

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2010B065

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STEPHEN HARRIS,

Complainant,

vs.

COLORADO STATE UNIVERSITY, COMMUNICATIONS & CREATIVE SERVICES,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on April 6 and 7, 2010, at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on April 7, 2010, at the conclusion of closing arguments. Senior Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Katherine Phifer, Director of Communications and Creative Services. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Stephen Harris ("Complainant") appeals the decision to reduce his position as a Production Operator II from full-time to half-time as part of a reorganization as arbitrary, capricious or contrary to rule or law. Complainant seeks reinstatement to his former full-time status.

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

ISSUE

1. Whether Respondent's decision to change Complainant's full-time position to a half-time position was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

General Background

1. The Department of Communications and Creative Services ("CCS") is a department reporting to the Colorado State University ("University") Vice President for Public Affairs.
2. Prior to November 2009, CCS consisted of printing, media, and publications operations, such as an offset printing operation known as the "Print Shop," and digital copy operations known as "FastPrint" and "Copy Rite." CCS also includes other media and communication sections, such as photography, video, and television services.
3. The funding for CCS primarily comes from "21 Fund" monies. 21 Fund monies require that the operation receiving such funds charge as much for services as the services cost. The receipt of such funds means that CCS was expected to cover the costs of its operations through the fees that it charged to its University clients.
4. CCS's budget was decreasing in Fiscal years 2008 and 2009 as state government braced to handle declining state revenues and the University underwent state funding budget cuts. The University as a whole suffered a budget rescission in February 2009 of approximately 9%, and a 4% budget reduction was ordered for the next fiscal year. These declining revenues directly affected CCS's clients, and reduced the demand for CCS services.
5. By the end of Fiscal year 2009, CCS was showing a deficit of approximately \$306,000.

Print Shop Operations

6. The Print Shop was a sub-department of CCS that provided off-set printing services to the University. The Print Shop included off-set presses that could handle one and two color printing jobs. The Print Shop also included a bindery to help finish print jobs produced either by the off-set presses or through digital printing services.
7. Not all off-set print jobs were handled by the Print Shop. CCS routinely authorized outside vendors to handle some of the off-set printing orders, depending upon the requirements of the job.
8. The Print Shop's services were provided to University customers who required off-set printing, such as the creation of forms for University departments. Over

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time, however, the demand for off-set printing of forms and other materials had decreased as the use of digital printers increased and as web-based programs eliminated the need for paper forms. Outside printing vendors also possessed newer off-set printing equipment which could offer four and eight color off-set printing options.

9. As part of Respondent's considerations of how to bring CCS operating costs within its budget, the Financial Officer for the University's Division of Public Affairs, Mark Cooper, calculated the revenue and expenses attributable to the Print Shop since 1997. The calculations showed that the Print Shop operating costs had exceeded its revenue each year since 1998. Mr. Cooper's calculations indicated that the Print Shop had deficits of \$103,308 in Fiscal Year ("FY") 2006; \$85,345 in FY 2007; \$264,067 in FY 2008; and \$202,253 for FY 2009.
10. By the end of FY 2009, nearly two-thirds of the \$306,000 deficit carried by CCS was due to Print Shop operations.

Attempts To Change The Economics of CCS

11. In February of 2009, CCS management created a new plan to bring more work back to the Print Shop and to Copy Rite. A plan was implemented which restricted the use of outside vendors for particular types of printing jobs. The plan also reduced the prices for some expenses in order to attract more University clients.
12. CCS management held discussions with the employees within the CCS copy and printing centers concerning the budget issues and possible solutions. In March of 2009, CCS management and employees proposed a series of steps to be taken to reduce costs by changing various practices, staffing patterns, and printing equipment.
13. One of the proposed changes was to replace three student hourly workers with three work-study students to take advantage of the reduced cost of work-study students to CCS. This specific proposal was inadvertently delayed by several months in its implementation by CCS, which resulted in a loss of some of the proposed \$32,000 in savings per year. The majority of the other proposed changes were implemented.
14. The changes made in early 2009, however, did not create the influx of work or the reduction in costs necessary to solve the Print Shop budget issues. By late 2009, the Print Shop was still producing only 20% of the off-set print jobs needed by University clients, and the budget deficit problem for the Print Shop had not been corrected.

15. Respondent also considered what it would cost to upgrade the Print Shop presses to handle four and eight color off-set printing jobs. The cost of the new presses necessary for such an upgrade was estimated to be from \$800,000 to a million dollars. Respondent decided that such a large expense to upgrade the printing presses could not be supported during a period when state budgets were decreasing. Respondent was also concerned that off-set printing was not a sustainable enterprise over the long run because of the increasing ability of digital printing technology to provide full-color printing services.

Complainant's Position

16. In November of 2009, Complainant held a full-time Production II position that was based primarily in the Print Shop. Complainant's duties included delivering paper orders and finished print jobs around the campus, as well as servicing the library copy machines and bill changer machines. Complainant also transported print jobs and supplies among the various printing and copy sections of CCS, such as from Copy Rite to the Print Shop and back.
17. Complainant's Production II duties supported more than just Print Shop operations. By November 2009, the funding for Complainant's position had already been administratively split so that half of Complainant's time was paid for through the Print Shop, and the other half was paid for by Copy Rite.
18. Until about the time that the Reorganization Notice was issued in November 2009, Complainant was not aware that half of his position was funded through the Print Shop and that the other half of his position was funded through Copy Rite.

Reorganization Plan

19. By memorandum dated November 9, 2009 ("Reorganization Plan"), Respondent announced that CCS would change its structure due to a lack of funds, a lack of work, and the need to reorganize the unit.
20. The Reorganization Plan was signed by Mark Minor, Vice President for Public Affairs, Communication and Creative Services. Mr. Minor was designated by the University to carry out the reorganization of CCS, and he made the final decisions on the reorganization of CCS.
21. The Reorganization Plan document began with an introduction section which explained how the Print Shop revenue had declined over the previous years as a result of competition with digital printing and the decline in available funds to clients of CCS. The Introduction also provided Respondent's assessment that the closing of the Print Shop would result in more than \$280,000 in annual savings for CCS.

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22. The Reorganization Plan identified the planned change as the “elimination of the Print Shop services and operation.” The Plan noted that such a change would result in the abolishment of eight full-time positions and a reduction of two full-time positions to half-time. The Plan explained that the change of two full-time positions to part-time positions was the result of these two positions already having half of their funding through the Print Shop and half of their funding through other CCS operations unaffected by the Plan.
23. The Reorganization Plan identified the positions to be fully abolished as an LTC Operation II position, a Production V position, two Production IV positions, two Production III positions, an Equipment Operator position, and an Administrative Assistant II. A half-time Production III position and a half-time Production II position were also eliminated. Complainant’s position with the Print Shop was the half-time Production II position.
24. The Reorganization Plan explained that Respondent anticipated that the work of the Print Shop would be directed to outside vendors and to the in-house digital printing services.
25. The Reorganization Plan also included the current and the proposed organizational chart for CCS. The initial organization chart produced did not include Complainant’s position in it. By December 9, 2009, CCS management had been made aware of the omission, and a new set of organization charts were generated which showed Complainant with a half-time position funded by Copy Rite.
26. Respondent’s Reorganization Plan was posted at the main CCS office on campus.
27. Respondent also issued a Communications and Creative Services Print Shop Closure Transition Plan dated November 19, 2009. This document explained Respondent’s projected timeline for the closure of the Print Shop, along with deadlines for specific tasks to be accomplished in the transition. The document also provided employees with additional specific information on how CCS work was to be re-allocated without the Print Shop services.
28. Respondent modified the Reorganization Plan after more consideration of how off-site vendors would be used to fulfill the functions of the Print Shop. Respondent realized that many of the finishing functions provided by the bindery portion of the Print Shop for digital printing projects could not be sent to outside vendors because the vendors did not want finishing work without also having the printing work. Respondent decided that the bindery equipment, and the Production IV position which had been within the Print Shop to operate that equipment, should be maintained to support the work of the other printing and

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copy sections of CCS. This modification of the Reorganization Plan did not affect Complainant.

Layoff Notice

29. By letter dated and delivered on November 23, 2009, Complainant was informed of the decision to eliminate half of his position. The letter informed Complainant that the change in his position would take effect January 29, 2010.

30. The letter of November 23, 2009, also informed Complainant that:

Essentially, as a certified employee you have the right to be placed into a vacant full-time position at the University in your present job class or, if no vacant position exists, to exercise your retention rights against the position in your job class filled by the employee with the least retention rights. These same rights may extend to positions in job classes in which you have previously held certified status if no position at your current class is available to you prior to the reduction in time. Positions which require bona fide special qualifications would not be available to you unless you meet or exceed those special qualifications.

31. The letter of November 23, 2009, told Complainant that, if he wished to have Human Resources determine his retention rights, he had to respond by returning a Determination of Retention Rights Election Form within three working days of receipt of the letter.

32. The letter of November 23, 2009, also informed Complainant of his right to appeal the decision to the State Personnel Board ("Board"). Complainant was provided with a copy of the standard appeal form and with the proper address for the Board. Complainant was also told that the any appeal had to be received by the Board.

33. Complainant submitted his Determination of Retention Election Form on or about November 30, 2009. Complainant chose the option which stated:

My position is being reduced from full-time to part-time, I elect to accept my current position at the new percentage of effort (part-time).

I understand that Human Resources will not determine my retention rights to any other filled or vacant positions and that I may elect to be placed on the University's reemployment list for up to one year.

34. Complainant filed a timely appeal of Respondent's decision to reduce his position from full-time to half-time with the Board.

DISCUSSION

I. GENERAL

In this non-disciplinary appeal, Complainant bears the burden to prove that Respondent's reorganization decision was arbitrary, capricious, or contrary to rule or law. *See Velasquez v. Department of Higher Education*, 93 P.3d 540, 542 (Colo.App. 2003) (noting that "[e]xcept as otherwise provided by statute, the proponent of an order shall have the burden of proof in an administrative hearing," and that "the proponent of an order" is the person who brings forward a matter for litigation or action;" holding that in a non-disciplinary dismissal appeal, a certified state employee carries the burden of persuasion).

II. HEARING ISSUES

The Appointing Authority's decision to reduce Complainant's work to half-time was not arbitrary and capricious, and was not contrary to rule or law.

1. Respondent's decision to reduce Complainant's hours was not arbitrary or capricious:

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Complainant argued at hearing that the Reorganization Plan was flawed because it overstated the likely actual savings from the Print Shop closure, was not as efficient with staff as it should have been, and was implemented without defining Complainant's specific job duties. Complainant also testified that he believed that CCS should have simply continued to absorb the Print Shop loss by shifting funds from other portions of CCS in order to continue the Print Shop operations.

The test for arbitrary or capricious action, however, looks at the decision-making process to ensure that a reasonable decision is made after proper investigation of the facts and a fair consideration of those facts.

The evidence at hearing demonstrated that Respondent made its decision to close

the Print Shop based upon long-standing and on-going fiscal problems for CCS created in significant part by the failure to the Print Shop to host enough work to pay its operating costs. The evidence persuasively demonstrated that the fiscal problems experienced by CCS were attributable in significant part to a shrinking demand for Print Shop services, and that there was good reason to expect that trend to continue or accelerate. The evidence also showed that the decision to close the Print Shop (and, therefore, affect Complainant's hours associated with the Print Shop) was only made after attempting to remedy the fiscal issues through other, unsuccessful, means. While Complainant may doubt that the reorganization will solve more problems that it creates, Complainant was not able to persuasively demonstrate that any of the assumptions made during the decision-making process were untrue or unreasonable. Under such circumstances, the decision to close the Print Shop cannot be said to be a decision that reasonable men, fairly and honestly considering the evidence, would not reach.

Complainant, therefore, has not presented sufficient evidence at hearing to show that the closure of the Print Shop and reduction of his hours has met the criteria under *Lawley* as an arbitrary and capricious layoff process.

2. Respondent's decision to reduce Complainant's hours was not contrary to rule or law:

The proper procedures to be followed in any reorganization are found in state statute and Board rules.

State statute provides:

- (1) When certified employees are separated from state service due to lack of work, lack of funds, or reorganization, they shall be separated or demoted according to procedures established by rule. Such procedures shall require that consideration be given to performance evaluations of the employees and seniority within the total state service. Such employees shall have retention rights through-out the principal department in which they are employed unless the head of the department requests, and the board approves, in advance, limitation of retention rights to major divisions, institution, or colleges within the principal department.
- (2) A certified employee who is separated shall be placed on a departmental reemployment list for a period of not less than one year.

C.R.S. §24-50-124. The relevant Board rules implementing this statute are located in Board Rules 7-7 through 7-19, 4 CCR 801-1.

Complainant identified several portions of rules that he believed to have been violated by the reorganization process in this case. A review of the process and the Board

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rules, however, reveals that this reorganization process complied with state law.

Like the statute, the Board's rules require that a layoff may only be done for "lack of funds, lack of work, or reorganization." Board Rule 7-7. Complainant argues that, because he was busy in his Production II position, that the reduction of his position to half-time was not due to a lack of work or funds. The reorganization of CCS, however, was not based upon an analysis of whether only one worker had sufficient work.

The problem faced by CCS was that it had an operation which was costly to run, which was required to bring in as much work as it needed to pay that significant operating cost, and which had a long history of not having sufficient work to meet that financial requirement. The budget cuts in 2008 and 2009 added even more financial stress to CCS and to the need to correct the financial problems caused by the Print Shop. Additionally, there were reasonable concerns raised about the long-term viability of a printing service running on older, more limited, off-set printing presses in an age of digital printing. The reorganization in question here was prompted by both a lack of sufficient work to cover costs of the Print Shop and a lack of funds caused by that lack of work. As such, the reorganization meets the requirements of the state statute and Board Rule 7-7.

The rules require that the department making a layoff decision is to post a Layoff Plan "signed by the Executive Director, head of a principal department or designee." Board Rule 7-7(B). In this case, the Layoff Plan was signed by Mark Minor on November 9, 2009, which meets the requirements of Board Rule 7-7(B).

The Layoff Plan itself was contained in the Reorganization Plan issued November 9, 2009. That document included a statement of the reasons for the plan, the anticipated benefits of the change, a short description of how the work of the Print Shop was to be shifted, the specific employee positions to be affected by the plan, and an organizational chart setting out the new structure. The inclusion of this information meets the requirements for the Layoff Plan set forth in Board Rule 7-7(B). Complainant argued at hearing that the plan did not include specific job duties for the newly revised positions, and that such an omission violates Board Rule 7-7(B). Board Rule 7-7(B), however, does not require that something as specific as new job descriptions be created at the time of the posting of the plan. Complainant has not demonstrated that any other information was required by Board Rule 7-7(B) to be offered with the Reorganization Plan.

The Reorganization Plan was posted at the main CCS office. The evidence at hearing was unclear as to precisely where in that office that the hard copy had been posted, or whether it had been posted on the departmental internet or intranet. Board rules require that the plan be posted "both in a conspicuous place where all impacted parties have access to view the posting and on the department's internet or intranet websites." Board Rule 7-7(B). The posting of the plan in the main CCS office on campus, under the circumstances where the affected employees were also on campus and not far away, appears to meet the intent of the rule to have the plan posted in a conspicuous place where all impacted parties will have access to view it. While it is not clear from the

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evidence produced at hearing that the rest of the posting rule has been satisfied, Complainant did not introduce persuasive evidence that Respondent had failed to meet the requirements of this portion of the rule.

Complainant's rights as an employee whose full-time position was being abolished also appear to have been satisfied under Respondent's process. Complainant was provided with his layoff notice on November 23, 2009. The effective date of the change in his duties was 67 calendar days later on January 29, 2010. Board rules provide that a layoff notice is to be provided at least 45 calendar days before the layoff, Board Rule 7-14, and Respondent's procedure in this case meets that requirement.

Complainant was also provided with a correct notice of the impending abolishment of his full-time position. Board Rule 7-14 mandates that an employee who is to be laid off must receive a written notice that provides at least three working days to state whether the employee wishes to have retention rights determined. That was done with the notice provided to Complainant on November 23, 2009.

Board Rule 7-13 provides that retention rights are available to employees who are moved from full-time to part-time as part of a layoff. Respondent recognized this and correctly offered Complainant an opportunity to have his retention rights calculated.

Complainant did not present any evidence or argument that his specific position should not have been abolished, or that he was more senior to someone else whose job he should have been permitted to take. There was no evidence presented suggesting that the decision to close the Print Shop required Respondent to choose among employees within a certified class for purposes of layoff. Board Rules 7- 10 and 7-11 define how an agency is to select which employees within a certified class are subject to layoff when a portion of the positions within that class are to be abolished. Those rules were not applicable to this situation because, under the Reorganization Plan, all of the positions within the Print Shop were eliminated. The eventual modification of the plan to keep the bindery services position does not help Complainant's argument because the bindery position was not a Production II position and not one for which Complainant was eligible.

Complainant also did not choose to have his retention rights calculated. Through that choice, Complainant decided that his seniority and performance would not be compared to other employees holding positions to which he may be eligible, and that he would not "bump" an employee whose combination of seniority and performance made that employee more at risk of a layoff. As a result, the requirements of Board Rules 7-15 through 7-19 are not applicable to this case.

Complainant argued at hearing that this reorganization process has violated federal law at 34 CFR § 675.20(c)(2)(iii), which prohibits federal work-study students to be used to "displace employees." Complainant did not persuasively demonstrate at hearing, however, that there has been any displacement of state workers by work-study students as a result of this reorganization. The reorganization's effect was to shut down the Print Shop in its

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entirety, except for work performed in the bindery by the Production IV position which was kept in order to support the other print and copy operations. There was no persuasive evidence presented at hearing that any of the functions previously performed by employees of the Print Shop had been transferred to any work-study student.

Complainant, therefore, has not persuasively demonstrated that the reorganization plan, and the resulting decision to reduce his hours to half-time, was contrary to rule or law.


CONCLUSION OF LAW

1. Respondent's decision to reduce Complainant's position from full-time to half-time was not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's decision to abolish Complainant's position within the Print Shop and to move Complainant to a half-time position is **AFFIRMED**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 21st day of May, 2010.



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.

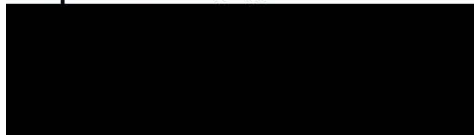
PETITION FOR RECONSIDERATION

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.

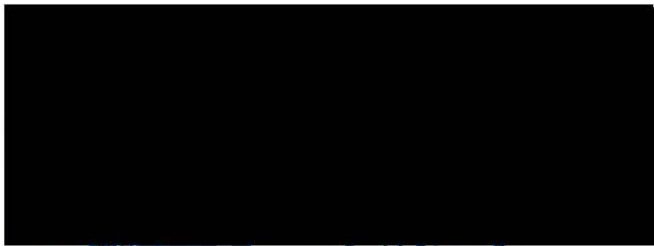
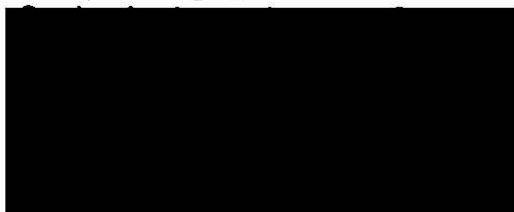
CERTIFICATE OF SERVICE

This is to certify that on the 24th day of May, 2010, I electronically served copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** addressed as follows:

Stephen M. Harris



Joseph Haughain



Andrea C. Woods