**STATE PERSONNEL BOARD, STATE OF COLORADO**
Case No. **2007B094**

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**JERRY AUTENRIETH,**

Complainant,

vs.

**DEPARTMENT OF LABOR & EMPLOYMENT, OFFICE OF UNEMPLOYMENT INSURANCE,**

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on August 27, 2007 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on the record at the conclusion of the hearing. First Assistant Attorney General Stacy Worthington represented Respondent. Respondent's advisory witness was Michael Cullen, the appointing authority. Complainant appeared and represented himself.

## MATTER APPEALED

Complainant, Jerry Autenrieth ("Complainant"), appeals the decision by Respondent ("Respondent" or "DOLE") to rescind his appointment to a Labor and Employment Specialist III ("L&E III") position. Complainant seeks reinstatement to an L&E III position.

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

## ADMINISTRATIVE NOTICE

The ALJ took administrative notice of the contents of the Board's files for *Lynn Redden and William J. Kaberlein v. Department of Labor And Employment*, State Personnel Board Case No. 2005G094(C), and the contents of the Board's files associated with this matter prior to the consolidation of the appeals, State Personnel Board Case nos. 2005G094 and 2005G096.

## ISSUE

1. Whether Respondent's decision to rescind Complainant's appointment to L&E III position was arbitrary, capricious or contrary to rule or law.

## FINDINGS OF FACT

### General Background

1. Complainant had been employed with Respondent as a Labor and Employment Specialist II within DOLE's Office of Unemployment Insurance. In April of 2005, he tested within the top 21 candidates for promotion to an L&E III position, and was promoted to one of seven available positions.

2. Lynn Redden and William Kaberlein also applied for the L&E III positions and neither applicant was successful. Ms. Redden and Mr. Kaberlein filed grievances with Respondent, and when those grievances were denied, filed requests for discretionary hearing with the Board.

### Redden and Kaberlein Appeals and Board Final Agency Order in 2005G094(C)

3. Ms. Redden's and Mr. Kaberlein's appeals generated two Preliminary Recommendations ("PRs"). The November 4, 2005 PRs both recommended that the Board grant a hearing because the selection procedure used by Respondent appeared to have violated the constitutional limitation on selection contained in the Rule of Three. Colo. Const. art. XII, Section 13(5)(requiring that a selected candidate "shall be one of the three persons ranking highest on the eligible list for such position ... as determined from competitive tests of competence"). The procedure also appeared to have exceeded the limitations in the revised Director's Procedure P-4-17. The Board granted hearing in both cases, and these appeals were consolidated into one matter, case number 2005G094(C).

4. The Redden and Kaberlein hearing was held on May 23, 2006. The Initial Decision for that matter was issued by ALJ McClatchey on July 6, 2007.

5. The July 6, 2007, Initial Decision found the following:

   a. In February 2004, Respondent announced nine L&E III Benefits positions. Fifty-eight applicants tested for the positions.

   b. Director's Procedure P-4-17, as it existed at the time, allowed for three referrals for the first vacancy and one additional referral for each additional vacancy in a multiple-vacancy selection procedure. A referral list of fourteen candidates (due to tied scores) was generated on May 19, 2004 in anticipation of a selection procedure for nine L&E III positions.

c. At the time of this selection process, Mr. Jeffrey Wells was the Executive Director of both Respondent and the Department of Personnel & Administration ("DPA"). Mr. Wells made the decision to delay the selection process for the L & E III positions pending his review of P-4-17 and its application to multiple vacancies. Respondent cancelled the May 19, 2004, referral list; the action gave DPA time to consider a change to Director's Procedure P-4-17, which would permit more candidates to be referred when filling multiple vacancies.

d. DPA approved a modification of Director's Procedure P-4-17 that went into effect on December 14, 2004. The amended procedure included the instruction: "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 mo more than three names for each vacancy to be filled will be referred to the appointing authority."

e. On January 20, 2005, a new referral list containing thirty names for ten openings was generated and sent to Mr. Cullen. After determining that two individuals on the list were either no longer working at DOLE or not interested in the position, two more names were needed for the referral list. There was a two-way tie for the ranking of 32. On January 25, 2005, Human Resources generated a second referral list containing a total of thirty-three names for the ten L & E III positions and sent the list to Mr. Cullen.

f. In February 2005, Mr. Cullen made the decision to fill only seven L & E III positions at that time. He did not communicate his decision to the Human Resources office prior to making his selection of seven individuals from the referral list for ten vacancies. At the time Mr. Cullen selected seven L & E III candidates, he planned to fill the three remaining positions "in the out years."

g. On March 3, 2005, Respondent announced the selection of seven individuals for L & E III promotions chosen from the 31 referrals. The chosen individuals had rankings of: 15, 17, 20, 20 (a tie), 22, 28, and 31.

h. In March 2005, Complainants Lynn Redden and William J. Kaberlein filed grievances with Respondent concerning the March 2005 selection of seven L & E III positions. Both Complainants had ranked in the top 9 of L&E III candidates and had been referred for interviews, and neither had been promoted.

i. Both Ms. Redden's and Mr. Kaberlein's grievances were similar in their content. Both challenged the selection process as violative of the state

constitution and state statute governing selection, P-4-17 as amended, and the associated Technical Assistance – Multiple Referrals, which had been issued when P-4-17 was amended. Complainants argued that referring more than 9 candidates for several positions violated the constitutional mandate of hiring from the top ranked three candidates. Complainants argued that a referral of over 31 candidates, rather than 21, to fill seven positions violated P-4-17 as amended. Complainants also argued that the selection process was arbitrary, capricious and contrary to rule or law.

j. Complainants' grievances were received by Cathy Hurd, Deputy Director of DOLE. Ms. Hurd inquired of the department's Human Resources staff as to whether any of the selected candidates ranked higher than 21. Ms. Hurd was informed that there were selected candidates ranked at 22 and 28. Ms. Hurd wrote an e-mail dated March 11, 2005, to Mr. Cullen, HR director Glenda Berry and others which indicated: "Not the news I was hoping for, but we should have caught this upfront. As the saying goes, 'haste makes waste' and we simply rushed though this process too quickly, So now I will de-offer the position to these individuals [numbers 22 and 28] & we'll need a new referral list for just 7 benefits positions. Thanks." Mr. Cullen, however, responded, "No... we requested the lists based on 10 positions ... I believe we have adequate justification through the reorganization not to fill all 10."

k. In March 2005, Mr. Cullen met with DOLE HR Director Glenda Barry and two other 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 the 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, at this meeting. Mr. Cullen and the others decided that it would be unfair to rescind the offers that had been made to the seven L&E IIIs already selected.

l. Complainants' grievances were denied by Mr. Cullen, and Complainants both filed appeals with the Board.

m. On January 9, 2006, the Colorado General Assembly's Legislative Legal Services Committee recommended that P-4-24 (which was formerly numbered as P-4-17) not be extended due to the language regarding multiple vacancies. DPA enacted an emergency rule on January 13, 2006, which repealed the multiple vacancy language in Director's Procedure P-4-24.

n. In February 2006, Respondent hired three additional individuals for the L&E III position from the January 2005 list of over thirty names. These three individuals had ranked 3, 29, and 32 on the referral list.

6. The July 6, 2006 Initial Decision found that Respondent violated the constitutional requirement that each selected candidate "shall be one of the three persons ranking highest on the eligible list for such position... as determined from competitive tests of competence," Colo. Const. art. XII, Section 13(5), otherwise known as the Rule of Three, in the process created for selection of employees for the seven L&E III positions. The Initial Decision also concluded that the selection procedure had violated the revised Director's Procedure P-4-17 by selecting for seven positions from a list prepared for ten vacancies.

7. The July 6, 2006 Initial Decision ordered the following remedy:

> 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.

8. The Board affirmed the Initial Decision, without modification, during the Board's December 19, 2006 meeting ("Board Order of December 19, 2006").

**Implementation Of the Board's Order:**

9. Respondent's Human Resources Specialist, Andrew Gale, was given the task of implementing the Board's Order of November 19, 2006.

10. In February of 2007, Mr. Gale canvassed the interest level of 29 of the referred candidates from the original selection process to determine whether they wished to be included in the new selection process for nine L&E III positions. Twenty-four candidates were interested in being considered for the positions.

11. A panel of three interviewers was chosen. The panel was given a list of the three highest ranking candidates. The panel conducted interviews and decided which of those three referred candidates was to be offered the first position under consideration at the time.

12. After a decision was made on one position, the panel would receive a new list of the remaining three highest-ranking candidates. The employee chosen for the previously filled position was no longer on the list. The list was also modified by Director Procedure P-4-21, which permits names to be removed from an employment list if an individual has been

referred and interviewed for three or more vacancies with the same appointing authority. During the course of the interviewing process for the revised selection process, six names were removed from consideration on the basis of Director's Procedure P-4-21.

13. The panel made selections and offers to fill six L&E III positions in March, 2007. In April, 2007, the panel met to fill the final three L&E III positions.

14. Complainant was referred and interviewed for the final position to be filled. That final position was offered to another candidate who, like Complainant, had been selected for an L&E III position in the April 2005 selection process. Complainant was not offered an L&E III position in the revised selection procedure.

15. All previous L&E III position holders who were not selected for positions as a result of the revised selection procedure were returned to their previous positions and provided with saved pay status for three years. By letter dated May 3, 2007, Complainant was returned to his position as an L&E II, effective April 30, 2007.

16. Complainant filed a timely appeal to the Board concerning Respondent's decision to remove him from his L&E III position.

## DISCUSSION

### I. GENERAL

The Board may reverse or modify the action of an appointing authority if the action is found to have been "arbitrary, capricious, or contrary to rule or law." Section 24-50-103(6), C.R.S. Because Complainant's removal from the L&E III position was not a disciplinary action, Complainant bears the burden of persuasion that the decision to rescind his appointment should be reversed by the Board. *See Velasquez v. Dept. of Higher Education*, 93 P.3d 540, 542-44 (Colo.App. 2003)(holding that discharge for job abolishment or reallocation is more administrative than disciplinary in nature, does not involve credibility judgments arising from contested allegations of employee misconduct and, therefore, it was proper to impose the burden of persuasion on the employee in such cases); *Harris v. State Board of Agriculture*, 968 P.2d 148, 150-51 (Colo.App. 1998)(holding that while disciplinary cases require that the burden of persuasion be on the employer, determination of issues other than the factual basis for the disciplinary action, such as whether there had been a constructive discharge, should be placed upon the party relying upon the applicability of such issues).

### II. HEARING ISSUE

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).

**A. <u>Complainant's Argument</u>:**

Complainant argued that the decision to rescind his L&E III position was arbitrary and capricious because the Board's order exceeded Redden and Kaberlein's request to have the selection process limited to the requirements of Director's Procedure P-4-17. In Complainant's view, the fact that he had tested within the top 21 candidates for the seven available L&E III positions meant that his selection should stand because Director's Procedure P-4-17 permitted the referral of three candidates per vacancy.

This argument is unpersuasive for at least two important reasons.

First, Complainant's conception of the Redden and Kaberlein appeal is incomplete. Complainant testified at several points during the hearing that the selection procedure was overturned by the Board because of the referral of more than 21 applicants. This may well be the rumor at the departmental level as to the reason for the rescission of the L&E III selection process. It is not a correct version of events, however, as the July 5, 2007 Initial Decision demonstrates. The Board's Order requiring a new selection process for all but the candidate who had tested at #3 was based upon the right of the top 9 candidates (not the top 21 candidates) to compete for 7 open positions. The fact that the department also violated its own erroneously revised policy by referring more than 21 candidates is simply further proof that the selection process for the L&E III position was contrary to rule or law.

More importantly, the Board's chosen remedy for an aggrieved employee must be consistent with the law. Employees may ask for a range of specific remedies, and to the extent that those remedies are within the Board's jurisdiction and comply with the law, those remedies may be granted. The Board, however, is not bound by the specific arguments or requests of the parties, particularly if those requests are not well-grounded in the law. In the case of the Redden and Kaberlein matter, a referral of 21 applicants for seven positions would still create an illegal procedure under the constitutional limitation contained in the Rule of Three because the department would be considering more than the three most qualified applicants for each position. The Board's Order in 2005G094(C) required Respondent to revise the selection procedure so that it met the applicable constitutional and rule limitations on selection. Complainant has presented no persuasive reason to find that such an action was arbitrary or capricious.

## B. Respondent's Argument:

During the course of the hearing in this matter, Mr. Cullen presented an argument as to why the Board's Order should be considered to be arbitrary or capricious. He argued that the procedure he implemented had followed Director's Procedure 4-17 and therefore should have been permitted to stand because reversal of the selection process has created difficulties within the division.

Mr. Cullen's argument does not take into account the fact that the procedure he used in selecting seven L&E III candidates from a referral list prepared for ten vacancies did not comport with the revised Director's Procedure 4-17. More importantly, this argument also demonstrates a fundamental misunderstanding about the nature of the Board's role in correcting errors in the personnel system and in upholding the law.

The restrictions which apply to the hiring process are part of an overall system which restricts appointments to only candidates who effectively demonstrate their merit and fitness to be hired through competitive testing. "The state personnel system is intended to assure that appointments and promotions are made based on merit and fitness, without regard to race, creed, color, or political affiliation, and that persons may hold their respective positions during efficient service or until retirement. The personnel system limits the ability of an employer to select, dismiss, suspend, and discipline employees." *Hughes v. Department of Higher Education*, 934 P.2d 891, 893 (Colo.App. 1997), *overruled on other grounds*, *Lawley v. Department of Higher Education*, 36 P.3d 1239 (Colo. 2001). The Rule of Three is a significant part of that set of restrictions, and it intentionally limits a manager's ability to choose among only those three candidates who test the highest for the position.

The fact that Mr. Cullen's superior and the head of DPA, Mr. Wells, had agreed to implement a new interpretation of the rule on selection numbers to substantially increase flexibility in hiring does not insulate the new policy from review and correction by the Board. Oversight of the personnel system is, in fact, one of the Board's primary duties. "While the Board, the Department of Personnel, and the office of the State Personnel Director are all created by the Constitution without a specified hierarchy, it is apparent that the Board is ultimately responsible for protecting the rights of public employees." *Hughes*, 934 P.2d at 893 – 94. See also C.A.P.E v. Lamm, 677 P.2d 1350, 1355 at n. 1 (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 under section 14(4) [of Article XII of the state Constitution]"); Spahn v. Department of Personnel, 615 P.2d 66, 68 (Colo. 1980)("The Board reviews the actions of the head of the Personnel Department").

In other words, it is ultimately the Board's responsibility to make sure that a selection process comports with the law. When a new interpretation falls outside of the restrictions placed on selection, the Board has a duty to correct those issues. This may require, as it did in the case of the Redden and Kaberlein appeals, ordering that the selection be performed again in a lawful manner.

Employees in Complainant's position are often directly affected by a Board decision reversing a selection process. There are ways to minimize that effect, however, so that a Board decision issued months after a selection process is not such a shock for an affected employee. Employees should understand from the beginning of their new assignment, for example, that they are on an extended trial service period if an appeal to the selection process has been filed with the Board. *See* Board Rule 4-28 (defining trial service as not to exceed six months except as provided in the "Time Off" chapter or "when there is a selection appeal pending"). The goal of the process, however, should not be to avoid correcting an unlawful selection process, but to assist affected employees as much as possible.

### C. Conclusion:

Neither Complainant's nor Respondent's arguments demonstrate that the decision to rescind Complainant's L&E III position was arbitrary, capricious or contrary to rule or law. The procedure followed by Respondent in implementing the Board's Order of December 16, 2006 followed the specific requirements for revising the L&E III selection process mandated by the Board. In the final analysis, Complainant has failed to demonstrate that the decision to rescind his L&E III appointment should be reversed by the Board.

## CONCLUSION OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

## ORDER

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

Dated this 10th day of October, 2007.

[redacted]

Denise DeForest
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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. 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 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 8-69, 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

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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 8-75, 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 8-65, 4 CCR 801.

## CERTIFICATE OF SERVICE

This is to certify that on the 11 day of October, 2007, 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:

Jerry J. Autenrieth
[redacted]

and in the interagency mail, to:

Stacy L. Worthington
[redacted]

[redacted]
Andrea C. Woods

(rev'd. 5/07)