

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2024G095**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARIANA LUNG,
Complainant,

v.

COLORADO STATE UNIVERSITY, VETERINARY TEACHING HOSPITAL, CRITICAL CARE UNIT,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held an evidentiary hearing in the above-captioned case on September 12, 2024 via Google Meet. Throughout the hearing, Complainant appeared in person, representing herself. Respondent appeared through its attorney, Assistant Attorney General Carlos Ramirez, Esq. Respondent's advisory witness was Tracy Hutton, Director of Strategic Partnerships and Employee Relations.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing, in the order of their appearance, are attached in an Appendix.

MATTER APPEALED

Complainant, a certified employee, appeals Respondent's reduction of her pay following her reallocation to a Vet Tech II position. Complainant seeks reinstatement of the original salary from the date she began work as a Vet Tech II.

Respondent alleges that it erroneously calculated Complainant's monthly salary during her reallocation, using the pay range for a Vet Tech III instead of the pay range for a Vet Tech II. Respondent argues that it was required to correct its erroneous calculation of Complainant's monthly salary to comply with its State Classified Compensation Policy and the Equal Pay for Equal Work Act, C.R.S. § 8-5-101, *et seq.*

For the reasons discussed below, Respondent's reduction of Complainant's monthly salary to correct a calculation error is affirmed.

ISSUES TO BE DETERMINED

Was Respondent's reduction of Complainant's pay arbitrary, capricious, or contrary to rule or law? If so, what is the appropriate remedy?

FINDINGS OF FACT

Respondent's Reallocation of Complainant's Position

1. Complainant Ariana Lung began working for the Veterinary Teaching Hospital's Critical Care Unit as a Vet Tech I on February 25, 2023.
2. Complainant's salary as a Vet Tech I was \$3596 per month.
3. In early 2024, Complainant's supervisor, Sam Gould, submitted a request to Respondent's Human Resources department to reallocate Complainant's position from a Vet Tech I to a Vet Tech II.
4. Complainant did not apply for a promotion; it was Respondent's decision to reallocate Complainant's position.
5. The reallocation to a higher placement in the Vet Tech job class series meant that Respondent would also increase Complainant's pay.
6. Respondent approved Complainant's reallocation to a Vet Tech II position.

Respondent's State Classified Compensation Policy

7. Tracy Hutton, Director of Strategic Partnerships and Employee Relations in Respondent's Division of Human Resources, created Respondent's State Classified Compensation Policy to provide clarity and consistency for all salary decisions concerning state classified employees.
8. At all times relevant to this appeal, Respondent's State Classified Compensation Policy established "compensation rates for state classified positions for new hires and when existing employees transfer, are promoted to existing positions or are eligible for in-range salary adjustments."
9. At all times relevant to this appeal, the provisions of Respondent's State Classified Compensation Policy ensured that salary decisions avoid creating inequity among existing employees with the same or substantially similar job duties and seniority levels.
10. At all times relevant to this appeal, Respondent's State Classified Compensation Policy, section 2(d) provided:

When an individual position audit (PDQ review) results in a promotion, the incumbent employee is eligible for up to a 10% salary increase, or to the new pay range minimum, if greater.
11. At all times relevant to this appeal, Respondent was required to follow the provisions

of the State Compensation Policy.

Respondent's Calculation of Complainant's Salary After Reallocation

12. Liz Carter, CSU's Classification and Compensation Specialist, calculated Complainant's new salary as a Vet Tech II.
13. In accordance with the State Classified Compensation Policy, Ms. Carter determined that Complainant should receive the pay range minimum for her reallocated position. In calculating Complainant's new salary, Ms. Carter erroneously used the pay range minimum for a Vet Tech III, which was \$4023 per month.
14. On March 29, 2024, Complainant received an Allocation Notice from Respondent stating that her salary as a Vet Tech II would be \$4023 per month.
15. The salary increase was effective beginning April 1, 2024.
16. On April 13, 2024, Respondent's Operations team sent Ms. Carter an email inquiry about Complainant's salary increase, which was more than 10% above Complainant's prior salary as a Vet Tech I.
17. Ms. Carter checked her notes concerning her calculation of Complainant's salary increase and discovered her error.
18. In accordance with the State Classified Compensation Policy in effect at the time, Ms. Carter reviewed the salaries of existing Vet Tech IIs with similar duties and seniority levels. To ensure equity with other Vet Tech IIs, Ms. Carter determined that Complainant's salary as a Vet Tech II could not be higher than \$3729 per month.
19. On April 15, 2024, Respondent issued a revised Allocation Notice, stating that Complainant's salary as a Vet Tech II would be \$3729 per month.
20. On April 18, 2024, Sam Gould, Complainant's supervisor, informed Complainant that her monthly salary would be reduced to \$3729 per month.
21. On April 22, 2024, Complainant spoke to Ms. Carter. Ms. Carter apologized and explained that the original calculation of Complainant's salary at \$4023 per month was made in error.
22. Complainant's recalculated salary rate was not submitted in time for the April payroll. As a result, on April 30, 2024, Complainant received \$3596 as her regular salary for that month.
23. On May 31, 2024, Complainant received her recalculated monthly salary of \$3729, as well as a "Retro Salary" payment of \$133, which was the amount Complainant had been underpaid in April 2024.

24. Complainant has not received any pay at the rate of \$4023 per month.

25. Complainant filed a timely appeal of Respondent's reduction of her pay.

ANALYSIS

I. RESPONDENT'S REDUCTION OF COMPLAINANT'S MONTHLY SALARY WAS NOT ARBITRARY OR CAPRICIOUS.

In determining whether an agency's decision is arbitrary or capricious, the Board must determine whether the agency has: 1) neglected or refused "to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it," 2) failed "to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion," or 3) exercised "its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

The preponderance of the evidence establishes that Respondent's reduction of Complainant's monthly salary as a reallocated Vet Tech II was necessary to correct an unintentional calculation error. Under Respondent's State Classified Compensation Policy in effect at the time, Complainant was "eligible for up to a 10% salary increase, or to the new pay range minimum, if greater." Ms. Carter credibly testified that, when she originally calculated Complainant's new salary, she erroneously used the pay range minimum for a Vet Tech III, which was \$4023 per month. Both Ms. Carter and Ms. Hutton credibly explained that setting Complainant's salary at this rate would create inequities with other Vet Tech IIs, whose salaries are substantially lower.

While the recalculation of her salary was understandably disappointing and frustrating for Complainant, Ms. Carter used "reasonable diligence and care" and gave "candid and honest consideration" of all the factors necessary for this recalculation. *Lawley*, 36 P.3d at 1252. Ms. Carter reviewed the salaries of existing Vet Tech IIs, and recalculated Complainant's salary to match that of Vet Tech IIs with similar duties and seniority. Providing a higher salary to Complainant would not only violate Respondent's State Classified Compensation Policy, but would also violate The Equal Pay for Equal Work Act, C.R.S. § 8-5-101 *et seq.*, which requires employers, including the State of Colorado, to pay employees equally for substantially similar work regardless of sex. See C.R.S. § 8-5-101(5); C.R.S. § 8-5-102(1).

The preponderance of the evidence establishes that Respondent's actions were not "based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley*, 36 P.3d at 1252. Therefore, Respondent's reduction of Complainant's monthly salary to correct a calculation error was not arbitrary or capricious.

In reviewing her pay stubs in preparation for the hearing, Complainant discovered that, even though she began working as a Vet Tech II on April 1, 2024, Respondent paid her the Vet Tech I salary of \$3596 for the month of April. Complainant's May paystub reflected the recalculated Vet Tech II monthly salary of \$3729, as well as an additional "Retro Salary" of \$133. Director Hutton credibly testified that Complainant's recalculated Vet Tech II salary rate was not submitted in time for the April payroll. Respondent paid Complainant the recalculated Vet Tech II salary in May 2024, as well as reimbursement for the \$133 Complainant should have received for her work as a Vet Tech II in April. The ALJ finds that Respondent's timely reimbursement of Complainant's Vet Tech II salary under these circumstances was reasonable, and was not arbitrary or capricious.

II. RESPONDENT'S REDUCTION OF COMPLAINANT'S MONTHLY SALARY WAS NOT CONTRARY TO RULE OR LAW.

Complainant did not identify any rule or law prohibiting Respondent's reduction of Complainant's monthly salary as a reallocated Vet Tech II. In contrast, Respondent identified two legal authorities requiring such reduction.

As discussed above, allowing Complainant to be paid at the rate of \$4023 per month would create inequities with other Vet Tech IIs, whose salaries are substantially lower. Maintaining such salary inequities would not only violate Respondent's State Classified Compensation Policy, but would violate The Equal Pay for Equal Work Act, C.R.S. § 8-5-101 *et seq.*, which requires employers, including the State of Colorado, to pay employees equally for substantially similar work regardless of sex. See C.R.S. § 8-5-101(5); C.R.S. § 8-5-102(1). Therefore, Respondent's reduction of Complainant's monthly salary to correct a calculation error was not contrary to, but in fact was in compliance with, applicable rules and law.

CONCLUSIONS OF LAW

Respondent's reduction of Complainant's monthly salary to correct a calculation error was not arbitrary, capricious, or contrary to rule or law.

ORDER

For the above reasons, Respondent's reduction of Complainant's monthly salary to correct a calculation error is **affirmed**.

Dated this 23rd day
Of September, 2024, at
Denver, Colorado.

/s/ [REDACTED]
Susan J. Tyburski
Senior Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of September, 2024, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Ariana Lung
[REDACTED]

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[REDACTED]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: A, B, D, E, F, G. The following additional exhibits were admitted into evidence over Respondent's objections: C, H.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 1, 2, 3, 4, 5, 6, 7.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing in order of initial appearance:

Liz Carter, Classification and Compensation Specialist
Sam Gould, Critical Care Supervisor
Tracy Hutton, Director of Strategic Partnerships and Employee Relations
Ariana Lung, Complainant

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. 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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.
4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 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. Board Rule 8-53(C). That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is served 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 8-54.

ORAL ARGUMENT ON APPEAL TO THE BOARD

In general, no oral argument is permitted. Board Rule 8-55(C).

MOTION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).