps to remedy it with a uniform, published policy.

The evidence does not establish that Respondent violated the *Lawley* standard.

It is reasonable for a departmental HR Director to determine that it is poor HR practice to hire a former employee terminated for disciplinary reasons. In addition, it is an appropriate HR practice to assure that prior to making a hiring decision, the appointing authority is given all relevant information necessary to make a fully informed judgment.

### **III. Respondent did not retaliate against Complainant.**

Complainant asserted in her opening statement that Respondent blocked her hiring for the TA II position for the same reason it terminated her employment: to retaliate against her for her knowledge of problems with the child welfare budget, and actions she took based on that knowledge during her previous employment. Respondent moved to exclude evidence concerning events that took place during her former employment at DHS, on grounds it was subject to collateral estoppel. Respondent asserted that the forum to litigate Respondent's reasons for taking action against her based on her previous employment was in the evidentiary hearing at which Complainant appealed her termination. The motion was granted.

Collateral estoppel, or issue preclusion, is an equitable doctrine that operates to bar relitigation of an issue that has been finally decided by a court or administrative agency in a prior action. Issue preclusion bars relitigation of an issue if: 1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; 2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; 3) there is a final judgment on the merits in the prior proceeding; and 4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc., v. Cooper*, 25 P.23d 44 (Colo. 2001).

All four elements of collateral estoppel are present here. At the time of hearing on this case, the Initial Decision affirming the termination had been issued and affirmed by the State Personnel Board. Complainant did not appeal the final agency order to the Colorado Court of Appeals. Therefore, there is a final judgment on the merits in the prior proceeding concerning all legal issues relating to Complainant's prior employment at DHS, including Respondent's motives for taking action against Complainant. Complainant had the opportunity to fully litigate the issue of retaliation in her hearing challenging the basis for her termination; it would be inappropriate to relitigate it here.

Complainant did not present any evidence of retaliation at hearing. Therefore, Respondent's motion to dismiss that claim at the conclusion of Complainant's case-in-chief was granted.

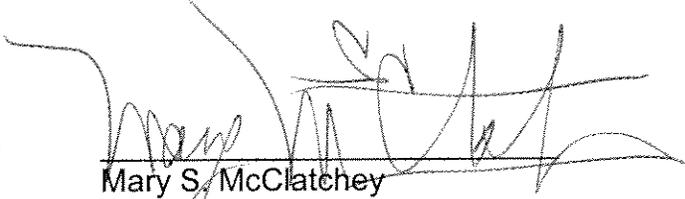
### **CONCLUSIONS OF LAW**

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
2. Respondent did not retaliate against Complainant.

**ORDER**

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

Dated this 30<sup>th</sup> day of May, 2006

  
Mary S. McClatchey  
Administrative Law Judge  
633 - 17<sup>th</sup> 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 8-68B, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

### 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. Board Rule 8-69B, 4 CCR 801. 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. Board Rule 8-72B, 4 CCR 801. 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 8-73B, 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. Board Rule 75B, 4 CCR 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 ALJ's decision. Board Rule 8-65B, 4 CCR 801.

**CERTIFICATE OF SERVICE**

This is to certify that on the 31<sup>st</sup> day of May, 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:

Pamela Cress  
2028 North Elizabeth Street  
Pueblo, Colorado 81003

and in the interagency mail, to:

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

  
Andrea C. Woods