

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LAWRENCE V. CUTTS III,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, DIVISION OF ADULT PAROLE,
Respondent.

This matter came before the Personnel Board for an evidentiary hearing on June 25-26, 2024. Complainant appeared in person with counsel, Mark Schwane, Esq. Respondent appeared by and through counsel, Grace Chisolm, Esq. and Amanda Swartz, Esq. Respondent's advisory witness, Melissa Bellew, Human Resource Manager for the Department of Corrections (DOC) was also present. A list of the exhibits admitted into evidence and the witnesses who testified at hearing is attached as Appendix I.

MATTER APPEALED

Complainant contends that Respondent's reduction of his base pay and the resulting garnishment of his wages were arbitrary, capricious and contrary to rule or law. As relief, he requests: 1) a finding and order that Complainant was not overpaid as defined by law; 2) a refund of all amounts garnished from his compensation; 3) PERA contributions on the amounts garnished from his compensation; 4) an order barring DOC from collecting any further amounts; 5) statutory interest on the amount garnished from his pay; and 6) attorney's fees/costs.

Respondent argues that Complainant's salary was entered incorrectly due to a technician's error. Respondent further argues that the appointing authority did not authorize the salary paid to Complainant, and that the Fiscal Rules require the collection of the resulting overpayment. Respondent requests that the Board affirm the actions of the appointing authority, deny all relief sought by Complainant, and dismiss Complainant's appeal with prejudice.

For the reasons discussed below, Respondent's action is **reversed**.

ISSUES TO BE DETERMINED

Was Respondent's reduction of Complainant's base pay and the resulting garnishment of his wages arbitrary, capricious, or contrary to rule or law?

FINDINGS OF FACT

1. The DOC hired Complainant as a Correctional Officer I on June 4, 2018. He is a certified state employee.
2. In 2019, Complainant was promoted to a Correctional Officer II. As of July 1, 2021, he was paid a salary of \$4,840 per month.
3. Complainant continued to seek career advancement within the DOC. In November of 2021, Complainant took the exam for a parole officer position and scored the highest in the state.
4. On October 8, 2021, Complainant applied for a Community Parole Officer (CPO) position in the Colorado Springs office (Colorado Springs Position).
5. On November 23, 2021, Complainant applied for a CPO position in multiple locations in the Denver Metro.
6. In January of 2022, Complainant interviewed for the Denver Metro CPO posting. The DOC selected him for a position in the Aurora Office (Aurora Position).
7. Starting salaries within the classification range are in the discretion of the appointing authority. The appointing authority completes a referral, also called a requisition summary. The referral is controlling regarding salary. The referral also specifies an effective date, but for promotions, this may be deferred until the employee's former position is filled.
8. The referral is saved in the "exam plan" in the Neogov system.
9. At the time of Complainant's promotion, it was DOC's policy to set a promotional salary at the rate specified by the appointing authority in the referral. If the appointing authority did not specify a salary in the referral, it was DOC's standard practice to give the employee a 10% raise.
10. Susan White, the Appointing Authority, completed a referral for the Aurora Position, stating Complainant's selection was effective March 1, 2022, with a salary \$5,023 per month.

11. The HR technician mistakenly entered the 10% raise, which calculated to \$5,324 per month rather than the \$5,023 per month specified by Ms. White in the referral for the Aurora Position.
12. Complainant's Employee History Report reflects Complainant's promotion and new salary of \$5,324 per month. The entry is dated March 1, 2022, but there is no evidence in the record that DOC actually began paying Complainant the higher salary as of that date.
13. The DOC did not notify Complainant of his selection for the Aurora position, and he did not find out about it until sometime during the first week of March.
14. Nicole Fernandez, the DOC Staff Resources Coordinator, informed Complainant that his salary would be \$5324 per month. Complainant told at least two coworkers that he would be receiving a 10% raise.
15. After learning of his selection for the Aurora Position, Complainant requested a transfer to the Colorado Springs Position, which remained open. Ms. Fernandez informed Complainant that a transfer would not be fair to other applicants and that he would have to go through the open competitive process.
16. Ms. Fernandez reviewed the applications for the Colorado Springs Position and completed the initial comparative analysis. On March 4, 2022, Ms. Fernandez created a list of the top six eligible candidates who were referred for an interview, including Complainant.
17. DOC interviewed Complainant for the Colorado Springs Position on March 14, 2022.
18. Complainant received and accepted an offer for the Colorado Springs Position effective April 1, 2022 without ever working at the Aurora office.
19. Debra Duran was the appointing authority for the Colorado Springs Position. The appointing authorities frequently signed documents for one another, and this was an accepted practice.
20. Susan White signed the referral for the Colorado Springs Position. The line for the salary was left blank.
21. HR processed Complainant's position change from the Aurora office to the Colorado Springs office as a transfer.
22. Complainant began working at the Colorado Springs Position. He was paid \$5,324 per month.

23. In November of 2023, Andrew Zavaras, Assistant Director of Parole was conducting research to determine appropriate salaries for new CPO's. He notified HR Director Michele Cottingham that he had discovered discrepancies between Complainant's salary and other CPO's who started at the same time.
24. Ms. Bellew reviewed Complainant's records and determined that Complainant's salary should have been \$5,023 per month per the referral signed by Ms. White for the Aurora Position.
25. Ms. Bellew was not aware that Complainant had never worked in the Aurora Position. She did not review the referral for the Colorado Springs Position.
26. During her investigation, Ms. Bellew did not speak with Ms. White, who had by that time retired. She also did not speak to Ms. Fernandez or Ms. Duran. She made her determination regarding Complainant's salary solely on the records for the Aurora Position.
27. On November 22, 2023, DOC sent a letter to Complainant notifying him that it had overpaid him by \$310 per month since March 1, 2022, and that it needed to correct his salary.
28. The DOC initially stated it would forgive the overpayment, but the State Controller overruled the DOC.
29. On January 23, 2024, the DOC sent a second letter to Complainant stating he had to repay \$7,915.39 in overpaid salary. It informed Complainant he could request to repay the amount over a period up to 24 months.
30. The DOC began collecting the overpayment from Complainant's March paycheck. It took \$219.88 from his March 2024 check and \$279.90 from his April 2024 check for a total of \$494.78.
31. Complainant filed this appeal on March 15, 2024.
32. Complainant voluntarily resigned from his employment with DOC effective April 5, 2024 to accept a job as a police officer.

ANALYSIS

Complainant bears the burden to prove by a preponderance of the evidence that Respondent's decision to reduce his pay and claim an overpayment was

arbitrary, capricious, or contrary to rule or law. C.R.S. §24-50-103(6). *Velasquez v. Dep't of Higher Ed.*, 93 P.3d 540, 542-44 (Colo. App. 2004).¹

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

A. The Colorado Springs Position Was a Promotion, Not a Transfer

Ms. Bellew mistakenly believed Complainant was transferring from the Aurora Position to the Colorado Springs Position. However, Complainant credibly testified that his request for a transfer to the Colorado Springs Position was denied because the position had been posted, and it would not be fair to other applicants to allow the transfer. Complainant's testimony is supported by the fact that he went through the comparative review and interview process. It is also supported by the fact that the Colorado Springs Position had a different appointing authority.

In addition, Ms. Bellew testified that the Colorado Springs Position was a separate position in the Neogov system. Complainant never worked in the Aurora Position. While Complainant's Employee History shows a promotion and salary increase on March 1, 2024, there is no evidence he was actually paid the new rate as of that date, nor would it make any sense for Respondent to pay Complainant for work he was not performing. As a result, Complainant's selection for the Colorado Springs Position should have been characterized as a promotion from Complainant's Correctional Officer II position rather than a transfer from the Aurora Position.

B. As a Result of the Mistake, Respondent Did Not Use Reasonable Diligence and Care to Obtain the Evidence

The relevant documentation to determine the correct amount of Complainant's compensation is the referral for the Colorado Springs Position. Because Ms. Bellew mischaracterized Complainant's selection as a transfer instead of a new hire, she did not review or consider said referral. She also did not speak to Ms. White, Ms. Duran, or Ms. Fernandez who may have been able to clarify the situation. Under these circumstances, this ALJ cannot find that Ms. Bellew used

¹ During the prehearing conference, this ALJ and the parties mistakenly believed the burden of proof was on Respondent. However, this is not a disciplinary action, so the burden of proof is on Complainant.

reasonable diligence and care to procure the relevant evidence before determining Complainant was being paid the wrong salary. Because Respondent's decision regarding Complainant's salary was based on incomplete and inaccurate information, it was arbitrary and capricious.

C. The Correct Pay Rate Should be a 10% Raise Based on DOC's Policy That was in Effect at the Time

Ms. Bellew's and Mr. Ducas' testimony was very clear that the referral is the controlling document regarding compensation. Ms. Bellew also testified that if the salary in the signed referral was blank, it was DOC's standard policy to provide a 10% raise. In this case, the referral for the Colorado Springs Position signed by Ms. White does not list a specific salary. The correct salary would therefore be the 10% promotional increase over Claimant's salary as a CO II, which calculates to \$5,324 per month. While Respondent presented some evidence to the contrary, it was insufficient to rebut the referral for the Colorado Springs Position signed by Ms. White on behalf of the appointing authority, Ms. Duran.

D. Attorney's Fees

C.R.S. § 24-50-125.5(1) provides, in pertinent part:

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose . . . was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless . . . the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee . . . against whom such personnel action was taken

A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-51(B)(1). Personnel actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-51(B)(2). A groundless personnel action "means that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support the theory." Board Rule 8-51(B)(3).

The circumstances in this case are highly unusual due to the fact that Complainant was offered and accepted two different positions. Respondent's decision to reduce Complainant's compensation was due to mistake or neglect, rather than bad faith, malice, or harassment. In addition, Respondent presented some evidence to support its decision. While the evidence was ultimately unpersuasive, its case was neither frivolous nor groundless. Accordingly, an award of attorney's fees is not warranted.

CONCLUSION OF LAW

Based on the above analysis, this ALJ concludes that Respondent's decision to reduce Complainant's salary and garnish his wages was arbitrary and capricious.

ORDER

1. Respondent's decision to reduce Complainant's salary is reversed.
2. Respondent shall pay Complainant based on a salary of \$5,324 per month from the date he began working at the Colorado Springs Position through the date of his resignation Respondent shall calculate all overtime and PERA contributions accordingly.
3. Respondent shall repay the 219.88 withheld from Complainant's March paycheck and pay interest at a rate of 8% per annum from March 29, 2024 until paid.
4. Respondent shall repay the \$279.90 withheld from Complainant's April paycheck and pay interest at a rate of 8% per annum from April 30, 2024 until paid.
5. Complainant's request for attorney's fees is denied.

Dated August 2, 2024 by:

/s/ [REDACTED]
Charlotte A. Veaux
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of **August, 2024**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

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APPENDIX I

Respondent's Witnesses:

Melissa Bellew, Human Resources Manager

Andrew Zavaras, Assistant Director/Denver Metro & Northern Field Operations
Commissioner/Interstate Commission for Adult Offender Supervision

Bradley Duca, DOC Controller

Respondent's Admitted Exhibits:

1-29.

Complainant's Witness:

Mr. Lawrence Cutts, III

Complainant's Admitted Exhibits:

A - Z