STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2013B006**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT P. BLUME,
Complainant,

vs.

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

Administrative Law Judge (ALJ) Robert R. Gunning presided over this matter at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on November 1, 2012. Following the hearing commencement, the parties filed motions for summary judgment and responses thereto. The record was closed on February 12, 2013 upon conclusion of the oral argument on the parties' motions for summary judgment. Assistant Attorney General Alice Hosley represented Respondent. Complainant represented himself.

MATTERS APPEALED

Complainant served as an exempt Administrative Professional with the Colorado State Forest Service (CSFS) for approximately nine years. As of July 1, 2012, certain functions, positions, and employees of the CSFS were legislatively transferred to Respondent Department of Public Safety, Division of Fire Prevention and Control (Respondent or DPS) as part of a larger reorganization and consolidation of agencies. DPS requested that CSFS employees submit applications, background packets, and take polygraph examinations prior to being considered for employment. Complainant did not do so, and the position was filled by another individual. On July 2, 2012, DPS issued Complainant a letter terminating his employment.

Complainant argues that his position as Deputy Chief for Wildland Fire Field Operations transferred as a matter of law, and that he was not lawfully required to complete the application process to retain his position. He asserts that he became a classified employee on July 1, 2012, and that DPS' action in terminating his employment on July 2, 2012, was contrary to law. As relief, Complainant seeks reinstatement as a state employee in Fort Collins, at a level commensurate with the position he previously held, back pay, and benefits.

Respondent argues that Complainant's position and employment did not automatically transfer because such a transfer would violate the state Constitution's merit and fitness requirement for classified employees. Because Complainant did not apply for the DPS position, Respondent asserts that it was unable to hire him into the position, and that he was not a classified employee at the time of his termination. Respondent therefore moves to dismiss Complainant's appeal for lack of jurisdiction, and as relief, requests that Complainant's notice of appeal be dismissed with prejudice.

For the reasons set forth below, Complainant's notice of appeal is **dismissed with prejudice.**

ISSUES

1. Whether the Board has jurisdiction over this appeal.

2. If the Board has jurisdiction over this appeal, whether DPS acted arbitrarily, capriciously, or contrary to rule or law in terminating Complainant's state employment.

PROCEDURAL HISTORY

1. Respondent DPS issued a termination notice to Complainant on July 2, 2012.

2. Complainant filed a timely notice of appeal with the Board on July 11, 2012.

3. On August 16, 2012, DPS filed a motion to dismiss for lack of jurisdiction. DPS asserted that the Board did not have jurisdiction because Complainant was a non-classified employee, and was exempt from the state personnel system. Complainant filed a response on August 27, 2012, contending that his employment was transferred to DPS by virtue of HB 12-1283 on July 1, 2012, and that he became a classified employee of DPS on that date. The parties subsequently filed additional briefing.

4. On October 31, 2012, the ALJ issued an Order denying DPS' motion to dismiss. The Order concluded that the relevant statutes codifying HB 12-1283 were ambiguous, as the General Assembly's intent in passing HB 12-1283 was unclear as to exempt employees such as Complainant. The Order noted that legislative history could be relevant in determining the legislature's intent.

5. The hearing commenced, by telephone, on November 1, 2012. An evidentiary hearing date was set for February 12, 2013. A summary judgment deadline was set for November 21, 2012.

6. The parties timely filed motions for summary judgment. Both motions stated that there were no genuine issues of material fact that needed to be resolved. The parties thereafter filed timely responses to the motions for summary judgment. The motions and responses included a number of affidavits and exhibits.

7. On January 23, 2013, the ALJ issued an Order Vacating the Evidentiary Hearing and Prehearing Statement Deadline and Setting Oral Argument. Due to the fact that both parties agreed that there were no genuine issues of material fact, there was no need for an evidentiary hearing. Oral argument was set in lieu of the evidentiary hearing.

8. On February 12, 2013, the parties participated in oral argument on the pending motions for summary judgment. Neither party had additional documentation to present as evidence. The record was closed at the conclusion of the oral argument.

UNDISPUTED MATERIAL FACTS

The following undisputed material facts are based on the the affidavits and exhibits attached to the motions for summary judgment and responses thereto.

Complainant's employment history

1. Complainant has been employed in the field of Wildland Fire Management for a total of 37 years. He served 14 years with the U.S. Forest Service followed by 14 years with the Bureau of Land Management.

2. Complainant commenced employment with the CSFS in March 2003. The CSFS was managed by Colorado State University until July 1, 2012.

3. CSFS hired Complainant as a Fire Mitigation Specialist. This position was advertised and open to the public. Complainant was required to complete an application addressing the knowledge, skills, and abilities required by the position. After the application was reviewed by the Human Resources staff, Complainant interviewed before a selection panel. Following the interview process, Complainant passed a background check, and was offered the position. He did not go through a written or oral examination process to obtain his position with CSFS.

4. Complainant held various positions with the CSFS, most recently as Deputy Chief for Wildland Fire Field Operations.

5. Complainant was employed by CSFS through June 30, 2012.

6. Complainant is one of only 17 individuals nationally who are currently qualified and active as Type I Incident Commanders, directing all activities on the most complex wildfires and other disasters throughout the United States. He serves as an instructor and coach for S-520 Advanced Incident Management at the National Advanced Fire and Resource Technology Center. Additionally, he was recognized as the Outstanding Professional Federal Employee of the Year by the Grand Junction Federal Executives' Association and Colorado Supervisor of the Year to the BLM.

7. While he was employed by CSFS, Complainant was an at will employee exempt from the state personnel system due to his status as an Administrative Professional. No evidence has been presented to indicate that Complainant had any disciplinary or adverse employment actions taken against him while employed by CSFS. Complainant attained superior to exceptional annual performance evaluations at CSFS. He was in good standing with CSFS as of June 30, 2012.

8. As of June 30, 2012, Complainant was one of the two highest paid staff members of CSFS. The other was Richard Homann, who was also terminated by DPS. Mr. Homann's appeal is pending before the Board as Case No. 2013B004.[1]

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[1] On November 7, 2012, ALJ McClatchey issued an Order to Show Cause Regarding Consolidation of the two cases. Respondent filed an objection to consolidation because there are factual differences between the two cases, and ALJ McClatchey issued an Order denying

HB12-1283

9. In the 2012 legislative session, House Representative Mark Barker sponsored HB 12-1283 (HB 1283) to the Colorado legislature. The general purpose of HB 1283, as originally drafted, was to consolidate the functions of Homeland Security from the Office of the Governor to DPS.

10. Jim Davis, the DPS Executive Director, testified that the supporters of HB 1283 were hoping to accomplish the following objectives: (1) create a single point of contact in state government for critical events and disasters; (2) better utilize the ever decreasing federal grant funds for homeland security activities; (3) reduce redundancies in state government; (4) transfer emergency response function from DPS to the Department of Local Affairs (DOLA); and (5) codify provisions of Executive Order D 2011-030.

11. The House Judiciary Committee referred the bill, unamended, to the Committee of the Whole with favorable recommendation on February 21, 2012.

12. The next public hearing on HB 1283 was on May 1, 2012 before the Senate Judiciary Committee. Senator Angela Giron, the bill's senate sponsor, testified that passage of HB 1283 would provide stability and sustainability by codifying responsibility. Specifically, she testified that HB 1283 would: (1) improve coordination and customer service; (2) provide mechanisms for state agencies, federal, tribal and local partners to share information, coordinate training, and streamline risk communication and cooperation on state homeland security strategy; (3) create an advisory committee to increase local participation for homeland security activities; and (4) create a single point of contact and responsibility to provide enhanced accountability for service deliveries.

13. Before presenting the bill, Senator Giron told the committee that she "had to take a deep breath" before presenting the bill because there were "so many different things happening with the bill." At this hearing, the committee members discussed Amendment LO-10, which had been offered the week before and was still in the drafting process. Senator Giron testified that this was a fast-track amendment which was a work in progress.

14. Mr. Davis explained the provisions of Amendment LO-10 to the committee. He testified about the tragic fire that had occurred in Colorado at the beginning of May, and that as a result of that fire, a committee of subject matter experts convened to look into the state's position to respond to wildfires and other disasters. As a result, it was determined that a single agency needed statutory authorization to respond to disasters, including wildfires, and the best place for that responsibility was DPS. Thus, in conjunction with the reorganization of the homeland security functions and responsibilities originally contemplated in HB 1283, Amendment LO-10 sought to reorganize the functions and responsibilities for wildfire management and response for the whole state. Specifically, the amendment proposed transferring the Division of Emergency Management from the DOLA to DPS, and transferring the wildfire fighting responsibilities from the CSFS to DPS. The Division of Fire Safety in DPS would be renamed the Division of Fire Prevention and Control.

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consolidation. On December 5, 2012, the undersigned ALJ issued an Order Denying Consolidation in this matter.

15. The Senate Judiciary Committee referred the amended bill to the Senate Appropriations Committee. The Senate Appropriations Committee referred the amended bill to the Senate Committee of the Whole on May 7, 2012. The Senate Committee of the Whole passed the bill on May 9, 2012. Later that day, the House considered the bill with amendments and concurred. The bill was signed by the Speaker of the House on May 24, 2012, and by the President of the Senate on May 25, 2012. Governor Hickenlooper signed the bill on June 4, 2012. The bill became effective on July 1, 2012, less than one month after it was signed.

16. As set forth below in the Discussion section, HB 1283 provided that certain functions, positions and employees of CSFS were to be transferred to DPS.

Transfer of functions, positions, and employees to DPS, and Complainant's role in the process

17. To accomplish the reorganizational task, a process was created to incorporate the individual employees who were previously responsible for the wildfire functions under CSFS to the new organizational structure under DPS. Each individual whose responsibilities were being eliminated under CSFS participated in drafting the position description questionnaires (PDQs) for the newly created position at DPS that would absorb the responsibilities and duties of their previous position. Previous positions and titles were altered to fit the new structure. Duties, responsibilities, and titles of the previous positions were changed and adjusted to accommodate the intent of HB 1283 to create a single point of contact in the state for events and disasters, including wildfires, and to eliminate redundancies.

18. DPS required each individual incumbent to complete a background packet, participate in a polygraph examination, and complete an application for the newly created position. The individual was then eligible to participate in the interview process.

19. Complainant participated in drafting the PDQ for the Deputy Chief of Wildland Fire Operations position at DPS (Deputy Chief position). This position absorbed the duties he was previously responsible for at CSFS, in addition to supervisory and management duties made necessary by the restructuring of the agencies. The pay range was a higher pay rate than Complainant had been paid by CSFS.[2]

20. DPS posted the Deputy Chief position on June 12, 2012, with a closing date of June 14, 2012. There were no applicants for the position.

21. The PDQ for the Deputy Chief position was modified, and the position was reposted on June 22, 2012, with a closing date of June 25, 2012.

22. Paul Cooke, the Director of the Division of Fire Prevention and Control, encouraged Complainant to apply for the Deputy Chief position. When the position was posted the second time, Complainant was informed by email that the announcement had been posted.

23. On June 22, 2012, in response to an email from Carol Pritchard, DPS Human Resources Specialist, Complainant sent an email to DPS officials stating that he was "interested

[2] As set forth below in the Discussion section, the legislation required that all "positions" be transferred to DPS. Thus, the authority of DPS to reorganize or change the positions prior to the transfer is unclear. However, this issue is not relevant to a determination of this appeal, because the issue is whether Complainant was automatically to DPS as a classified employee.

in retaining his position as Deputy Chief of Fire Operations." Mr. Cooke responded by stating that he should apply for it.

24. Complainant did not complete a background packet, participate in a polygraph examination, or complete an application for the new position during either posting.

25. Another individual applied, Rocco Snart, proceeded through the interview process, and met the minimum qualifications. He was hired for the Deputy Chief position. The Deputy Chief position was classified as a General Professional VI position within DPS.

26. According to Mr. Cooke, Complainant had a good reputation within the fire fighting community. Although he did not review his qualifications because he never submitted an application, in Mr. Cooke's opinion, it was "highly probable" that Complainant would have met the merit and fitness requirements for the Deputy Chief position. He also believed it was likely that, had he participated in the employment process and applied for the position, he would be currently employed in the position.

27. On June 28, 2012, Complainant issued a certified letter to Mr. Davis, stating that he had no plans to resign or retire and that he expected to become an employee of DPS on July 1, 2012. This letter stated that Complainant would continue to report to work and perform normal duties, including assignment to wildland fires, until such time as the final legal interpretation of the law is rendered or he receives written direction from DPS not to do so. Complainant had previously sent an email containing similar information to Ms. Pritchard and other DPS individuals on June 23, 2012.

Complainant's termination of employment

28. Complainant never received a letter or written communication from DPS stating that he had been accepted into a position within DPS.

29. On July 2, 2012, Mr. Cooke issued a letter to Complainant through electronic mail, stating that Complainant's employment with DPS was being terminated effective 12:01 a.m. on July 3, 2012. The letter did not indicate Complainant's position with DPS. This letter did not state a reason for the termination, or make an assertion that Complainant's job performance was unsatisfactory. The letter informed Complainant of his appeal rights to the Board. Despite reference to being sent by certified mail, Complainant was not served with a notice other than the copy sent electronically.

30. On July 6, 2012, DPS issued a warrant check to Complainant in the amount of $6,608.59, for 8 hours of regular work and 240 hours of accrued annual leave. On July 31, 2012, DPS issued a warrant check to Complainant in the amount of $2,747.73, for 85.88 hours of accrued sick leave.

31. DPS created a Public Employees Retirement Account (PERA) account for Complainant and earnings were withheld from his paycheck, employee and employer contributions were deposited in his account, and one month of PERA service was credited toward retirement eligibility. The PERA General Information states that Complainant's latest employer was DPS.

32. Complainant filed a notice of appeal with the Board on July 11, 2012.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-40 (Colo. 1988). A material fact is a fact that will affect the outcome of the case. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Id.* at 376.

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. *Id.* at 375; *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238 (Colo. 1984). Once the moving party "has made a convincing showing that genuine issues of fact are lacking, the nonmoving party must demonstrate by admissible facts that a real controversy exists." *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.2d 598, 603 (Colo. App. 2004).

II. HEARING ISSUES

The issues in this case are whether the Board has jurisdiction over the appeal, and if so, whether DPS acted arbitrarily, capriciously, or contrary to rule or law when it issued the termination notice to Complainant on July 2, 2012. There is no dispute that the action taken was not done for disciplinary reasons. Rather, Respondent argues that Complainant's employment did not automatically transfer to DPS, and because he did not apply for the position at issue, he was never brought into the state personnel system and the Board has no jurisdiction.

Resolution of the threshold jurisdictional issue first requires an analysis of whether the legislature intended for Complainant to be automatically transferred to DPS as a classified employee. If it did, DPS lacked the authority to require Complainant to apply for the position, and he became a classified employee of DPS by operation of law on July 1, 2012. However, if the legislature did not intend for Complainant to become a classified employee by operation of law, Complainant did not apply for the position, and he therefore never became a classified DPS employee.

A. The Legislation is Ambiguous.

In determining the meaning of a statute, a court's central task is to ascertain and give effect to the intent of the general assembly. *Jefferson County Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). The language at issue must be read in the context of the statute as a whole, and the context of the entire statutory scheme. *Id.* A court's interpretation should give consistent, harmonious, and sensible effect to all parts of a statute. *Id.*; *O'Gorman v. Industrial Claim Appeals Office*, 826 P.2d 390, 392 (Colo. App. 1991). The interpretative process begins by looking to the express language of the statute, construing words and phrases according to grammar and common usage. *Gerganoff*, 241 P.3d at 935; § 2-4-101, C.R.S.

If, after review of the statute's language, a tribunal concludes that the statute is unambiguous and the intent appears with reasonable certainty, the analysis is complete.

Gerganoff, 241 P.2d 932, 935. However, where a statute is ambiguous, courts employ additional interpretational aids to assist with selecting among reasonable interpretations of the particular language chosen by the legislature. *Id.*; *Union Pacific R.R. Co. v. Martin*, 209 P.3d 185, 188 (Colo. 2009). A statute is ambiguous when it is "capable of being understood by reasonably well-informed persons in two or more different senses." *Gerganoff*, 241 P.3d at 935; 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 45:2, at 13, 19 (7th ed. 2007).

Here, both parties contend that HB 1283 unambiguously supports their position.

HB 1283 transferred certain functions, positions, and employees from CSFS to DPS. For purposes of this appeal, the three key components of the bill, as codified in statute, are set forth below:

> 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, relating in any way to fire and wildfire preparedness, response, suppression, coordination, or management by the board, the state forest service or its employees 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.
>
> On July 1, 2012, all employees of the board of governors of the Colorado state university system 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 department of public safety. 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.

Under canons of statutory construction, these provisions should be read together to achieve a harmonious and sensible effect. Collectively, the statutes plainly mandated that the

functions, funds and positions of employment in CSFS principally related to wildfire preparedness, response, suppression, coordination, or management were to be transferred to DPS on July 1, 2012. Because all funds and employment positions transferred, there were no layoffs of employees. *See* Board Rule 1-55, 4 CCR 801 ("layoff" means the process of involuntarily separating an employee from a position in the state personnel system due to lack of work, lack of funds, reorganization, or displacement by another employee exercising retention rights); *Cf. Bardsley v. Colorado Dep't of Public Safety*, 870 P.2d 641, 643 (Colo. App. 1994) (layoff occurred where a statute abolished an entire division and 31 FTE and replaced it with a reorganized division in another department with 20 FTE).

Most critically for this analysis, the statutes also mandated that personnel and employees of CSFS be transferred to DPS. Section 23-31-208(2), C.R.S. provides that wildfire related "personnel" be transferred to DPS on July 1, 2012, "pursuant to section 24-33.5-1201, C.R.S." Section 24-33.5-1201(4)(b)(II), C.R.S. states that "all employees" of CSFS employed in wildfire related positions "shall be considered employees" of DPS as of July 1, 2012. If subpart (4)(b)(II) stopped there, the statutes would plainly and unambiguously mandate that all employees of CSFS related to wildfires, including exempt employees, transfer to DPS on July 1, 2012.

However, the next sentence of subpart (4)(b)(II) states that "such employees shall retain all rights under the state personnel system." The term "retain" means "to continue to hold, have, use, recognize, etc., and to keep." Black's Law Dictionary, 6th ed., p. 1316. An individual cannot retain something that he or she does not already have.

Therefore, the use of the word "retain" indicates that the legislature may have presumed that all the affected employees were already within the state personnel system. Or, the legislature may have intended for only those employees already within the state personnel system to transfer by operation of law. Otherwise, employees who previously had no rights within the state personnel system would acquire rights they previously did not hold. Had the legislature intended for state employees who were not within the state personnel system to become classified employees and acquire all rights thereto, the statute presumably would have so stated. Alternatively, the statutes could reasonably be construed as transferring all the employees to DPS, with the employees retaining any and all rights they held. As Complainant held no rights in the state personnel system, he would be transferred to an unclassified position within DPS.

Due to the use of the terms "personnel" and "all employees," the statutes may reasonably be construed as transferring all employees, including state employees outside of the state personnel system, into DPS as classified employees. Or, due to the use of the term "such employees shall retain all rights under the state personnel system," the statutes may reasonably be construed as automatically transferring only those employees already within the state personnel system to DPS.

The statutes are therefore ambiguous. When a statute is ambiguous, extrinsic aids to interpretation may be employed to determine legislative intent. *Gerganoff*, 241 P.3d 932, 935.

B. The Legislative History is Unavailing.

In denying Respondent's motion to dismiss, the ALJ previously concluded that the statutory scheme was ambiguous, and requested the parties to provide and/or brief HB 1283's legislative history. A primary and important resource for determining legislative intent is the

discussion which takes place in hearings before House and Senate Committees concerning a bill. *O'Gorman*, 826 P.2d at 392.

In response, Complainant tendered an affidavit of State Representative Randy S. Fischer regarding his interpretation of the relevant statutory language. According to Mr. Fischer's affidavit, he believed that the legislature intended to include all CSFS employees principally employed in the area of fire and wildfire preparedness, regardless of their classification status "without further requirement upon the employees to compete or recompete to retain the positions they already held," in the transfer of personnel to DPS.

However, the affidavit of a single state legislator, in and of itself, does not reveal legislative intent. *See Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026, 1030 (Colo. App. 1993) (the post-enactment recollections of a legislator do not constitute legislative history and are not admissible to establish legislative intent). Moreover, Representative Fischer was not the sponsor of HB 1283. Indeed, he voted against the concurrence of the Senate's amendments to the bill, and then voted against the bill itself. Therefore, Representative Fischer's interpretation of HB 1283 does not constitute legislative history and is not relevant in determining legislative intent.

Respondent provided written legislative history of HB 1283. No evidence was submitted indicating that there was any relevant discussion of the critical language during the legislative committee hearings. The written legislative history revealed that the pertinent provisions were added to HB 1283 at the eleventh hour of the session (May 2012) through amendment. Under these circumstances, the legislative history of HB 1283 is not instructive as to legislative intent.

C. Complainant's Proposed Interpretation of HB 1283 Would Result in Constitutional Infirmity.

A statute is presumed to be constitutional. *People v. Longoria*, 862 P.2d 266 (Colo. 1993); *see also* § 2-4-201(1), C.R.S. (in enacting a statute, it is presumed the legislature intended compliance with the U.S. and Colorado Constitutions). When a statute may be interpreted in two ways, the way which renders it constitutional must be adopted. *Catholic Health Initiatives Colo. v. City of Pueblo*, 207 P.3d 812, 822 (Colo. 2009); *see also Hall v. Walter,* 969 P.2d 224, 229 (Colo. 1998) (although a court must give effect to the statute's plain and ordinary meaning, the intention of the legislature prevails over a literal interpretation of the statute that conflicts with the Colorado or United States Constitutions).

The Board does not have the authority to determine whether acts of the legislature are unconstitutional on their face. *Horrell v. Dep't of Administration*, 861 P.2d 1194, 1198 (Colo. 1993). However, the Board may evaluate whether an otherwise constitutional statute has been unconstitutionally applied with respect to a particular personnel action. *Id.* at 1198, n.4. In interpreting HB 1283, the Board therefore has the authority to consider whether Complainant's interpretation of the pertinent statutory provisions would be unconstitutional as applied to Respondent's action. Such an interpretation is not tantamount to a declaration that HB 1283 is unconstitutional on its face.

Respondent contends that if HB 1283 is construed as automatically transferring Complainant, as a non-classified state employee, into a classified position within the state personnel system, the legislation would violate the merit and fitness requirements of Colo. Const. art. XII, § 13. In contrast, Complainant asserts that if HB 1283 did not unambiguously

transfer him into a classified position within DPS, he met the merit and fitness requirements by virtue of obtaining his position with the CSFS nine years earlier.

Article XII, § 13 of the Colorado Constitution establishes the criteria for hiring and promotion within the state personnel system. *Colorado Association of Public Employees v. Lamm*, 677 P.2d 1350, 1359 (Colo. 1984). In particular, Colo. Const. art. XII, § 13(1) provides that "[a]ppointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence without regard to race, creed, or color, or political affiliation."[3] Further, Colo. Const. art. XII, § 13(5) states in relevant part that the "person to be appointed to any position under the personnel system shall be one of the three persons ranking highest on the eligible list for such position, or such lesser number as qualify, as determined from competitive tests of competence." The purpose of competitive examination provisions in the Constitution is to promote the efficiency of civil service by employing and advancing only those persons who have demonstrated qualification through testing. *Lamm*, 677 P.2d at 1361.

In short, as of July 1, 2012, the applicable constitutional provisions mandated that all appointments to positions within the state personnel be made according to merit and fitness, to be ascertained by "competitive tests of competence." Under the former "Rule of Three," the person appointed had to be one of the three persons ranking highest on the eligible list for the position (or such lesser number as met the minimum qualification) determined by the competitive tests of competence.

Here, Complainant obtained his CSFS position outside of the state personnel system by interviewing for the position. Although the position was posted and Complainant obtained the position through the application and interview process, there is no evidence that Complainant underwent a "competitive test of competence" or examination to obtain that position.

More critically, the subject position within DPS was a classified position. The compensation for the DPS position was also greater than the compensation for the former position at CSFS. Respondent posted the subject Deputy Chief position and encouraged Complainant to submit an application and background packet. Complainant elected not to proceed with the application process, and never initiated the selection process. Under these undisputed facts, Complainant did not go through a competitive test of competence for the classified Deputy Chief position as contemplated by Colo. Const. art. XII, § 13(1) or (5). If HB 1283 were interpreted to automatically place Complainant into the classified Deputy Chief position within DPS, the statutory provisions would therefore conflict with the merit and fitness clauses of the Colorado Constitution.[4]

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[3] Colo. Const. art. XII, § 13 was amended by the electorate in November 2012. Because the employment action at issue occurred prior to amendment, the prior version of the constitutional provision applies here.

[4] The determination that Complainant did not demonstrate compliance with the merit and fitness constitutional requirements should in no way be construed that he was not qualified for the Deputy Chief position. Complainant served in the wildfire fighting field with distinction for 37 years. He was encouraged to apply for the position, but elected not to. The conclusion that he did not demonstrate the constitutionally required merit and fitness is based solely on the undisputed fact that he did not apply for, and therefore did not compete for, the classified position.

Moreover, if the statutory scheme was interpreted to mandate the transfer of Complainant to DPS as an exempt employee, this interpretation would violate Colo. Const. art. XII, § 13(2), which requires all non-politically appointed DPS employees to be classified. Additionally, under this interpretation, the Board would lack jurisdiction over the appeal, because Complainant would not be a classified employee.

D. Board Rule 4-19

In interpreting a statute, it must be presumed that the General Assembly was cognizant of the existing procedure adopted by an administrative agency in fulfilling its delegated duties. *O'Gorman*, 826 P.2d at 392. In March 2011, the Board amended Board Rule 4-19, 4 CCR 801 to implement the constitutional merit and fitness requirements in situations similar to the one at hand. Board Rule 4-19 states:

> Any person currently or previously employed by the state of Colorado, not within the state personnel system, must successfully complete the selection process before being placed in a position in the state personnel system. Treatment of such person is subject to the provisions of § 24-50-136, C.R.S.[5] This includes political subdivisions of the state with similar merit systems that have a formal arrangement with the Board.

As of June 30, 2012, Complainant was employed by the state of Colorado, but was not within the state personnel system. Under Board Rule 4-19, he was therefore required to successfully complete the selection process before being placed into the classified Deputy Chief position with DPS. He did not begin the selection process.[6]

E. *Rice v. AHEC*

Lastly, although the case involved certified employees laid off from their positions, *Rice v. Auraria Higher Educ. Center (AHEC)*, 131 P.3d 1096 (Colo. App. 2005) is instructive. In *Rice*, the petitioners were laid off from their employment as certified state employees of the University of Colorado Denver (UCD) Media Center. Petitioner Rice applied for a new position with AHEC, where the new positions were located, but was not provided with reinstatement rights as required by law and Board Rules. The Court of Appeals therefore upheld the ALJ's initial decision reversing AHEC's action in not hiring him. *Id.* at 1102-03. In contrast, petitioner Wells did not apply for an AHEC position. The ALJ and the Board concluded that by failing to apply for an AHEC position, Wells did not provide notice of his intent to protect his tenure right, and AHEC did not violate his rights. In upholding this determination, the Court of Appeals held that "by failing to apply for a transfer, Wells is precluded from challenging AHEC's hiring decisions,

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[5] Section 24-50-136, C.R.S. provides that 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 is credited with his or her former state service for purposes of leave, seniority, and other benefits. Although this statute contemplates non-classified employees entering or being brought into classified positions, it does not provide the mechanism for how this occurs or state that the entry into the classified position is exempt from the merit and fitness requirements.

[6] Had Complainant been a classified employee, he would not have been lawfully required to apply for the position, because HB 1283 transferred the CSFS employees within the state personnel system to DPS.

and he waived any right to ask the Personnel Board to order AHEC to give him a job." *Id.* at 1103.

Thus, in *Rice*, petitioner Wells was unable to avail himself of his reinstatements rights as a classified, certified employee because he did not apply for the new position at AHEC. Similarly, here, even though he was not a classified employee, Complainant had the opportunity to apply for the classified Deputy Chief position, but decided not to apply. According to Mr. Cooke's affidavit, had Complainant applied, he "likely" would have been accepted and entered the state personnel system. In not applying for the position in question, Complainant is precluded from arguing that he met the merit and fitness requirements. Instead, to prevail, Complainant must demonstrate that HB 1283 transferred him from an exempt position to a classified position by operation of law. As set forth above, such an interpretation would result in constitutional infirmity.

F. The Board Does Not Have Jurisdiction Over This Appeal.

Based on the foregoing analysis, Complainant was not employed within the state personnel system at the time of his termination on July 2, 2012. The Board has jurisdiction over certain employment actions taken against classified employees within the state personnel system. *See* Colo. Const. art. XII, §13(8) (any action of an appointing authority disciplining a person certified to any class or position in the state personnel system is subject to appeal to the Board); § 24-50-101(1), C.R.S. (purpose of the State Personnel System Act is to provide a sound personnel management and administration system for the employees within the state personnel system). Additionally, the Board has the authority to decide selection appeals alleging discrimination. Section 24-50-125.3, C.R.S. (an applicant who alleges discriminatory practices may appeal to the Board).

In contrast, except for selection appeals involving discrimination, the Board lacks jurisdiction over employment disputes regarding non-classified personnel. Complainant did not hold or acquire a classified position in the state personnel system, and has not brought a selection appeal alleging discrimination. Accordingly, the Board lacks jurisdiction to hear this appeal. Due to lack of jurisdiction, the Board is without authority to overturn or rescind the employment action taken by Respondent. Section 24-50-103(6), C.R.S. (an action of an appointing authority appealable to the Board by statute or the state constitution may be reversed or modified on appeal only if at least three Board members find the action to have been arbitrary, capricious, or contrary to rule or law).

CONCLUSIONS OF LAW

1. The Board lacks jurisdiction over Complainant and this appeal because Complainant was not a classified state employee at the time of his termination.

2. The Board therefore lacks the authority to overturn or rescind the action of the Respondent.

ORDER

The Board lacks jurisdiction over this appeal. Complainant's notice of appeal is therefore dismissed with prejudice.

Dated this 21st day of February, 2013 at Denver, Colorado.

[redacted]

Robert R. Gunning
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 22nd day of February, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Robert P. Blume
[redacted]

Alice Q. Hosley A.A.G.
[redacted]

[redacted]

Woods, Andrea

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.