

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2022B052**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STEVE IDA,
Complainant,

v.

UNIVERSITY OF COLORADO BOULDER, STUDENT ACADEMIC SUCCESS CENTER,
Respondent.

Administrative Law Judge (“ALJ”) McCabe held an evidentiary hearing on May 31, 2023 and June 1, 2023. On May 31, 2023, the hearing was conducted on site at 1525 Sherman Street, 4th Floor, Courtroom 6 in Denver, Colorado. On June 1, 2023, the hearing was conducted remotely using Google Meet. The record closed on July 5, 2023.¹ Steve Ida (“Complainant”) appeared on Complainant’s own behalf. Bijan Bewley, Esq., represented SASC, University of Colorado Boulder, Student Academic Success Center (“Respondent” or “SASC”). Dr. Corinna Rohse, Complainant’s Appointing Authority, appeared as SASC’s advisory witness.

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

MATTER APPEALED

Complainant, a certified employee, appeals SASC’s decision to lay off Complainant from employment. Complainant argues SASC failed to comply with Board Rules during the layoff process and discriminated against him in violation of the Colorado Anti-Discrimination Act (“CADA”) on the basis of age. Complainant seeks \$1,550 in legal fees or an apology from SASC and restoration to an equivalent position.

SASC argues its decision to layoff Complainant was not arbitrary, capricious, or contrary to rule or law, and denies that it discriminated against Complainant in violation of CADA.²

For the reasons discussed below, SASC’s layoff of Complainant from employment is **AFFIRMED**.

¹ There was a delay in closing the record due to issues with the redaction of exhibits. Some improperly redacted exhibits were ultimately excluded from the record. The excluded exhibits are, in some form, duplicated in other exhibits.

² Respondent’s Prehearing Statement and arguments at hearing requested attorney’s fees. The Administrative Law Judge set a deadline for the parties to submit written requests for attorney’s fees following the hearing. Respondent filed none. Therefore, Respondent’s request for attorney’s fees is considered abandoned.

ISSUES

1. Was SASC's decision to lay off Complainant from employment arbitrary, capricious, or contrary to rule or law?
2. Did SASC discriminate against Complainant in violation of CADA on the basis of age?

FINDINGS OF FACT

Background

1. Corinna Rohse, Director of SASC, was Complainant's appointing authority from 2012 through the time of Complainant's layoff. Dr. Rohse began work for the SASC in this position on July 1, 2012.
2. SASC is an educational opportunity center.
3. SASC works only with eligible disadvantaged (first generation or low-income) students, and students who are underrepresented in higher education. Underrepresented students include individuals who are aging out of foster care, adult learners, veterans, students with learning or physical disabilities, and students from underrepresented minority, linguistic, or ethnic groups.
4. SASC's mandate is to improve academic outcomes for participating students.
5. Complainant began work for SASC in approximately 2001 in a temporary position.
6. In 2006, SASC converted Complainant's position to a classified State Service Professional Trainee I position ("Position"). The Class title for the Position was State Service Professional Trainee I.
7. Per the job conversion paperwork, the "Nature of Work" for the Position was to, "...serve as Tutors in [SASC]. Responsibilities include tutoring university students one-on-one or in small groups to improve understanding of university course material."
8. The Position was a 1% on-call position, with no guaranteed working hours. SASC contacted Complainant as needed when work was available.
9. In the Position, Complainant worked as a Professional Tutor. Complainant provided content-based professional tutoring.
10. Professional Tutors provide the highest level of content-based tutoring. Undergraduate and Graduate Student Tutors provide lower levels of content-based tutoring.
11. In 2011, SASC stopped providing work to Complainant and all other Professional Tutors due to issues with funding.
12. Complainant has not performed any work for SASC since late 2011.
13. Complainant was the last Professional Tutor to perform any work for SASC.

14. From 2011 to 2019, SASC continued to employ Graduate and Undergraduate Student Tutors to provide content-based tutoring.

15. In 2019, SASC ceased providing all content-based tutoring. The content-based tutoring model was too expensive for SASC to maintain.

16. In 2019, SASC changed to a learning mentor model. The learning mentor model seeks to improve learning skills.

17. In the time period between 2011 and 2021, SASC had available positions. SASC's available positions included instructor positions. The instructor positions teach credit-bearing courses. SASC's instructor positions are not part of the classified state personnel system. The available positions also included positions open only to students enrolled in SASC's program. SASC offers student-only positions to engage the students, and improve academic outcomes for the students.

18. Complainant is not eligible for student-only positions, because he is not a student enrolled in SASC's program.

19. In the time period between 2011 and 2021, Complainant did not apply for any of SASC's available positions. Complainant, however, sent inquiries to SASC expressing an interest in working for SASC. SASC did not respond to Complainant.

Other Tutoring Provided by Complainant

20. Complainant holds a second 1% on-call position with the University of Colorado Boulder's Athletic Department. As of the dates of the evidentiary hearing, Complainant continues to work in the position with the Athletic Department.

21. Complainant provides, or has provided in the past, tutoring for the Department of Naval Sciences as a Federal Independent Contractor. Although this tutoring is associated with the University of Colorado Boulder, it is not a position with the University of Colorado Boulder. Complainant was not paid by the University of Colorado Boulder for his work as a Federal Independent Contractor.

2013 and 2015 Communications Related to Complainant's Employment Status

22. In 2013, Complainant engaged in an email exchange with Karen Wyatt, SASC Tutor Program/Academic Skills Specialist.³ Ms. Wyatt was Complainant's supervisor. Ms. Wyatt wrote, in part, "Steve, I am so sorry you feel emotion that SASC no longer employs you. It was not my decision at all. All the non-student tutors were not rehired. It was not personal...I refer clients to you a lot, as I feel you were a great tutor."

23. SASC did not separate Complainant from employment in 2013. Complainant continued to hold the Position.

³ Ms. Wyatt has since retired from employment with Respondent.

24. Following his email exchange with Ms. Wyatt, Complainant believed SASC no longer employed him. Complainant did not seek State Personnel Board (“Board”) review of Ms. Wyatt’s 2013 email and what he believed was a separation.

25. In 2015, there were five Professional Tutors, including Complainant, who remained on SASC’s employee roster.

26. In 2015, Human Resources worked on a project to update SASC’s employee rosters.

27. Human Resources informed Dr. Rohse about the remaining Professional Tutors, including Complainant. Dr. Rohse was not aware there were Professional Tutors until that time.

28. In 2015, Dr. Rohse informed Complainant in writing that he was going to be laid off from the Position. Dr. Rohse provided Complainant the opportunity to resign or be laid off.

29. SASC did not complete a layoff of Complainant in 2015. Complainant continued to hold the Position.

30. In approximately December 2015, Complainant sent an email to Kat Scheible, Human Resources, and Dr. Rohse with a list of “interrogatories.” Neither person responded to the interrogatories.⁴

31. Complainant did not follow-up with SASC after sending the “interrogatories.”

32. Complainant did not seek Board review of the 2015 communication from Dr. Rohse regarding layoff.

2021 Layoff

33. In October 2021, in the midst of the pandemic, SASC returned employees to work following 15 months of remote teaching and learning. Upon that return, there was a mandatory vaccination requirement for all University employees and students. At that time, Dr. Rohse began a review of SASC’s employee rosters to confirm compliance with the vaccination requirement.

34. In reviewing employee rosters, Dr. Rohse became aware three Professional Tutors, including Complainant, still held their positions with SASC.

35. Dr. Rohse began working with Taylor Craven, Employee Relations Specialist,⁵ to lay off the remaining three Professional Tutors.

36. On November 2, 2021, Employee Relations Specialist Craven requested a retention rights calculation for Complainant and the two other Professional Tutors.

⁴ The record is unclear on if Dr. Rohse received the interrogatories, and when Ms. Scheible received the interrogatories. Dr. Rohse did not recall receiving the interrogatories. Ms. Scheible testified she received the interrogatories at some point, but it was initially sent to a spam folder.

⁵ Employee Relations Specialist Craven’s position has changed since the time period at issue.

37. On November 3, 2021, Employee Relations Specialist Craven received confirmation that Complainant was not entitled to retention rights.

38. In making the decision to layoff the Professional Tutors, Dr. Rohse considered the amount of work they had done over the past ten years, their positions in light of SASC's learning mentor model and the pandemic, and budgetary restraints resulting from the pandemic.

39. The reason for the layoff was lack of work. The Professional Tutors had not worked in 11 years. SASC had also restructured to eliminate all content-based tutoring positions in 2019. SASC no longer utilized any content-based tutors at the time of layoff.

40. On November 29, 2021, SASC posted the layoff plan:

Purpose of this memo

The purpose of this memo is to inform the Student Academic Success Center (SASC) faculty and staff of a scheduled layoff. Per the State Personnel Board Rules and Directors Procedures, for any and all layoffs, after making its business decisions and ten days prior to issuing the first layoff notice, the department shall post a layoff plan, signed by the Executive Director, head of a principal department or designee, both in a conspicuous place where all impacted parties have access to view the posting and on the University of Colorado at Boulder Human Resources website <http://www.colorado.edu/hr/>. The purpose of the layoff plan is to facilitate strategic planning prior to the abolishment of any positions and to provide an open and transparent explanation for the elimination of positions and/or services.

Description of the planned changes

SASC has three 1% on-call positions in our unit which prior to 2011 served as professional tutors in the SASC Tutoring Program on the occasion that tutoring service beyond the scope of work (content expertise) of peer tutors was required. There are no documented occasions of work for these three positions since 2011. This 10-year period with no on-call hours reflects a lack of work for professional tutors who provide tutoring service beyond the scope of work (content expertise) of peer tutors. In 2019, SASC eliminated the tutoring program within its Supplemental Instruction Services and launched a new initiative call the Learning Mentor Program (now in its third year) that provides metacognitive skill training (not content-based tutoring). The new program uses peer learning mentors (not peer tutors) with duties of Student Assistant III-IV positions. Peer learning mentors create a cadre of student leaders in the center who model academic success outcomes for other SASC students. They are not tutors (content specialists). Instead, they are trained in the high-impact practice of metacognition which supports students by "learning how to learn." Due to this shift in our program services, there has not been and there will be no future work for these 1% on-call positions. Therefore, our unit has decided to eliminate these positions accordingly.

Organizational chart changes

N/A

Positions to be Abolished

All 1% On Call State Serv Prof Train I positions will be abolished. Position numbers can be found under "Classes Affected."

Positions to be Shifted

N/A

Positions to be Added

N/A

Reasons for the change

The lack of work backdates to 2011.

The reorganization backdates to 2019. The elimination of these positions is occurring now because our department is prioritizing the need to have a personnel roster that accurately reflects our current staffing in hourly effort and salary budget. This effort ensures compliance with fiscal stewardship and with public health guidelines in our post-pandemic return to campus (2021-22).

Anticipated benefits and results

The overall anticipated benefit of this plan is an eliminated redundancy of 1% On Call State Serv Prof Train I positions which have no documented work for a 10-year period. Additionally, our unit will see improved effectiveness of an accurate personnel roster for fiscal and public health compliance.

Expected changes for the employees

There are three (3) incumbents in the 1% On Call State Serv Prof Train I positions who will be subject to layoff and loss of pro-rated benefits due to lack of work. No other employees in the department will be impacted.

Work absorption

SASC closed its Tutoring Program in 2019. There has been no work to offer these 1% On Call State Serv Prof Train I positions since 2011. Consequently, there is no work or percentage effort to reassign once the 1% On Call State Serv Prof Train I positions are eliminated.

Classes affected

[Listing of the Job Codes, titles, positions numbers, business title, and FTE for the three eliminated positions]

Please contact Corinna S. Rohse if you have any questions about this notice.

41. On November 29, 2021, Dr. Rohse sent Complainant an email notifying Complainant of the layoff. The email included a link to the posted layoff plan.
42. On November 30, 2021, Complainant responded to the email. Complainant wrote, in part:

As per State Employee Personnel Directives and Procedures, I am informing you of my intention to actively contest your layoff plan for position #612727 along with all necessary notifications to associated offices of Human Resources, EEOC, Colorado Civil Rights representatives.
43. On December 7, 2021, Dr. Rohse responded to Complainant's email. Dr. Rohse offered to meet with Complainant by "zoom conference or telephone call prior to 9-Dec-21 to answer any

questions you may have or hear any mitigating information you have to offer as to why this decision should not be made (as is the purpose of this 10-day consideration period)."

44. On December 7, 2021, the University of Colorado Boulder's Office of Institutional Equity and Compliance sent an email to Complainant and Dr. Rohse. The email provided the names and email addresses of the point people, Natasha Doorn and Tessa Daniels, assigned to Complainant's case as a result of Complainant's November 30 email.

45. On December 9, 2021, Dr. Rohse sent a certified letter to Complainant notifying Complainant of layoff.⁶ The letter included the following:

We are writing to notify you that due to reorganization and a lack of work with the Student Academic Success Center (SASC), the position which you now occupy...is to be abolished. As you may be aware, SASC closed its Tutoring Program in 2019 and we have had no work to offer the State Serv Prof Train I positions since 2011. Due to these factors and in accordance with State Personnel Board Rules Chapter 7, the date of the abolishment is at the close of the workday on January 24, 2022 and will result in separation of your employment from the University of Colorado Boulder.

Please contact Sonya Todacheene at [contact information] to arrange a time to complete check-out procedures. You may also want to contact a benefits counselor at Employee Services at [contact information] to provide you with information about continuation of your health insurance benefits under the COBRA program. The benefits counselor can also assist you in understanding your PERA benefits.

You may contact Taylor Craven, Employee Relations Consultant, at [contact information] to discuss the layoff process if you have questions.

You may protest this action by filing an appeal with the State Personnel Board. Employee relations has standard appeal forms for your use. You may contact Taylor Craven to initiate this process. The appeal must be postmarked, delivered, emailed, or faxed no later than ten (10) calendar days after your receipt of this letter, addressed as follows:

[State Personnel Board address, fax, and email address]

For detailed information regard the appeals process, you can view Board Rule 8-6 on the [Colorado State Personnel Board website](#). The ten-day deadline and these appeal procedures also apply to all charges of discrimination.

I am sorry that the present circumstances make issuing this letter necessary.

46. On December 15, 2021, the University of Colorado Boulder's Office of Institutional Equity and Compliance again reached out to Complainant by email. The email informed Complainant

⁶ Complainant's Consolidated Appeal and Dispute Form represents that Complainant received the letter on December 14, 2021.

that if he wanted to speak with Ms. Doorn, Complainant and Ms. Doorn could have a meeting via telephone or zoom.

47. Complainant timely filed an appeal of the layoff with the Board.

48. Despite attempts at communication from the University of Colorado Boulder's Office of Institutional Equity and Compliance and SASC, Complainant chose not to further engage regarding the layoff because he had filed an appeal with the Board.

49. SASC eliminated Complainant's position and laid off Complainant.

50. Complainant was 67 years old at the time of the layoff.

51. SASC did not place Complainant on a reemployment list.

52. SASC did not do a ranking system in the layoff process.

53. Dr. Rohse was unaware of Complainant's age at the time SASC laid off Complainant from employment.

54. Employee Relations Consultant Craven was aware of Complainant's age at the time of layoff due to the retention rights calculation, which included Complainant's birthdate and age.

ANALYSIS

A. THE BOARD DOES NOT HAVE JURISDICTION TO REVIEW THE 2013 AND 2015 COMMUNICATIONS TO COMPLAINANT.

While the 2013 and 2015 communications to Complainant have limited relevance to the issues before the Board, the Board does not have jurisdiction to review them, because Complainant did not timely seek Board review of either.

Pursuant to Board Rule 8-7(A), an appeal is timely if it is postmarked or received within 10 days after receipt of the written notice of action or no later than 10 days after the employee knew of the alleged improper action. The Board does not have jurisdiction to review an action that is not timely appealed. *See State Pers. Bd. v. Gigax*, 659 P.2d 693, 694 (Colo. 1983) ("The ten-day limitation set forth in section 24-50-125(3), C.R.S. 1973 is mandatory. Filing of a petition for appeal with the Board or a request for an extension of time in which to file an appeal within the ten-day period is a condition precedent to further action.").

Complainant, as a classified state employee, is charged with knowing the State Personnel Board Rules. *See* Board Rule 1-12. Complainant, through procedures established by Board Rule, could have attempted to address Complainant's concerns with Respondent or the Board following the communications received in 2013 or 2015. Complainant could have, but did not, seek Board Review of either communication within 10 days of receiving the communication. Therefore, the Board does not have jurisdiction to review SASC's 2013 and 2015 communications with Complainant.

B. SASC'S DECISION TO LAYOFF COMPLAINANT FROM EMPLOYMENT WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

Complainant bears the burden to prove by a preponderance of the evidence that SASC's decision to lay him off from employment was arbitrary, capricious, or contrary to rule or law. §24-50-103(6), C.R.S.; *Velasquez v. Dep't of Higher Educ.*, 93 P.3d 540, 542-44 (Colo. App. 2004).

a. SASC's decision to layoff Complainant from employment was not arbitrary or capricious.

In determining whether an agency's decision to separate an employee 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," 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).

As to the first *Lawley* prong, there is no evidence in the record that Dr. Rohse neglected to use reasonable diligence and care to procure evidence. In this case, it appears there was little evidence to gather. At the time of layoff, Dr. Rohse was aware SASC no longer used content-based tutors, and initiated the layoff process after discovering Professional Tutors remained on SASC's employee roster. Dr. Rohse was aware SASC had not provided work to Professional Tutors for over a decade and ceased providing all content-based tutoring in 2019. Complainant did not present evidence demonstrating that Dr. Rohse could or should have gathered additional evidence. Therefore, the preponderance of the evidence establishes that Dr. Rohse used reasonable diligence and care to procure evidence.

As to the second *Lawley* prong, there is no evidence in the record that Dr. Rohse failed to give candid and honest consideration to the evidence before her. SASC no longer used content-based tutors, and no longer had a need for the Position. Complainant, and all Professional Tutors, had not performed work since 2011. Complainant did not present evidence that demonstrates that Dr. Rohse failed to give candid and honest consideration to the evidence, or that the reason for the layoff was disingenuous. Therefore, the preponderance of the evidence establishes that Dr. Rohse gave candid and honest consideration to the evidence before her.

As to the third and final *Lawley* prong, the evidence in the record does not support that reasonable persons, after fair and honest consideration of the evidence, must reach a contrary conclusion to that of Dr. Rohse. It was reasonable for Dr. Rohse to eliminate positions that lacked work for over a decade and existed to provide services SASC no longer provided. Therefore, the preponderance of the evidence does not support that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions.

b. SASC's decision to layoff Complainant was not contrary to rule or law.

This case presents an unusual circumstance for two primary reasons: 1. Complainant held a classified position with no guaranteed hours/pay; and 2. Complainant had not performed work for SASC for over a decade. This unusual circumstance rendered compliance with some of the applicable rules futile as discussed below.

SASC generally complied with Board Rules and Director's Administrative Procedures concerning layoffs. The layoff process for employees within the state personnel system is set forth in Board Rules and Director's Administrative Procedures 7-5 to 7-20.

Director's Administrative Procedure 7-7 states, in part, "The only reasons for layoff are lack of funds, lack of work, or reorganization." Complainant did not perform services for SASC due to lack of work for over a decade before SASC completed the layoff process. SASC reorganized and eliminated all content-based tutors from its organizational structure in 2019. SASC then lacked work for Complainant and reorganized. The preponderance of the evidence establishes that SASC had authorized reasons to lay off Complainant pursuant to Director's Administrative Procedure 7-7.

Director's Administrative Procedure 7-8 requires an agency to publish a layoff plan. Board Rule 7-8, states in part:

After the department makes its business decisions for all layoffs and ten (10) days prior to issuing the first (1st) layoff notice, the department shall publish a Layoff Plan, signed by the department head or designee, both in a conspicuous place where all impacted parties have access to view the publication and on the department's internet or intranet websites.

Director's Administrative Procedure Rule 7-8(B) requires the layoff plan to include:

1. A description of the planned changes in the fundamental structure, positions, or functions accountable to one or more appointing authorities;
2. If applicable, a list of the ranking factors and their relative weights;
3. An organizational chart setting out the planned changes in the fundamental structure, positions, or functions accountable to one or more appointing authorities;
4. The reasons for the change;
5. The anticipated benefits and results, including any cost savings;
6. A general description of the expected changes and their effects on employees;
7. If applicable, a description of how the work performed by the eliminated positions will be absorbed by the department;
8. A listing of the classes in which positions will be eliminated as contemplated in the Layoff Plan; and
9. If there have been any modifications to the special qualifications for positions affected by the Layoff Plan within sixty (60) days or less prior to publication of the Layoff Plan, a list of such positions.

SASC published a layoff plan on November 29, 2021, more than 10 days before SASC notified Complainant of the layoff on December 9, 2021. The layoff plan included a description of the planned changes, the reasons for change, the anticipated benefits, expected changes/effects

on employees, work absorption, and a list of the classes in which the positions would be eliminated as required by Director's Administrative Procedure 7-8(B)(1),(4),(5),(6),(7), and (8). The layoff plan did not include a list of ranking factors or an organizational chart, because they were not applicable in this layoff. A ranking was unnecessary because all remaining Professional Tutors were eliminated from SASC's employee roster. The preponderance of the evidence establishes that SASC's layoff plan complied with Board Rule 7-8.

As to Director's Administrative Procedures and Board Rules 7-10 to 7-14, "Procedures for Determining Priorities for Layoff," all of the individuals on SASC's employee rosters who were Professional Tutors were laid off by Respondent. As all of the Professional Tutor positions were eliminated through the layoff, there was no need to rank the individuals being laid off and establish priority. There is no violation in terms of determining priority for layoff because SASC eliminated all of the Professional Tutor positions.

SASC complied with Director's Administrative Procedure 7-15 as it published the layoff plan more than 55 days in advance of the layoff, with at least 45 days of notice to Complainant that SASC was eliminating his position. SASC also notified Complainant of his appeal rights as required. SASC also complied with Director's Administrative Procedure 7-16, because it notified Complainant that it published the layoff plan.

Complainant did not have retention rights pursuant to Director's Administrative Procedure 7-17. Complainant argued his time served as a Federal Independent Contractor should be considered in determining his retention rights. This argument is not legally supported. Calculation of retention rights is determined by years of service with a state agency, and does not include consideration of years served as a Federal Independent Contractor. See § 24-51-101(20) and § 24-51-602, C.R.S.

While SASC complied with the majority of the Board Rules and Director's Administrative Procedures, the evidence presented at hearing indicates SASC did not consider alternatives to layoff, did not consider Complainant for vacant positions, and did not place Complainant on a departmental reemployment list as required by Director's Administrative Procedures 7-5, 7-13, and 7-18. In this case there was no alternative to layoff. It was a pro forma layoff. SASC eliminated the Position, and all other Professional Tutor positions, more than a decade after SASC last had work for the positions and approximately two years after it eliminated all content-based tutoring positions. SASC simply no longer provided the content-based tutoring services the Position existed to provide. It would have been futile to consider an alternative to layoff.

As to placing Complainant on a reemployment list, Complainant did not present evidence that demonstrates SASC had positions in the same Class as the Position. Director's Administrative Procedure 1-33 defines "Class" as, "A group of positions whose essential character (general nature of the work and responsibilities) warrants the same pay grade, title, and similar qualifications for entry into the class." Director's Administrative Procedure 1-63 defines "Reemployment" as, "The right of an employee to be returned or rehired to the class from which separated by layoff." The Class for the Position was State Service Professional Trainee I. Through the layoff, SASC eliminated all Professional Tutors in the Position's State Service Professional Trainee I Class. Therefore, SASC could not reemploy Complainant in that Class and creating a reemployment list would have been futile.

As to consideration for of Complainant for other positions, Director's Administrative Procedures and Board Rules make placement into another position discretionary. Dr. Rohse had no obligation to place Complainant into another position. In this unusual case, Dr. Rohse had not

worked with Complainant and had little to no communication with Complainant outside of the layoff communications. When Complainant performed work for SASC, Complainant provided Professional Tutoring and worked on an as needed basis. This work last occurred more than a decade before the layoff. While Complainant had no obligation to engage with Dr. Rohse, it would have been difficult for Dr. Rohse to meaningfully consider Complainant for other positions without communicating with Complainant. Without communication, Dr. Rohse could not have known Complainant's interest in continuing work with SASC and, as it had been more than a decade since he performed work, Complainant's availability to perform work in another position with SASC. Dr. Rohse provided Complainant an opportunity to communicate with her prior to the layoff going into effect, and Complainant chose not to engage with Dr. Rohse beyond telling her Complainant planned to contest the layoff. It would have been a perfunctory consideration of other positions without communication from Complainant.

Further, Complainant did not demonstrate SASC had any position similar to the Position for which Complainant was eligible that were vacant at the time of layoff. The student-only learning mentor positions bear the most resemblance to the Position. The learning mentor positions, however, did not provide content-based tutoring. Additionally, Complainant was, and is not, eligible for any student-only positions. Because there are no similar positions available for which Complainant is eligible, considering placing Complainant into a vacant position would be futile. It would be an unreasonable exercise of discretion for Dr. Rohse to move Complainant from the Position, with no guaranteed working hours, into a position with guaranteed hours and set pay – particularly an instructor position (a position outside of the state personnel system), teaching a credit-bearing course for a set amount of pay. Such placement would be tantamount to a promotion.

Therefore, for all of the reasons discussed above, Respondent's layoff decision was not contrary to rule or law.

C. SASC DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF AGE IN VIOLATION OF CADA.

Claims of unlawful discrimination fall within the Board's jurisdiction under § 24-50-125.3, C.R.S. Pursuant to that statute, the type of discrimination claims the Board may hear are those enumerated in CADA, which include discrimination based on age. § 24-34-402(1)(a), C.R.S.

Complainant claims SASC discriminated against him in violation of CADA on the basis of age. Complainant has the burden to prove by a preponderance of the evidence that SASC discriminated against him on the basis of his age. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400-01 (Colo. 1997). CADA provides that it is a discriminatory or unfair employment practice "to refuse to hire" or "to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of" age. § 24-34-402(1)(a), C.R.S. Age is defined as a "chronological age of at least forty years." § 24-34-301(1), C.R.S.

To establish a *prima facie* case of discrimination in employment on the basis of one of the protected classes:

First, an employee must show that he belongs to a protected class. Second, the employee must prove that he was qualified for the job at issue. Third, the employee must show that he suffered an adverse employment decision despite his qualifications. Finally, the employee must establish that all the evidence in the

record supports or permits an inference of unlawful discrimination.

Bodaghi v. Dep't of Natural Resources, 995 P.2d 288, 297 (Colo. 2000).

As to the first element of a *prima facie* case of discrimination, Complainant was 67 years old at the time of layoff. Therefore, Complainant belonged to a protected class on the basis of age. The evidence in the record establishes the first element of a *prima facie* case of discrimination.

As to the second element of a *prima facie* case of discrimination, Complainant held the Position at issue, and was therefore qualified for that Position. The evidence in the record establishes the second element of a *prima facie* case of discrimination.

As to the third element of a *prima facie* case of discrimination, Complainant suffered the adverse employment action of being laid off and losing a certified position within the state personnel system. The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." Colo. Const. Art. XII, § 13(8). Despite the absence of a change in work activity and pay, a loss of a certified state position is an adverse employment action because a certified employee holds their position as provided by the Colorado Constitution. Therefore, the evidence in the record establishes the third element of a *prima facie* case of discrimination.

As to the fourth element of a *prima facie* case, Complainant must proffer evidence that supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297. Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. See *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). "Direct evidence is '[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption.' (citations omitted)." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). However, as the Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi*, 995 P.2d at 296. "[E]mployees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis." *Id.* Complainant may rely on, "existing conditions from which a fair inference of such discrimination could legitimately be drawn." See *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Complainant failed to present direct evidence of age discrimination.

As to indirect evidence of discrimination, Dr. Rohse was unaware of Complainant's age at the time of his separation. There is no evidence that Dr. Rohse proceeded with the layoff due to Complainant's age.

Complainant's arguments in support of an inference of discrimination focused on work SASC had available, including work available only to students, and how SASC handled/communicated with Complainant about lack of work and the layoff.

As to the work SASC had available, SASC had open positions after 2011. Complainant likely had the skills necessary to perform some of the positions. Complainant, however, did not present any information that raises an inference of discrimination concerning the open positions. The positions were not the Position. The Position was a 1% on-call position that existed to provide professional tutoring to students. SASC did not provide professional tutoring to students after 2011 and ceased providing all content-based tutoring in 2019. After layoff, Complainant was not

replaced by a younger employee, because he was not replaced at all. SASC's open positions in the period of time Complainant was not working and at the time of layoff do not raise an inference of discrimination.

As to student-only positions, SASC has positions that Complainant may have had the skills to perform, that were only for students – these included Undergraduate and Graduate Tutors positions from 2011 to 2019 and learning mentor positions. First, at the time of layoff SASC did not have Undergraduate and Graduate Tutor positions, because it did not offer any content-based tutoring. Second, Complainant did not provide any legal authority to show that it is discriminatory on the basis of age to have positions reserved for students – particularly when, as here, student-only positions are too to support the academic success of students. SASC's student-only positions do not raise an inference of discrimination.

As to SASC's failure to notify Complainant of available positions, there is no evidence in the record that SASC had an obligation to notify Complainant of positions for which he may have been qualified. There is nothing in Board Rule or Director's Administrative Procedure that requires a departmental agency to notify employees of available positions at the time of layoff. SASC publicly posts their positions, and Complainant could have applied for available positions. Complainant did not apply for available positions. SASC's failure to specifically notify Complainant of available positions does not raise an inference of discrimination. Not hiring Complainant for positions for which he did not apply also does not raise an inference of discrimination.

As to SASC's handling of the lack of work for Complainant (and other Professional Tutors) and Complainant's layoff, SASC erred. SASC failed to timely layoff Complainant from the Position. SASC conducted a pro forma layoff years after it no longer had work for the Position. Complainant, however, failed to present evidence that SASC's error was in any way related to Complainant's age. The evidence in the record demonstrates that SASC ceased providing Professional Tutoring in 2011, and all content-based tutoring in 2019. The evidence in the record supports that these changes were due to funding and changes in services being provided by SASC. There is no evidence that suggests these changes were in any way related to Complainant's age. SASC's handling of Complainant's lack of work and layoff do not raise an inference of discrimination.

For all of the above reasons, Complainant failed to establish the fourth element of a *prima facie* case of age discrimination.

Even if Complainant had established a *prima facie* case of age discrimination, SASC articulated legitimate, nondiscriminatory reasons for laying off Complainant from the Position. "When the plaintiff has proved a *prima facie* case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 260 (1981). SASC laid off Complainant from the Position, because it lacked work for Complainant and had reorganized to eliminate all content-based tutoring. SASC had legitimate non-discriminatory reasons to lay off Complainant.

Once an employer meets its burden of proffering a legitimate, nondiscriminatory reason for an adverse employment decision, Complainant must "demonstrate by competent evidence" that this articulated reason is "a pretext for discrimination." *Big O Tires*, 940 P.2d at 401. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did

not act for the asserted non-discriminatory reasons.’ (citation omitted).” *Morgan v. Hilti, Inc.*, 108 F. 3d 1319, 1323 (10th Cir. 1997).

Complainant did not demonstrate SASC’s legitimate non-discriminatory reasons for Complainant’s layoff were pretextual. Complainant did not demonstrate “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions” in SASC’s reasons for laying off Complainant. SASC lacked work for Complainant, and all other Professional Tutors, for over a decade before it laid him off from the Position. SASC had also reorganized to eliminate all content-based tutoring approximately two years prior to the layoff. There is nothing in the record that suggests SASC’s explanation is “unworthy of credence.” *Id.*

SASC’s legitimate business reasons for laying off Complainant are worthy of credence. Complainant did not present evidence that demonstrates SASC’s explanation was unworthy of credence and was pretextual. Therefore, Complainant’s claim of age discrimination is without merit.

D. THERE IS NO MEANINGFUL RELIEF THE BOARD CAN GRANT COMPLAINANT.

It is important to note here that even if Complainant were successful on the merits, there is no meaningful relief the Board has the authority to grant Complainant. Complainant did not specifically request any relief that the Board has the authority to provide or that Complainant does not already have.

Complainant requested legal fees in the amount \$1,550 through his Prehearing Statement. No attorney entered an appearance in this matter. Therefore, there is no basis for the Board to award attorney fees if any were warranted.

Complainant requested an apology. The Board does not have authority to order an apology. Even if the Board ordered an apology, a forced apology would be hollow. The ALJ finds SASC’s pro forma layoff is a point of concern, but as discussed above, there is no evidence that it was discriminatory.

Complainant requested to be restored to an equivalent position. Complainant already holds an equivalent position with the University of Colorado Boulder Athletics Department. SASC does not have any equivalent positions available because it no longer offers content-based tutoring to students.

In terms of relief not specifically requested, the Administrative Law Judge is unaware of any relief which the Board could provide. As to back pay, in this unusual case, Complainant had no guarantee of hours, and has not received any pay from SASC since 2011. SASC’s layoff of Complainant did not result in a loss of pay to Complainant. No back pay can be awarded under the circumstances of this case. As to restoration to the Position, the evidence in the record demonstrates SASC does not have work for Professional Tutors and does not offer any content-based tutoring. Returning Complainant to the Position would not result in SASC providing work to Complainant. Therefore, it does not appear, and Complainant did not demonstrate, there is any meaningful relief the Board can grant Complainant.

CONCLUSIONS OF LAW

1. SASC's decision to layoff Complainant was not arbitrary and capricious, or contrary to rule or law.
2. SASC did not discriminate against Complainant in violation of CADA.

ORDER

SASC's decision to layoff Complainant from employment is **affirmed**. Complainant's appeal is **dismissed with prejudice**.

Dated this 19th day, of
July, 2023, at,
Denver, Colorado.

/s/ [REDACTED]

K. McCabe, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the **20th** day of **July, 2023**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Steve Ida
[REDACTED]

Bijan Bewley, Esq.
Bijan.Bewley@cu.edu

Katie Gleeson, Esq.
Katie.Gleeson@cu.edu

Alex Loyd, Esq.
Alex.Loyd@cu.edu

Sara.Missel@cu.edu
UCBLegalAdmin@cu.edu

[REDACTED]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS:

Offered and Admitted: A, B, D, E (Excerpt - March 15, 2020 Email), F, H(1), K (1-2, 5-6, 8, and 9), M, R(1), R(2), S, T, Y, Z, AB, AF, and AG.

Offered and Not Admitted: E (Full Exhibit), E(1) (Page 13 of Full Exhibit E), G, H(2), I, J, and L.

RESPONDENT'S EXHIBITS:

Stipulated: 5.

Offered and Admitted: 2, 3, 8, 10, 11, 12, and 16.

WITNESSES

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

Taylor Craven

Jessica Holman

Stephen Ida

Corinna Rohse

Kat Scheible

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).