

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. **2021B040**

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**ORDER DENYING COMPLAINANT'S DISPOSITIVE MOTION, GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and NOTICE OF APPEAL RIGHTS**

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**JEROME GREENE,**

Complainant,

v.

**UNIVERSITY OF COLORADO BOULDER, COLLEGE OF ARTS & SCIENCES,**

Respondent.

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This matter is before the Senior Administrative Law Judge (ALJ) on Complainant's Dispositive Motion, filed March 29, 2021; Respondent University's Motion to Dismiss Or In The Alternative Motion for Summary Judgment, filed April 14, 2021; and Complainant's Objection to Motion to Dismiss and Motion for Summary Judgment, filed April 15, 2021.

The ALJ also reviewed the following filings by Complainant: Complainant's Prehearing Statement, filed March 29, 2021; Addition to Dispositive Motion, filed April 2, 2021; Complainant's Exhibit 1 – Emails, Complainant's Exhibit 2 - Perjury, Complainant's Exhibit 3 - Manipulation, Complainant's Exhibit 4 - Law, Complainant Witness #1, and Complainant Witness #2, all filed April 5, 2021; Addition to Prehearing Statement, filed April 7, 2021; and More Materially False Statements by CU Counsel, filed April 15, 2021.

Having reviewed the parties' arguments, exhibits and applicable legal authorities, and being sufficiently advised, the ALJ finds and orders as follows:

**UNDISPUTED MATERIAL FACTS**

1. Complainant has been employed by Respondent for 23 years. He is currently works as a Laboratory Coordinator III in the University's Department of Molecular, Cellular and Developmental Biology.

2. Complainant is a certified employee and, until May 29, 2021, was a full-time permanent employee.

3. In May 2020, Complainant became aware that Respondent was experiencing a "budget crisis." Complainant offered to reduce his position to half-time if he could collect PERA retirement benefits to supplement his income.

4. On February 12, 2021, Complainant received a "Notice of Layoff – Appointment Reduction." This Notice informed Complainant that, because of a reduction in the volume of available laboratory support work, in part due to COVID-19, his position would be reduced to a 37.5% position, effective at the close of the work day on May 29, 2021.

5. Respondent University's Administrative Policy Statement (APS) 5054, Section I (A), states, in pertinent part: "Retirees may be hired into university staff or classified positions but are limited to a 9-month or 12-month or other defined project period."

### **STANDARD OF REVIEW**

The nature of Complainant's Dispositive Motion is unclear. Respondent has filed a Motion to Dismiss Or In The Alternative Motion for Summary Judgment. Because both parties submitted exhibits in support of their motions, which were considered by the ALJ, their respective motions shall be analyzed as motions for summary judgment under C.R.C.P. 56.

The purpose of summary judgment is to permit the parties to pierce the formal allegations and save the time and expense connected with a 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 appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c); *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 the motion and identifying those portions of the record and of the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact. 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 material fact. *Continental Air Lines*, 731 P.2d at 713. A material fact is one that might affect the outcome of the lawsuit. *Krane v. St. Anthony Hospital Systems*, 738 P.2d 75, 77 (Colo. App. 1987). The ultimate burden of persuasion, however, always remains on the moving party. *Continental Air Lines*, 731 P.2d at 712.

### **ISSUE TO BE DETERMINED**

Should Respondent be required to retain or rehire Complainant as a certified, permanent part-time employee following his retirement?

### **ANALYSIS**

Complainant has confirmed that he is not alleging that Respondent violated the Layoff Principles outlined in Chapter 7 of the State Personnel Board Rules and Personnel Director's Administrative Procedures, 4 CCR 801-1. Rather, Complainant wishes to retain a classified part-time position and collect Colorado Public Employee Retirement Association (PERA) benefits to supplement his lost salary. Complainant does not believe he needs to terminate his employment with Respondent in order to collect PERA retirement benefits. Respondent has indicated a willingness to hire Complainant as a temporary part-time employee after he retires. However, Complainant does not want to retire if he cannot be retained as a classified employee. Complainant contends that Respondent is "interfering" with his right to collect PERA retirement benefits by refusing to retain him as a part-time classified employee once he retires. Complainant argues that this refusal violates Art. XII, §13 of the Colorado Constitution.

Nothing in Art. XII, §13 of the Colorado Constitution requires a state agency to retain or rehire a classified employee once he retires. Complainant argues that, in order to compensate him for the reduction of hours imposed by Respondent, he should be permitted to remain a certified employee while “partially” retiring and collecting PERA retirement benefits. Complainant has provided no legal authority permitting such “partial” retirement.

Complainant argues that he does not need to terminate his certified employment to be eligible for collecting PERA retirement benefits. However, all relevant legal authority indicates that “retirement” from state employment necessarily involves separation from that employment. Board Rule 1-67 defines “retirement” as “[s]eparation of an employee from the state personnel system who is eligible to retire...” The statutes governing PERA confirm this definition. Section 24-51-101(19), C.R.S. provides: “Effective date of retirement’ means the date after termination of employment on which the member becomes eligible for benefits.” Section 24-51-1101(1), C.R.S., provides that service retirees may not work “during the month of the effective date of retirement.”

These legislative provisions are echoed in PERA’s “Working After Retirement” publication (February 2021), which was attached to Respondent’s Motion as an exhibit. The very first sentence in the initial “Overview” section of this publication unequivocally states: “In order to retire and receive a Colorado PERA benefit, you must terminate employment with all PERA employers.” A similar instruction appears in the “Returning to Work for a PERA Employer” section:

There must be a termination of employment for you to be eligible to retire; any return to work in the effective month of retirement, even with a new PERA employer, may cause PERA to question whether you were truly terminated from all PERA covered employment.

The Colorado PERA Rules cited by Complainant also acknowledge the necessity of terminating employment to be eligible for retirement. Rule 6.30(A) states, in pertinent part, that “the effective date of retirement shall be no earlier than the first day of the month following the last day of employment.”

Complainant has failed to provide any legal authority supporting his argument that Respondent should be required to retain or rehire him as a certified part-time employee once he has retired. Complainant argues that APS 5054 permits Respondent to rehire retirees in part-time certified positions. However, Complainant does not cite any authority that requires Respondent to rehire retirees in part-time certified positions. Alternatively, Complainant argues that his requested relief should be granted as a “fair employment practice” implicitly contained in Board Rule 7-2’s encouragement of “progressive employment practices” and “alternatives to minimize or avoid layoffs of employees in the state personnel system.” While strongly encouraging the consideration of various alternatives to layoffs, Board Rule 7-2 does not require a state employer to take any specific action.

Finally, Complainant has identified a number of assertions by Respondent and its attorney with which he disagrees, and has labeled these statements as “perjury.” After reviewing these disputed assertions, the ALJ has determined that they are not material to the outcome of the dispositive motions currently before the ALJ. *Krane v. St. Anthony Hospital Systems*, 738 P.2d at 77.

After reviewing all of the submissions by the parties and the applicable legal authorities, the ALJ finds that Respondent cannot be required to retain or rehire Complainant as a certified, permanent part-time employee following his retirement.

### **CONCLUSIONS AND ORDER**

Because there is no genuine issue of material fact, and no legal basis for the relief sought by Complainant in his appeal, summary judgment is appropriate for Respondent as a matter of law. C.R.C.P. 56(c); *Continental Air Lines, Inc. v. Keenan*, 731 P.2d at 712 (Colo. 1987).

IT IS THEREFORE ORDERED that Complainant's Dispositive Motion is DENIED and Respondent's Motion for Summary Judgment is GRANTED. Complainant's appeal is hereby **dismissed with prejudice**. All scheduled hearings and prehearing deadlines are VACATED.

Dated this 21st day of  
April 2021, in  
Denver, Colorado

/s/ Susan J. Tyburski  
Susan J. Tyburski,  
Senior Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4<sup>th</sup> Floor  
Denver CO 80203

### **CERTIFICATE OF SERVICE**

This is to certify that on the 21st day of April 2021, I electronically served a true and correct copy of the foregoing **ORDER DENYING COMPLAINANT'S DISPOSITIVE MOTION, GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and NOTICE OF APPEAL RIGHTS** as follows:

Jerome Greene  
[REDACTED]

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*Andrea Woods*

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## **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 8-62, 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 8-65, 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 8-63, 4 CCR 801.

### **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 8-64, 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 8-67, 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 8-70, 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 of receipt of the decision. The petition for reconsideration must allege an oversight or misunderstanding 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 8-60, 4 CCR 801.

Due to concerns about the Novel Coronavirus, the parties may file by email to:  
[dpa\\_state.personnelboard@state.co.us](mailto:dpa_state.personnelboard@state.co.us). Instructions for filing by email can be found at:  
<https://spb.colorado.gov/forms-and-filing>.