STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2013B004**

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

RICHARD L. HOMANN,
Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY, DIVISION OF FIRE SAFETY AND CONTROL,
Respondent.

This matter is before the Administrative Law Judge (ALJ) on cross motions for summary judgment. Having reviewed the pleadings and the attachments thereto, the ALJ finds and orders as follows:

ISSUES PRESENTED

1. What law applies to the legislative transfer of Complainant's position from Colorado State University (CSU) to the Department of Public Safety (DPS) as mandated by House Bill 12-1283 (HB 1283); and

2. What is Complainant's current job status in the personnel system.

PROCEDURAL BACKGROUND

1. This matter is before the Board following passage of HB 1283 by the Colorado General Assembly in 2012. The legislation, as enacted, transferred all firefighting positions in the Colorado State Forest Service (Forest Service) at CSU to DPS, Division of Fire Prevention and Control (Fire Division) on July 1, 2012.

2. Respondent DPS terminated Complainant's employment at 12:01 on July 1, 2012. Complainant appeals his termination.

3. Respondent filed a motion to dismiss for lack of jurisdiction. Complainant filed a response. Respondent filed a reply. Complainant filed a surreply. Respondent filed a response to the surreply. Several of these pleadings contained attached materials outside the pleadings.

4. On October 11, 2012, the ALJ issued an Order Treating Motion to Dismiss as Motion for Summary Judgment; Order Denying Motion to Stay Proceedings; Order Vacating Hearing; Briefing Schedule. The Order determined that HB 1283 was ambiguous; permitted the parties to conduct additional discovery regarding the legislative intent of HB 1283; and ordered the parties to file briefs on summary judgment in December 2012.

5. Both parties have filed briefs in support of summary judgment, with attachments, and responses with attachments.

6. In December 2012, upon review of the briefs, the ALJ vacated the hearing, informed the parties that the case could be decided on the motions, and indicated that an order would be issued in January 2013.

7. The case was subsequently reassigned to another ALJ.

8. The case has now been reassigned back to the undersigned ALJ.

9. The motions for summary judgment are ripe for review.

UNDISPUTED MATERIAL FACTS

1. In May 1997, Complainant was hired as Chief of the Wildland Fire Management Section at the Colorado Forest Service, CSU. Complainant's position was also known as Fire Division Supervisor. *Complainant's Response to Respondent's Brief in Support of Summary Judgment (R Brief).*

2. On October 18, 2011, Colorado Governor John Hickenlooper signed Executive Order D 2011-030 (the EO) into law. The EO was titled, "Coordinating State Homeland Security Duties and Resources and Establishing the Homeland Security and All-Hazard Senior Advisory Committee." As background, the EO reviewed post-September 11, 2001 actions taken in Colorado to coordinate and plan emergency preparedness efforts. It also emphasized that since Hurricane Katrina, "Teamwork across disciplines, among levels of government and with the private and nongovernmental sectors was determined to be the only way to ensure that government can deliver to the best of its collective ability the most effective and efficient services no matter the cause of a disaster." *R Brief, Exhibit D, EO, at page 2.*

3. The EO established the Division of Homeland Security, directed DPS to coordinate homeland security functions among state agencies, federal, tribal and local governments, and the private sector, and established the Homeland Security and All-Hazard Senior Advisory Committee. *Id., pages 1 – 2.*

4. The Advisory Committee's work culminated in the introduction of HB 1283 during the 2012 legislative session. When HB 1283 was introduced in the Colorado Senate, its sponsor, Senator Angela Giron, testified as follows: "Where previously homeland security structures have been created through executive order, HB 1283 provides stability and sustainability by codifying responsibilities. The bill makes transfers of FTE, full time equivalent, between several state agencies to align efforts and eliminate redundancies, including transferring emergency management functions, concerning resource mobilization to the Division of Emergency Management in the Department of Local Affairs." *R Brief, Exhibit C, legislative hearings on HB 1283.*

5. Since at least the 1950's, the State of Colorado has housed firefighting functions at both the Forest Service at CSU and in the Division of Fire Safety at DPS. *Id., testimony of Roxanne White, Chief of Staff to Governor Hickenlooper.*

6. In early May 2012, Colorado experienced extreme wildfire disasters. The Governor's Office determined that it was an opportune time to consolidate all firefighting efforts at the state level into one agency, DPS, and to accomplish this task via an amendment to HB 1283. Within the space of one week, the Governor's Office, Senator Giron, and

others gathered information on best practices from other states and drafted amendment LO-10 to HB 1283. *Id.*

7. In May 2012, Senator Giron introduced amendment LO-10 to HB 1283 at the Senate Judiciary Committee hearing. She testified that the amendment "takes the Division of Emergency Management from the Department of Local Affairs and moves it into the Department of Public Safety. And, it takes the wildfire fighting responsibility from the State Forest Service and moves it into the Department of Public Safety." She testified that bringing these functions together into a single department would ensure the work was performed "effectively, efficiently, and elegantly." *R Brief, Exhibit C.*

8. The Executive Directors of DOLA and DPS, and representatives of local fire chiefs associations, testified in favor of the amendment. *Id.*

9. Governor Hickenlooper's Chief of Staff, Roxanne White, testified regarding the genesis of the amendment and her Office's work with Senator Giron to draft it. She noted that it was a groundbreaking moment for the State, because it would expedite the state's response to wildfire disasters, and thus save precious time when minutes matter. In response to questioning, she testified, "The official position of the Colorado State Forest Service was that it would not be possible to move a portion of the functions." She testified that after studying best practices in other states that had consolidated firefighting activities into one agency, they had learned that it was possible to separate out wildfire response functions from state forest service functions. *Id.*

10. Ms. White testified that she had the authority of CSU officials to impart their full support of the amendment on the record.

11. HB 1283, as amended, passed both houses of the Colorado General Assembly and was signed into law by Governor Hickenlooper on June 4, 2012. Its effective date was July 1, 2012. *R Brief, Exhibit F, last page.*

12. HB 1283 renamed the DPS Division of Fire Safety to the Division of Fire Prevention and Control (Fire Division).

Applicable Provisions of HB 1283

13. HB 1283, Section 1, **Legislative Declaration**, states:

> (3) The general assembly also finds and declares that:
>
> (a) Fire prevention and control are public safety functions best addressed by a public safety agency;
> (b) In order to effectively manage wildland fires, the executive branch needs the ability to coordinate firefighting, public safety, and emergency management functions within the executive branch;
> (c) The Colorado state forest service admirably provides for healthy forests and furthers the mission of Colorado state university;
> (d) Transferring wildland fire prevention and suppression operations from Colorado state university to the department of public safety will not diminish the Colorado state forest service's role in providing for healthy forests, nor will it diminish the university's ability to carry out its mission of educating its students;

(e) The division of fire prevention and control has an established relationship with Colorado's fire service; and
(f) Transferring fire prevention and suppression functions from the Colorado state forest service to the division of fire prevention and control will strengthen the ability of the state to manage wildland fires.

14. HB 1283 contains several provisions that effectuate the transfer of functions and positions from CSU to DPS:

> Effective July 1, 2012, the forestry functions of the board relating principally to fire and wildfire preparedness, response, suppression, coordination, or management are transferred by a **type 2** transfer, as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S., to the wildland fire management section in the division of fire prevention and control in the department of public safety.
>
> § 23-31-201(2)(a), C.R.S.
>
> On July 1, 2012, the board's funds, moneys, positions of employment, personnel, and personal property that were, as of June 30, 2012, principally directed to fire and wildlife preparedness, response, suppression, coordination, or management and any and all claims and liabilities, whether known or unknown, asserted or unasserted. . . on or before June 30, 2012, are transferred to the division of fire prevention and control in the department of public safety pursuant to section 24-33.5-1201, C.R.S.
>
> § 23-31-208(2), C.R.S.
>
> On July 1, 2012, **all positions of employment in the State Forest Service** of the Board of Governors of the Colorado State University System that are principally related to fire and wildfire preparedness, response, suppression, coordination, or management **shall be transferred to the Division of Fire Prevention and Control in the Department of Public Safety and shall become employment positions in the Wildland Fire Management Section therein**.
>
> § 24-33.5-1201(4)(b)(I), C.R.S. (2012)(emphasis added).
>
> On July 1, 2012, **all employees** of the Board of Governors of [CSU] or the State Forest Service thereunder who are employed in a capacity principally related to and (sic) wildfire preparedness, response, suppression, coordination, or management **shall be considered employees of the Wildland Fire Management Section in the Division of Fire Prevention and Control** in the [DPS]. Such employees shall retain all rights under the State Personnel System and to retirement benefits pursuant to the laws of this state, and their services shall be deemed to have been continuous. § 24-33.5-1201(4)(b)(II), C.R.S. (2012)(emphasis added).

15. The affected parties had roughly three weeks to implement HB 1283. All of the structural and personnel changes happened very quickly, between June 4 and July 1, 2012. *R Brief, Exhibit A, Affidavit of Paul Cooke, Paragraph 3.*

16. Complainant's position, as well as a few others in the Forest Service at CSU, was exempt from the state personnel system. Most of the employees transferred to DPS were not exempt.

17. Mr. Paul Cooke, Interim Director, Fire Division at DPS, worked with the Forest Service Human Resources staff to draft the job descriptions, or Position Description Questionnaires (PDQ's) for the new equivalent positions at DFPC. Complainant participated in drafting the PDQ for the Section Chief of Wildland Fire position, which was the closest equivalent to Complainant's Fire Division Supervisor position at CSU. *R Brief, Exhibit A, Paragraphs 6 and 7.* The PDQ for the Section Chief position was classified as a General Professional (GP) VII position. *Complainant's Summary Judgment Brief, November 26, 2012, Paragraph 6.*

18. Every individual hired into the Fire Division at DPS from the Forest Service was required to complete a background packet and participate in a polygraph examination. *R Brief, Exhibit A, Paragraphs 3 and 4.*

19. In June 2012, Complainant applied for the GP VII Wildland Fire Section Chief position, completed and passed the DPS background investigation, and took and passed the DPS polygraph examination. *Complainant's Summary Judgment Brief, November 26, 2012, Paragraphs 5 and 6.*

20. No other individuals applied for the Wildland Fire Section Chief position. *Id.*

21. On June 5, 2012, Mr. Cooke emailed Complainant regarding "Conceptual DFPC Org Chart." He stated, "Rich, Thank you for your review and comment on the conceptual DFPS Org Chart. As we previously discussed, I will be at your office in the morning (by 8:30 AM) to meet with you . . . assuming you are still available. However, we need to change the scope of the meeting. Before I approve the PDQ's for the proposed positions of Deputy Chief of Wildland Fire Preparedness Operations and Deputy Chief of Wildland Fire Planning, I need a better understanding of what these positions do (or will do) on a day to day basis. Again, thank you, Paul". *Complainant's Response to R Brief, Exhibit 4.*

22. On June 6, 2012, Mr. Cooke met with Complainant to discuss the transfer of positions to and the organizational structure of the Fire Division.

23. On June 7, 2012, Michael C. Morgan, Fire Chief, Rifle Fire Protection District, emailed Mr. Cooke, stating in part, "I hope your meeting with the 'Fire Chief for Colorado' went well!" *Complainant's Response to R Brief, Exhibit 5, page 1.*

24. On June 7, 2012, Mr. Cooke responded in part, "For me, I was essentially put on notice by Rich Homann that if I didn't accept the organizational structure that he proposed (unchanged), I am jeopardizing effectiveness and safety and could be jeopardizing funding from the USFS if it is believed the state 'does not know what it is doing.' Following my meeting with him yesterday, it became abundantly clear that he is a 'cancer' that will do whatever he can to stand in the way of successful transfer of the fire program from CSFS to CDPS. I no longer support him even being considered for the Wildland Fire Section Chief position." *Id.*

25. Forest Service and Fire Division staff affected by HB 1283 had weekly Transition Advisory Committee (TAC) meetings. The purpose of the TAC was to effectuate the assimilation and reorganization of the Forest Service into the Fire Division. *Complainant's Response to Respondent's Reply in Support of Motion to Dismiss, Affidavit of Mary Atella.*

26. At the June 21, 2012, TAC meeting, Complainant, Mr. Cooke, Mary Atella, Chief Financial Officer of the Forest Service, Joe Duda, Deputy State Forester, Dave Farmer, North Area Forester, and others were present. Mr. Cooke decided at that meeting that he might be able to work with Complainant, that his institutional knowledge would be helpful to the program, and advised Complainant that he would await his feedback regarding the terms and conditions, expectations and working conditions related to the Wildland Fire Section Chief position. *R Brief, Exhibit A, Affidavit of Paul Cooke, Paragraph 13.*

27. Mr. Cooke announced at the June 21 TAC meeting that Complainant would be the Chief of the Wildland Fire Management Section of the Fire Division. *Complainant's Response to R Brief, Exhibit 1, Supplemental Affidavit of Richard Homann, Paragraph 13; Complainant's Response to Respondent's Reply in Support of Motion to Dismiss, Affidavit of Mary Atella, Paragraphs 2, 4, 5, 8, and 9.*[1]

28. On June 21, 2012, Kathy Sasak, Executive Director of DOLA, emailed Adrienne Loye, [position unknown], copying Mr. Cooke and others, regarding, "Correspondence from AGs office today." Her email stated in full, "Did Jim get anything today from the AGs office today reference an opinion that at will employees have job protections come July 1 regardless of whether they apply and pass the backgrounds. Have you seen anything?" *Complainant's Response to R Brief, Exhibit 3, page 3.*

29. On June 21, 2012, Mr. Cooke responded, "Thank you for your follow-up on this. I know I did not misunderstand Joe Duda when he told me that the CSU General Counsel received word from the AGO that the statute requires all affected CSFS personnel to transfer to CDPS. He also expressed his understanding that the AGO's interpretation had been sent to CDPS." *Id., pp. 2-3.*

30. On June 22, 2012, Ms. Sasak responded to Mr. Cooke, explaining that based on the opinions of several members of the Colorado Attorney General's Office, "It sounded like some of the general opinion coincided with what we've understood all along – the positions are coming over as of 7/1, and the people in those positions will need to come to CDPS or be placed. It appears that the sticking point is the interpretation about at-will employees. . . . I thought we were working on an accommodation that would require employees who didn't qualify to come to CDPS to stay on the CSU side of the fence (so CSU would be required to fund the payouts. Is that still an outstanding issue?)" *Id., pp. 1–2.*

31. Mr. Cooke responded to Ms. Sasak on June 22, 2012, stating in part, "I do not know of any specific agreement that CSFS or CSU would place at will employees that did not get placed with CDPS; however, they have worked with us on a couple of positions that did

[1] Respondent and Mr. Cooke do not contest that this was a TAC meeting at which all of the members were present, or that he announced Complainant as the new Chief at the meeting. They do, however, characterize the meeting as a "merit and fitness interview" of Complainant. *Id.*

not want to make the move. They have said if there are open positions, the at will employees can apply for them."

32. On June 27, 2012, Jeff Jannke, State Forester, sent a letter to Complainant stating, due to the passage of HB 1283, "your position is officially transferred by operation of law to DPS on July 1 and your position and your employment at CSU will cease on that date . . . thank you for making CSU a better place and we wish you the best with your new assignment in the Colorado Department of Public Safety." He added a hand-written personal thanks to Complainant on the letter. *Complainant's Response to Respondent's Reply in Support of Motion to Dismiss, Attachment.*

33. On June 28, 2012, Respondent sent Complainant a letter terminating his employment at DPS effective July 1, 2012. The letter stated, "Your employment with the Colorado Department of Public Safety will terminate at 12:01 a.m. on July 1, 2012. If you have not already done so, you must return any state owned equipment, supplies and badge/credentials to your supervisor in your current agency or to your CDPS appointing authority. Any pay due you will be mailed to the address you have on file within 3 business days. Please contact CDPS Human Resources at 303.239.4427 if you have questions. You may appeal this decision in writing to: State Personnel Board . . . . ." The letter was signed by "Kevin R. Klein, Appointing Authority." *R Brief, Exhibit B.*

DISCUSSION

Standards for Summary Judgment

The purpose of summary judgment is to permit the parties to pierce the formal allegations and save time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail at hearing. *Peterson v. Halsted,* 829 P.2d 373, 375 (Colo. 1992). Summary judgment "is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue as to any material fact, and that all legal prerequisites are clearly established." *Id.* at 375 – 376. (internal citations omitted).

Summary judgment under C.R.C.P. 56(c) is appropriate "when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Whenever summary judgment is sought, the moving party bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and of the affidavits, if any, which he believes demonstrate the absence of a genuine issue of material fact. *Id.* Once a moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Id.* at 713. The ultimate burden of persuasion, however, always remains on the moving party. *Id.* at 712.

Statutory Construction of HB 1283

In determining the meaning of a statute, the central task is to ascertain and give effect to the intent of the General Assembly. The language at issue must be read in the context of the statute as a whole and the context of the entire statutory scheme. *Jefferson County Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). A statute should be given a construction that will render it effective in accomplishing the purpose for which it was enacted. *Zaba v. Motor Vehicle Div.*, 516 P.2d 634 (Colo. 1973).

The parties generally agree that the intent of the General Assembly in enacting HB 1283, as amended, was to consolidate all Colorado firefighting functions into one state agency, DPS, in a manner that ensured the work was performed effectively, efficiently, and elegantly.

A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses. *Jefferson County Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). The dispute in this case arises from the statute's silence regarding the specific job status of Complainant after that consolidation occurred. Respondent argues that the statute confers on Complainant no right to any position at DPS. Complainant argues that the statute transferred him by operation of law into the Wildland Fire Section Chief position and that his probationary status there entitles him to a hearing to challenge his termination on the first day of employment.

In ascertaining legislative intent, the starting point is to look at the express language of the statute. *Id.* Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. § 2-4-101, C.R.S. The legislature is presumed to be familiar with the laws existing at the time of passage. *County of Denver v. Rinker*, 366 P.2d 548, 550 (Colo. 1961). Further, when a statute is ambiguous, as it is here on the question of job status of previously exempt employees, laws upon the same or similar subjects are helpful in determining legislative intent. § 2-4-203(d), C.R.S.

i. The Law Governing Transfers in State Employment

The starting point here is the legislature's utilization of the term "transfer." To effectuate the agency reorganization, HB 1283 affected a Type 2 transfer of all firefighting functions from the Forest Service at CSU to the Fire Division at DPS under the Administrative Organization Act of 1968 at § 24-1-101, C.R.S. *et seq.* § 23-31-201(2)(a), C.R.S.

In addition, however, the legislation transferred all Forest Service firefighting positions, and the employees holding those positions, into the Fire Division of DPS. It required, "On July 1, 2012, **all positions of employment** in the state forest service . . . related to fire . . . **shall be transferred** to the division of fire prevention and control in the department of public safety and **shall become employment positions in the wildland fire management section** therein," C.R.S. § 23-33.5-1201(4)(b)(I)(emphasis added). And, it required, "On July 1, 2012, all employees [in the fire section of the forest service] shall be considered employees of the wildland fire management section." C.R.S. § 24-33.5-1201(4)(b)(II). By using the term "shall," the legislature intended for the transfers of positions and employees to be mandatory. *DiMarco v. Dept. of Revenue,* 857 P.2d 1349, 1352 (Colo.App. 1993).

"Transfer" is a phrase that has a technical and particular meaning in state employment. C.R.S. § 24-50-112.5(5)(a). The transfer clause of the Colorado State Personnel Systems Act states in its entirety, "Only a qualified candidate shall be appointed to a position in the state personnel system. A qualified employee may transfer between positions in the same class or to a different class at the same pay grade. The gaining organization shall assume all liability for the employee's base salary, credited leave accruals, and other applicable personnel system benefits." *Id.; see also* Board Rule 1-76.1, 4 CCR 801 (defining "transfer" as, "An appointment of a qualified and current employee to a different position in the same class or to a class with the same pay grade").

The statutory prerequisite that all transfer candidates be "qualified" for the positions into which they transfer eliminates the need for competitive testing and probation mandated for initial appointment under Colo.Const. art. XII, §§ 13(1) and (10). *Schmidt v. Hurst*, 124 P.2d 235, 239 (Colo. 1942)("Transfers, on the other hand, are customarily allowed upon request without any requirements as to an examination"). In 1984, the Colorado General Assembly passed a law requiring probation for transferred employees, which was affirmed in *CAPE v. Lamm*, 677 P.2d 1350, 1359 (Colo. 1984). Former § 24-50-115(6), C.R.S., stated, "The board shall establish probationary periods for all persons initially appointed, promoted, or transferred into a different position at their request . . . ." *Id.* at 1357. However, the legislature subsequently repealed this provision prior to its recodification at § 24-50-112.5(5), C.R.S., in 2001.

To summarize, under Colorado state law, to effectuate a transfer, the job candidate need not engage in competitive tests of competence or serve a period of probation. § 24-50-112.5(5)(a); Board Rule 1-76.1. As a practical matter, transfer candidates rarely test for the positions to which they transfer.

At the time it passed HB 1283, the General Assembly is presumed to have chosen the technical term, "transfer," in its treatment of Forest Service employees, with an understanding of its meaning in the State Personnel Systems Act. §§ 2-4-101 and 203(d), C.R.S.; *County of Denver v. Rinker*, *supra*. Therefore, § 23-33.5-1201(4)(b)(I), C.R.S. mandated that Complainant's Forest Service Fire Division Supervisor position be transferred to the Fire Division at DPS and "become an employment position" there. The fact that the DPS Fire Division needed to draft a GP VII PDQ for Complainant's position does not change the nature of the appointment as a transfer. Nor does the transfer's movement of the position from one state agency at which it was exempt to another within the personnel system vitiate the mandatory nature of the appointment.

Because HB 1283 mandated that "**On July 1, 2012, all employees** [in the firefighting section of the forest service] **shall be considered employees of the wildland fire management section,**" C.R.S. § 24-33.5-1201(4)(b)(II), Respondent was required to consider Complainant an employee of the Fire Division on July 1, 2012. *Id.*

Transfers are generally initiated by either the employee or the appointing authority. However, when a transfer is involuntary, and the employee refuses the transfer, the employee is deemed to have resigned. *See* Board Rule 4-37, 4 CCR 801 ("An employee or an appointing authority may initiate a transfer. When the appointing authority(s) initiates the transfer, for reasonable business necessity, within the same department and the employee refuses it, the employee is deemed to have resigned").

Complainant's transfer was made by the legislature in order to more efficiently and effectively deploy firefighting resources in Colorado. As such, it was an involuntary transfer. Because Complainant did not refuse the transfer, the Wildland Fire Section Chief position was his position as of July 1, 2012. Board Rule 4-37.

In addition to the transfer provision of the State Personnel System Act, the provision governing employees brought into the personnel system also applies to this case. The Act states, "**Persons brought into the personnel system.** (1) Whenever a person currently or previously employed by the state of Colorado, not within the state personnel system, enters or is brought into the state personnel system, the person shall be credited with his or her former state service for purposes of accumulated leave, leaving earning rates, seniority, and other benefits,

excluding retirement credit, afforded an employee in the state system." § 24-50-136(1), C.R.S. (emphasis in original).

The intent of this provision is to assure that exempt state employees' years of service credit be treated as classified state service upon entry into the personnel system. HB 1283 echoes and incorporates this provision by mandating that all transferred employees "shall retain all rights under the State Personnel System and to retirement benefits pursuant to the laws of this state, and **their services shall be deemed to have been continuous**." § 24-33.5-1201(4)(b)(II), C.R.S. (emphasis added).

Because HB 1283 deemed Complainant's service at CSU to have been continuous, he is by operation of law credited with over fifteen years in his position at DPS.

Board Rule 1-62.1, 4 CCR 801, defines a probationary employee as "a person who is not a current certified employee and who has been selected from a referral list for a permanent position but has not yet been certified to the class for that position." Complainant is not a probationary employee as defined by rule because he was not selected from a referral list. Instead, he was a mandatory involuntary transfer appointee with fifteen years of continuous service.

The definition of probationary employee appears to conflict with Board Rule 4-40(A), 4 CCR 801, which states, "Probationary service applies to appointments to permanent positions of: A. Employees who have not been previously employed within the state personnel system." Rules 1-62.1 and 4-40 must be read together to effectuate the intent of the legislature in passing HB 1283. Because the legislature mandated Complainant's transfer into the same position he held for fifteen years at CSU, and because his years of service "shall be deemed to have been continuous" under § 24-50-136(1), C.R.S., it is concluded that Complainant is not required to serve a period of probation.[2]

Board Rule 4-42(A), 4 CCR 801, states, "Trial Service applies to appointments to permanent positions of: A. At the discretion of the appointing authority, a current certified employee who voluntarily transfers to a position within the same class." Complainant did not voluntarily transfer into his Wildland Fire Section Chief position. Therefore, trial service does not apply to him.

Respondent makes a strained and implausible argument that it conducted a merit and fitness interview of Complainant in June 2012 and judged him to be unworthy of the Wildland Fire Section Chief position. Respondent's interpretation of HB 1283 would render the mandatory transfer provisions of HB 1283 a nullity and defeat its purpose of efficiently blending the two firefighting agencies into one. Statutory constructions that work a repeal by implication are not favored unless unavoidable. *Chism v. People*, 80 P.3d 293, 295 (Colo. 2003). Not only is a repealing construction avoidable in this case, but Complainant's transfer into the Wildland Fire Section Chief position was mandated by the statute, easily effectuated, and thus consistent with the legislative intent of an efficient transition. Respondent does not even assert that this result is unavoidable.

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[2] Board Rule 4-19 also mandates that any person brought into the state personnel system must successfully complete the selection process before being placed in a position. However, the statute's mandatory transfer provision trumps any Board rule that may conflict with it.

CONCLUSIONS OF LAW

WHEREFORE, Complainant's motion for summary judgment is **granted** and the following orders are entered:

A. HB 1283 affected a transfer of Complainant and his position from CSU to DPS; the legislative intent was to effectuate this transfer in an efficient manner;

B. The State Personnel Systems Act provisions governing transfers and bringing state employees into the personnel system apply to the movement of Complainant's position within the state system;

C. As an involuntary transfer appointee, Complainant was not required to apply for his position at DPS or to serve a period of probation or trial service; because Complainant did not refuse the Wildland Fire Section Chief position, it is his position by operation of law;

D. Complainant is entitled to service credit for his fifteen years in the Fire Supervisor position at CSU and his service is deemed to have been continuous;

E. Complainant is now a certified employee in the state personnel system by operation of HB 1283 and the State Personnel Systems Act;

F. Respondent's termination of Complainant's employment exactly one second after he transferred into the agency violated C.R.S. § 24-33.5-1201(4)(b)(I) and (II);

G. Complainant shall be reinstated to his Wildland Fire Section Chief position retroactive to July 1, 2012 and is entitled to back pay and benefits to that date.

Dated this 21st day of March, **2013.**

[redacted]

Mary McClatchey
Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202-3604

CERTIFICATE OF MAILING

This is to certify that on the 22nd day of March, **2013**, I electronically served a true copy of the foregoing **ORDER GRANTING COMPLAINANT'S MOTON FOR SUMMARY JUDGMENT** as follows:

Richard L. Homann

[redacted]

Katie A. Allison A.A.G.

[redacted]

[redacted]

Andrea Woods

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 electronic record on appeal in this case is $5.00. 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.