STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007G089**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA KIRKMEYER,

Complainant,

vs.

DEPARTMENT OF LOCAL AFFAIRS,

Respondent.

Administrative Law Judge (ALJ) Hollyce Farrell held the hearing in this matter on November 16 and 24, 2009, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. The hearing was commenced on September 16, 2009. Closing arguments were presented on December 2, 2009, and the record was closed on that date. First Assistant Attorney General Vincent E. Morscher represented Respondent. Respondent's advisory witnesses were Susan Kirkpatrick, the Executive Director for the Department of Local Affairs (DOLA), and Mona Heustis, the Human Resources Director for DOLA. Complainant appeared and was represented by William S. Finger.

MATTER APPEALED AND PROCEDURAL HISTORY

Complainant, Barbara Kirkmeyer (Complainant), appeals her separation from state service following the non-renewal of her Senior Executive Service (SES) contract. On June 7, 2007, the undersigned ALJ dismissed Complainant's appeal, finding that the Board had no jurisdiction over the case. The Board adopted that finding, and Complainant appealed to the Colorado Court of Appeals.

The Court of Appeals found that the Board did have jurisdiction, reversed the Board's order, and remanded the case with directions on February 12, 2009. The Court of Appeals held, "Because we conclude that the Board had jurisdiction to determine whether complainant could compete for open classified jobs as a certified employee, we reverse and remand with directions."

Complainant seeks the following relief: an order that reverses the determination that the contract provision promising her return to a classified pay position is void; and enforcement of that contract provision by order of the Board. Complainant seeks an order that the Department must offer her positions for which she qualifies when such

positions become available; an award of back pay; an award of future pay; and an award of attorney fees and costs. Respondent seeks an order finding that Respondent did not violate Board Rule 9-3 and that Complainant is not entitled to any relief.

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

SCOPE OF HEARING

Complainant requests an order reversing Respondent's determination that the contract provision promising her return to a classified pay position is void. In addition, she seeks as further relief an order by the Board enforcing that contract provision.

These two prayers for relief have been raised by Complainant in a separate District Court action. The District Court judge ruled that the contract provision was void, and denied Complainant the relief she seeks. Complainant has appealed that decision to the Colorado Court of Appeals in a separate case. Because Complainant has chosen to litigate the SES contract issue in a separate venue, and because it is pending on appeal, the Board will not exercise jurisdiction over this issue herein. While Complainant asserts that the Board should decide the contract issues herein, she has provided no legal authority for the proposition that an administrative agency should exercise concurrent jurisdiction over a matter pending before the Colorado Court of Appeals.

Lastly, the Colorado Court of Appeals restricted the issue on remand to the Board solely to the question of Complainant's reinstatement privileges. On page one of its opinion, the Court summarized its holding as follows: "Because we conclude that the Board had jurisdiction to determine whether complainant could compete for open classified jobs as a certified employee, we reverse and remand with directions." Again on page eight of the opinion, the Court wrote, "We conclude that she was entitled at least to a hearing as to whether she should be returned to certified status for purposes of competing for available classified positions." As Complainant argues, the Court of Appeals did decide that the added provision of the contract could be "harmonized" with the applicable statute and Board Rules. In so finding, the Court wrote, "Applying section 24-50-104(5)(c) to complainant's S.E.S. contract, and giving consideration to the pertinent Board Rules, we conclude that the statutory language and the contested provision can be harmonized. We see a distinction between the statute's provision that an S.E.S. employee shall not have a right to any particular non-S.E.S. position and the contract's contested provision, consistent with the Rules, that complainant shall have the privilege of being reinstated to certified status to compete for a classified position."

ISSUES

1. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;

2. Whether Respondent discriminated against Complainant in violation of Board Rule 9-3; and

3. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant was a certified employee who was employed as a Division Director for the Division of Local Government at DOLA. She was certified as a General Professional VI, General Professional VII and in the Management Class while working at DOLA. She began working for DOLA in January of 2001 as a General Professional VI.

2. As a Division Director, Complainant was a manager and supervisor with high level authority and responsibilities.

3. Michael Beasley is the former Executive Director of DOLA, and was Complainant's direct supervisor until January of 2006 when he left to pursue a different employment option.

4. Beasley regarded Complainant as a strong manager who had a command of all issues facing the Department. Complainant was familiar with the Joint Budget Committee of the Colorado Legislature and was often relied upon to use that knowledge to assist the Department. She had experience with the Legislature, and frequently testified on behalf of the Department at legislative sessions. She had experience in emergency management and all other areas of the Department. Beasley considered Complainant to be a valuable and knowledgeable employee and manager. Complainant received the highest ratings in her performance evaluations in 2001 and 2002 from a supervisor she had prior to Beasley.

5. When Beasley resigned his position, he recommended that then-Governor Bill Owens appoint Complainant as Acting Executive Director of DOLA. Beasley made the recommendation because he believed that Complainant was qualified for the position. Governor Owens did appoint Complainant as Acting Executive Director of DOLA. Complainant was the Acting Executive Director from January 1, 2006, until January of 2007.

6. In November of 2006, Bill Ritter, a Democrat, was elected Governor. Ritter took office in January of 2007. Ritter appointed Susan Kirkpatrick, also a registered Democrat, to the position of Executive Director of DOLA. Kirkpatrick became the Executive Director in January of 2007, and Complainant returned to her position as Division Director for the Division of Local Government.

SES Contracts

7. When Kirkpatrick assumed her position, there were two DOLA employees with SES contracts. Complainant was one of those individuals.

8. SES "is an alternative performance-based pay plan available for employees in positions that are in management class and are responsible for directly controlling, through subordinate mangers, relatively large or important segments of a principal department . . . ." *See* Director's Administrative Procedure 2-11, 4 CCR 801.

9. Complainant held SES contracts for the terms of: 1) July 1, 2004, through June 30, 2005; 2) July 1, 2005, through June 30, 2006, and 3) June 1, 2006, through July 1, 2007.

10. Director's Administrative Procedure 2-11(C), 4 CCR 801, provides, in part, "The department head may decide not to renew the [SES] contract for any reason . . . . [I]f the department head gives the employee written notice of non-renewal by May 1, the department head shall either separate the employee from state service upon expiration of the contract on June 30 or appoint the employee to a vacant non-senior executive service position for which [the employee] is qualified."

11. In anticipation that Ritter would be elected, some SES employees were concerned that their SES contracts would not be renewed, and they would be separated from state service. In response to this concern, and cognizant that many SES employees were long-term state employees, the Executive Director of the Department of Personnel and Administration under the Owens administration, Jeffrey Wells, permitted the following language to be added to SES contracts for the contract term of July 1, 2006, through June 30, 2007, "If the employee is not offered a contract for the 07-08 fiscal year, regardless of whether notice was timely given pursuant to State Personnel Rule 2-11(C) and without regard to paragraph 4 above, the employee shall be returned to the traditional classified pay plan at either the contract salary or the statutory lid, whichever is lower." This language is referred to as the "added provision."

12. Paragraph 4 of Complainant's 2006/2007 contract states, "If the Executive Director gives the employee written notice of non-renewal by May 1, the employee shall be separated from state service upon expiration of the contract on June 30 or appointed to a vacant non-senior executive service position at either the contract salary or the statutory lid, whichever is lower."

13. Not all Executive Directors included the added provision in the 2006 through 2007 SES contracts for their agencies.

Declaration that SES Added Provision Void

14. In a letter dated February 20, 2007, Kirkpatrick informed Complainant that the added provision was "inconsistent with Colorado law"; "contrary to the rules adopted by the State Personnel Board," and "inconsistent with the dual purposes of the SES program, which are: (1) to give department executive directors flexibility in selecting senior managers; (2) to compensate senior management personnel with higher salaries in exchange for giving up the rights and privileges associated with the state personnel system"; and would not be honored. As such, Kirkpatrick informed Complainant that she should not rely on the added provision when her contract expired. During that meeting, Kirkpatrick told Complainant that Complainant was a political appointee.

15. Executive Directors from other agencies provided similar letters to all or some of their SES employees.

16. On March 9, 2007, Kirkpatrick wrote the following to Jim Carpenter, Governor Ritter's Chief of Staff, in a weekly summary memorandum: "According to the HR Director at DOLA, Barb Kirkmeyer has a civil service classification within DOLA so when she is no longer in SES, she has rights to go back into her position as the Director of the Division of Local Govt."

17. Kirkpatrick and Complainant had few one-on-one meetings after Kirkpatrick became the Executive Director, and Kirkpatrick did not evaluate Complainant's performance even after Complainant requested that she do so.

18. Complainant is registered as a Republican and Kirkpatrick was aware of Complainant's political affiliation when she made the decision not to renew Complainant's SES contract or offer her other employment at DOLA.

Decision Not to Renew SES Contract

19. On or about April 26, 2007, Kirkpatrick, with Heustis present, had a meeting with Complainant and informed her that she was not going to renew Complainant's SES contract. Kirkpatrick provided written notice to Complainant on April 30, 2007, regarding the non-renewal of the contract, and informed her that she would be separated from state service effective June 30, 2007. Kirkpatrick did not offer Complainant another position at DOLA, and did not want her as a DOLA employee. Thus, Kirkpatrick did not consider Complainant for any open positions. The decision to not renew Complainant's SES contract and not retain her for other employment at DOLA was Kirkpatrick's.

20. During the April 26, 2007 meeting, Complainant expressed a desire to remain an employee at DOLA.

21. Kirkpatrick offered to let Complainant take two months of administrative leave instead of working through June 30, 2007. Complainant declined to do so as she wanted to stay in her position, she wanted to be at work for her staff members, and because she wanted to do her job. Kirkpatrick told Complainant that she no longer wanted her to attend Division Director meetings, which were an important component of Complainant's job.

22. Kirkpatrick had concerns regarding Complainant's performance while Complainant was the Acting Executive Director. She never communicated those concerns to Complainant or documented the alleged problems. Kirkpatrick did not feel that she could trust Complainant.

23. Complainant was not responsible for many of the problems Kirkpatrick believed Complainant had with her performance, such as the concerns regarding the lack of supervision in DOLA's Homeland Security Program, a subcontractor who was not performing to Kirkpatrick's expectations and Complainant allegedly taking the only complimentary registration given to DOLA for a conference.

24. Complainant timely filed an appeal with the State Personnel Board on May 7, 2007, regarding her separation from state service.

25. Before Complainant left employment at DOLA, Heustis asked her to complete a portion of a document known as a Separation Form. Complainant filled out her mailing address for her final paycheck and signed the document on June 29, 2007.

26. On July 11, 2007, Kirkpatrick completed another portion of the form. In response to the question on the form which asked, "Is he/she eligible for rehire?" Kirkpatrick checked "No." In response to the question, "If he/she is retiring, would you consider rehiring for part-time work?" Kirkpatrick checked "No." Kirkpatrick did not want to rehire Complainant. Complainant was not aware that Kirkpatrick had checked "No" in response to those questions until October of 2007.

27. When Complainant left state service, her separation was coded in the statewide data base as "33," which indicates that Complainant resigned for personal reasons. There is no separation code for non-renewal of an SES contract; the Department of Personnel and Administration instructed agencies to use "33." There are no negative connotations for resignation for personal reasons.

28. The Personnel Action Data form at DOLA indicates that Complainant is eligible for rehire.

Open Competitive Positions

29. After Complainant was told that her SES contract was not going to be renewed and she was separated from state service, DOLA announced several positions for which Complainant may have been qualified, but did not contact Complainant to see if she was interested in the positions.

30. Complainant did not apply for any of these positions.

31. After Complainant left state service, the Division Director for Division of Local Affairs position was occupied by a temporary employee for four or five months. The position was announced as an open competitive position on September 28, 2007, and was filled by an applicant who is a registered Democrat.

32. Complainant did not apply for her former position, or any other position at DOLA, and did not have a pending application on file with DOLA. Nobody at DOLA told Complainant that she needed to submit an application to be considered for a position.

33. After her SES contract at DOLA was not renewed, Complainant applied for two positions at the Colorado Department of Natural Resources, but was not selected for either position.

34. Complainant was an Appointing Authority while at DOLA, and was aware of the process for applying for employment with the state.

35. On June 26, 2007, DOLA announced a newly created position for a Deputy Director or Chief Operations Officer of DOLA. This position was in the Management Class. There was a three-day window for applicants to apply for the position. Although Complainant was qualified for the position and it was announced through the usual job announcement process, she did not apply for it.

36. Heustis gave Kirkpatrick a list of the applicants for the Deputy Director position who had met the minimum qualifications. Kirkpatrick asked Heustis if another individual, Bruce Eisenhauer, could also be considered for the position. Eisenhauer had not applied or tested for the Deputy Director position, but was on the eligible list for a General Professional V position, Field Representative. He did meet the minimum qualifications for the Deputy Director position. Kirkpatrick called or emailed Eisenhauer to see if he was interested in the Deputy Director position.

37. Eisenhauer interviewed for the Deputy Director position, and was selected. Although no paperwork had been completed, the Deputy Director position was downgraded from the Management Class to a General Professional V. None of the applicants for the position were told about the downgrade of the position.

38. Eisenhauer was hired as a General Professional V, but his position was upgraded ninety days later to the Management Class.

39. Complainant has reinstatement privileges to all of the positions for which she was previously certified and related classes with the same or lower grade maximum. Her previously certified classes were GP VI, GP VII and the Management Class. She is eligible for rehire at DOLA.

40. If DOLA, or any other state agency, were required to contact every former employee regarding position openings to ascertain interest in the openings, so many people would have to be contacted that it would be impractical.

41. Kirkpatrick was credible.

DISCUSSION

I. GENERAL

A. Burden of Proof

In this *de novo* proceeding, the Complainant has the burden to prove by preponderant evidence that Respondent's actions, if any, were arbitrary, capricious or contrary to rule or law. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if its actions are found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. (2009).

II. HEARING ISSUES

A. Respondent's actions did not violate state statute or Board Rules, and are in compliance with the Court of Appeals decision in this case.

The state personnel system is comprised of all employees of the state, with some exemptions which do not apply to Complainant. Colo. Const. Art. 12, Section 13(2). A person becomes a certified state employee once he or she satisfactorily completes a probationary period not to exceed twelve months. Colo. Const. Art. 12, Section 13(10). Moreover, State Personnel Board Rule 4-29, 4 CCR 801, provides, "Certified applies to employees who successfully complete a probationary or trial service period. A certified employee who demotes remains certified. A certified employee who transfers remains certified unless the appointing authority requires a trial service period. Early certification is not allowed if a selection appeal is pending."

The Colorado General Assembly created SES positions as a pay plan under the Colorado State Personnel Systems Act. Section 24-50-104(5)(c), C.R.S. In exchange for pay in excess of the statutory cap, high level management employees waive the right to a position outside of SES at the end of the contract period. Specifically, "Any

person in the senior executive service shall have no right to a position outside of the senior executive service." *Id.*

State Personnel Board Rule 2-13, 4 CCR 801, governs SES employment at the termination of the contract period. The Rule states, "Any employee entering or remaining in the senior executive service pay plan on or after July 1, 2003, waives retention and reemployment rights with respect to any other position in the personnel system pursuant to Board Rule 1-19, but shall have reinstatement privileges with respect to any vacant position in the employee's current or previously certified class."

In its opinion, the Court of Appeals harmonized the above governing law and Complainant's SES contract by holding that Complainant's status at the end of her SES contract is that of a certified employee, currently not holding a specific position, who has reinstatement privileges to any vacant positions in her current or previously certified class. Section 24-50-104(5)(c), C.R.S.; Board Rule 2-13.

Reinstatement privileges are defined in Director's Administrative Procedure 4-11, 4 CCR 801, which provides, "Reinstatement is a discretionary appointment of a former or current employee to a class in which the person was certified and either resigned or voluntarily demoted in good standing. The person may be reinstated to a related class with the same or lower grade maximum than the previously certified class." Based on this rule, Complainant does have the right to compete, as a certified employee, for positions. However, reinstatement decisions are entirely discretionary.

Reinstatement privileges are different from retention rights and reemployment rights. "Reemployment" is the "right of an employee to be returned or rehired to the class from which separated by layoff." Director's Administrative Procedure 1-63, 4 CCR 801. "Retention rights" apply in a layoff situation and are determined when an employee is laid off from his or her position. These rights are waived by an employee who enters SES. Section 24-50-104(5)(c), C.R.S. Reinstatement, on the other hand, is a privilege; it is not a right held by an employee, but is a decision within the discretion of the Appointing Authority. As such, Complainant's job performance, knowledge, and experience would not automatically guarantee her a position with DOLA; she would still have to apply and be selected for a position as a reinstatement candidate, or reach an agreement with the Department regarding reinstatement for a position.

Complainant argues that the added provision of the contract obligated Respondent to hire her for an open position for which she was qualified and to contact Complainant to ascertain her interest in open positions. In other words, Complainant argues that the added provision has expanded her rights within the state personnel system. There is no support in the applicable statutes, rules or the Colorado Court of Appeals decision in this matter for that argument.

In its February 12, 2009 opinion, the Colorado Court of Appeals repeatedly stated that Complainant had the right to "compete" for open positions, but did not state that Complainant had the right to a specific position. On page one of its opinion, the

Court summarized its holding as follows: "Because we conclude that the Board had jurisdiction to determine whether complainant could compete for open classified jobs as a certified employee, we reverse and remand with directions." Again on page eight of the opinion, the Court wrote, "We conclude that she was entitled at least to a hearing as to whether she should be returned to certified status for purposes of competing for available classified positions." As Complainant argues, the Court of Appeals did decide that the added provision of the contract could be "harmonized" with the applicable statute and Board Rules. In so finding, the Court wrote, "Applying section 24-50-104(5)(c) to complainant's S.E.S. contract, and giving consideration to the pertinent Board Rules, we conclude that the statutory language and the contested provision can be harmonized. We see a distinction between the statute's provision that an S.E.S. employee shall not have a right to any particular non-S.E.S. position and the contract's contested provision, consistent with the Rules, that complainant shall have the privilege of being reinstated to certified status to compete for a classified position."

In specifically addressing the added provision of the contract, the Court wrote, "Although the contract goes on to specify that the employee shall be returned at 'either the contract salary or the statutory lid, whichever is lower,' we read such language to be applicable in the event complainant was successful in obtaining a position, and not as a guaranty that she would be placed in a particular position."

The Court of Appeals opinion is well grounded in statutes and Board rules. Accordingly, there is no merit to the argument that Respondent was required under the contract to place Complainant in a position. Complainant had only the privilege of competing for another position, and to date, has not done so, as she has not applied for any open positions at DOLA. None of Complainant's rights under the applicable law or rules have been violated.

B. Respondent did not discriminate against Complainant in violation of Board Rule 9-3.

Complainant alleges that she was discriminated against based on her political affiliation in violation of Board Rule 9-3, 4 CCR 801. Board Rule 9-3 provides, "Discrimination against any person is prohibited because of race, creed, color, gender (including sexual harassment), sexual orientation, national origin, age, religion, political affiliation, organizational membership, veteran's status, disability, or other non-job related factors. This applies to all employment decisions." Respondent has not made any "employment decisions" regarding Complainant since her SES contract was not renewed. Complainant has not applied for, or competed for, any open positions for which she was not selected. Accordingly, Respondent did not violate Board Rule 9-3.

Assuming that Respondent did make an "employment decision" regarding Complainant, Respondent did not discriminate against Complainant on the basis of her political affiliation.

In a case where discrimination is alleged, through presentation of circumstantial evidence, a complainant must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. The elements of a *prima facie* case of intentional discrimination in a failure to hire case are: (1) that the complainant belongs to a protected class; (2) that the complainant applied and was qualified for a job for which the employer was seeking applicants; 3) despite being qualified, the complainant was rejected; and 4) after the complainant's rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Garrison v. Gambro, Inc.,* 428 F.3d 933 (10th Cir. 2005). [1]

Complainant does belong to a protected class under Board Rule 9-3. Complainant is a registered Republican and has been active in that party. Failure to hire for public positions on the basis of political affiliation is a violation of the First Amendment of the United States Constitution. *Rutan v. Republican Party of Illinois,* 42 U.S. 62 (1990). Moreover, discrimination on the basis of political affiliation is prohibited by Board Rule 9-3. However, Complainant fails to meet the second element of the *prima facie* case because she never applied for, or competed for, any position after her SES contract expired. Even though there is no dispute that Complainant was qualified for many positions at DOLA, some which were vacant after Complainant was told that her SES contract was not going to be renewed, Complainant did not apply for the Deputy Director position, or any other position at DOLA. Because she had been an Appointing Authority, she knew that the ordinary process in securing state employment begins by submitting an application for an open position. Complainant's knowledge of this process is evidenced by the fact that she applied for two positions at the Department of Natural Resources after her SES contract was not renewed. Because Complainant has not applied for any positions, she has not been rejected. Complainant has, therefore, established only the first element of the *prima facie* case.

Assuming arguendo that Complainant did establish a *prima facie* case of discrimination, the burden then shifts to Respondent to rebut the presumption of unlawful discrimination by showing that the adverse employment action was taken because of a legitimate, non-discriminatory reason. *Bodaghi v. Department of Natural Resources,* 995 P.2d 288 (Colo. 2000). Respondent presented several reasons for not reinstating Complainant. Most importantly, Complainant never applied or competed for any open position, nor did she express an interest in any specific position. Respondent has, therefore, met its burden of establishing a legitimate business reason for not hiring

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[1] Complainant has not proven by direct evidence that Respondent discriminated against her on the basis of her political affiliation. Proving discrimination by direct evidence is by establishing proof of "an existing policy which itself constitutes discrimination. *Stone v. Autoliv ASP, Inc.,* 210 F.3d 1132 (10th Cir. 2000) (citing *Ramsey v. City and County of Denver,* 907 F.3d 1004 (10th Cir. 1990). Kirkpatrick did tell Complainant that Complainant was a political appointee. Kirkpatrick's statement was her personal opinion, and not a public policy. Moreover, the statement was not made in the context of making a decision on Complainant's employment. As such, it is not direct evidence of discrimination, but can support an inference of circumstantial or indirect evidence of discrimination. *Stone v. Autoliv ASP, Inc.,* id.

Complainant.

To prevail, Complainant must next establish that the reasons offered by Respondent are merely a pretext for discrimination based on political affiliation. "If the employer succeeds in meeting its burden of production, that is, it asserts a non-discriminatory reason for the adverse employment decision, the factfinder cannot find unlawful discrimination without further consideration of the evidence presented, including credibility determinations. If the employer offers evidence sufficient to sustain the proffered legitimate purpose, the employee cannot prevail in reliance solely upon the *prima facie* case. In that instance, the factfinder, giving full and fair consideration to the evidence offered by both sides, proceeds to decide the ultimate question: whether, in light of all the evidence in the record, the employee has proved that the employer intentionally and unlawfully discriminated against the employee." *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 298 (Colo. 2000).

Complainant asserts that Respondent's decision not to reinstate her to any of the open competitive positions was a pretext for political affiliation discrimination. However, Respondent produced persuasive and credible evidence that Kirkpatrick had genuine concerns regarding Complainant's performance. Many, if not all, of these concerns later proved to be unfounded, but Kirkpatrick believed them to be true. Kirkpatrick did complete the Separation Form document indicating that Complainant was not available for rehire, but there is insufficient evidence to establish that Kirkpatrick's opinion was related to Complainant's political affiliation. Additionally, this form did not bar Complainant from applying for open positions. Kirkpatrick believed that there were issues with Complainant's performance, and did not want Complainant as a member of her senior staff, and did not feel she could trust her. The credible evidence at hearing was that Kirkpatrick's motivation in not offering Complainant a position was not one of unlawful discrimination on the basis of Complainant's political affiliation. *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007)(holding that "[e]ven a mistaken belief can be a legitimate, non-pretextual reason for an employment decision"). There was no persuasive evidence presented at hearing that Complainant's political affiliation was a factor in her not being reinstated at DOLA.

It is clear that Kirkpatrick did not want to hire Complainant, but no illegal animus for Kirkpatrick's actions was proven. As a result, Complainant has presented insufficient evidence to support a finding of pretext and of unlawful discrimination on the basis of her political affiliation. Complainant, therefore, has not presented sufficient evidence to prevail on her claim of unlawful discrimination. Respondent's decision to not to hire Complainant was not a violation of Board Rule 9-3, 4 CCR 801. Complainant is not entitled to any remedy.

C. Complainant is not entitled to an award of attorney fees and costs.

Complainant requests an award of attorney fees and costs. The Board's enabling act mandates an award of attorney fees and costs upon certain findings. Section 24-50-125.5, C.R.S. It states in part,

"Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . ." (Emphasis added.)

Respondent has prevailed in this case and there is no basis for an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent's actions were not arbitrary, capricious or contrary to rule or law.

2. Respondent did not discriminate against Complainant in violation of Board Rule 9-3.

3. Complainant is not entitled to attorney fees and costs.

ORDER

Respondent's action is **affirmed.**

Dated this 14th day of January 2010

Hollyce Farrell
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 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

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 8-72, 4 CCR 801. An original and 9 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 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 MAILING

This is to certify that on the 14th day of **January, 2010**, I electronically transmitted a true copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Frank & Finger, P.C.
William S. Finger, Esq.
[redacted]

Vincent E. Morscher
[redacted]

[redacted]

Andrea C. Woods