

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

GAIL S. BLEHM, Appellant,

vs.

DENVER AUDITOR'S OFFICE,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Sept. 21 and 30, 2009 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Nora Kelly, Esq. The Agency was represented by Assistant City Attorney Andrea Kershner. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision:

I. STATEMENT OF THE APPEAL

This is Appellant Gail S. Blehm's appeal of her July 9, 2010 layoff from the position of Associate Human Resources Professional with the Denver Auditor's Office (Agency). Appellant filed a timely appeal of the action under Career Service Rules (CSR) §§ 14-49 and 19-10 A.1.e., which also alleged disability discrimination, retaliation for use of FMLA leave, and a claim under the Denver Whistleblower Protection Ordinance, DRMC § 2-106 *et. seq.* Appellant withdrew the discrimination claim on August 20, 2010. [Appellant's Response to Agency's Motion for Discovery, ¶ 2.a.]

Agency Exhibits 2 – 6 were admitted by stipulation of the parties. Agency Exhibits 11 – 13 and Appellant's Exhibits B, D - F and I - K were admitted during the hearing.

II. ISSUES ON APPEAL

The issues presented for decision are:

- 1) Was the layoff of Appellant arbitrary, capricious, or contrary to rule or law,
- 2) Was the layoff motivated by retaliation for Appellant's disclosure of official misconduct, in violation of the Whistleblower Protection Ordinance, and
- 3) Was the layoff motivated by retaliation for Appellant's use of FMLA leave?

III. FINDINGS OF FACT

Appellant Gail Blehm was hired by the Denver Auditor's Office on April 1, 2002, and held the position of Associate Human Resources (HR) Professional at the time of her layoff. Appellant's position is classified as an intermediate level HR professional working in a major functional area, such as "classification, compensation, recruitment and selection, training, and/or employee relations". [Exh. I-1¹.] Appellant's duties consisted of production of internal publications, website content management, employee recognition, and payroll and benefits liaison. [Testimony of Appellant, 9/21/10, 1:06 pm; Exh. 13.] The Agency HR unit consisted of Appellant, Associate IT Analyst Rebecca Moreno, and Agency HR Director, Tammy Phillips. Together, they staffed the Management Services division which performed all HR functions and supported the Audit Services and Prevailing Wage divisions for the Auditor's Office.

Ms. Phillips assumed the HR Director position in August 2009, and received training in the operation of the Career Service Rules governing various HR functions from 15 Career Service Authority (CSA) staff members. After reviewing the Mayor's 2009 letter regarding the financial challenges facing the City during the national economic recession, Ms. Phillips studied her role to assure herself that she was adding value and meeting the needs of the Agency leadership. At the time, costs were being carefully scrutinized by the management team, and there were continual discussions about whether vacancies would be filled. At one meeting early in Ms. Phillip's employment, Director of Audit Services Kip Memmott asked her about the functions performed by Appellant. As a result, Ms. Phillips reviewed the duties listed in Appellant's Performance Enhancement Program (PEP), the job description which formed the basis for the annual performance evaluation. [Testimony of Ms. Phillips, 9/21/10, 4:10 pm; Exh. D, page 7.]

Shortly after Ms. Phillips began, she assumed the recruiting and new employee tasks being performed by Appellant in order to allow her to understand the hiring process from start to finish. After familiarizing herself with that operation, Ms. Phillips decided it would be more efficient if she continued to perform them as a part of her duty to manage Agency recruitment. [Testimony of Ms. Phillips, 9/21/10, 4:15 pm; Exh. 13-3.] Ms. Phillips also began to perform Appellant's functions in aid of the online hiring center called neogov. Mr. Memmott and Ms. Sulley liked how Ms. Phillips handled neogov, and so that function was not returned to Appellant. [Testimony of Appellant, 9/21/10, 11:42 am.]

On Oct. 21, 2009, Appellant entered Ms. Phillip's office while she was out, and saw a printed Outlook calendar page in her trash. The page showed that Ms. Phillips had an appointment with an applicant for an open Deputy Director position. Appellant was aware that Ms. Phillips knew the applicant through their employment at Price Waterhouse, Ms. Phillip's former employer. Appellant became concerned that having a separate meeting with a candidate could be a conflict of interest, and thus a

¹ The copy of Exhibit I submitted at hearing was revised on Aug. 8, 2010, and thus was not in effect until the last month of Appellant's employment. The parties agreed to substitute the classification description for Associate HR Professional that was revised May 24, 2009 as Exhibit I.

violation of the Denver Code of Ethics.² She testified that she believed Ms. Phillips was "doing all she could to impress Ms. Sulley . . . so if she was successful in getting some really top notch talent from people that worked at her prior employer, that would look really good on her time during her probation." [Testimony of Appellant, 9/21/10, 2:27 pm.] Appellant told her co-worker Ms. Moreno about her concerns, and gave the calendar page to her. [Testimony of Appellant, 9/21/10, 2:01 pm; Exh. E.]

Ms. Moreno testified that she then checked Ms. Phillips' calendar for the date of the appointment on the office's shared Outlook calendar to determine if the paper calendar matched the current electronic calendar. Ms. Moreno determined that it did. She noticed a related calendar entry showing that the same candidate's interview with the entire panel was scheduled for Nov. 2nd, and she gave Appellant a copy of it. [Exh. F.] Ms. Moreno concluded that Ms. Phillips was attempting to coach her former colleague prior to her interview, and thus provide her with an advantage not available to the other candidates. This candidate was later hired by the Agency for the lower level position of Internal Audit Supervisor. [Testimony of Appellant, 9/21/10, 2:30 pm.]

As a result of this information, Ms. Moreno requested a meeting with the Agency's whistleblower designee, Clay Vigoda, who is the Agency's Director of Government and Community Affairs. Communications Manager Denis Berckefeldt also attended the meeting. At that time, Ms. Moreno presented her claim that Ms. Phillips had engaged in unethical conduct, and asked Mr. Vigoda to "blow your whistle". [Testimony of Ms. Moreno, 9/21/10, 9:40 am.] The men asked Ms. Moreno to name the source of her information, but she declined to do so. Mr. Vigoda told her they would take care of the issue. At their next meeting, Mr. Vigoda informed Ms. Moreno that she "aimed and missed". Ms. Moreno interpreted the remark as meaning that he was not going to pursue an investigation into the whistleblower charge.

Some time thereafter, Ms. Moreno had lunch with her friend Barbara Jones, who works for the Denver Department of Safety and is a friend of the Denver Auditor, Dennis Gallagher. Ms. Moreno told Ms. Jones that Appellant had found a calendar entry showing that Ms. Phillips met with a job applicant who was a former co-worker at a private company. Ms. Moreno asked Ms. Jones what she should do. After their lunch, Ms. Jones called Mr. Gallagher and relayed this information to him. Mr. Gallagher then telephoned Deputy Auditor Dawn Sulley at home, and communicated Ms. Moreno's charge of unethical behavior. [Testimony of Ms. Moreno, 9/21/10, 9:44 am.]

On Nov. 22, 2009, a week after Ms. Moreno's meeting with Mr. Vigoda and Mr. Berckefeldt, Ms. Sulley called Ms. Moreno and her union representative into a meeting. Ms. Sulley was a member of the Agency hiring team, along with Ms. Phillips, and Audit Services Director and Deputy Director, Kip Memmott and John Carlson. Ms. Sulley informed Ms. Moreno that the hiring team had instructed Ms. Phillips to meet separately with the job candidate to discuss the Deputy Director job and encourage her to apply

² The Denver Code of Ethics states that a conflict of interest occurs if an employee is in a position to take direct official action affecting a substantial interest of the employee or an immediate family member. The Code also requires a waiver from the Board of Ethics before an employee may hire an immediate family member. [Exh. B-1, B-2.]

for the lower level position of Internal Audit Supervisor, a job the team thought was a better match for her. "I don't think she believed us that we directed [Ms. Phillips] to do that." [Testimony of Ms. Sulley, 9/21/10, 3:11 pm.] Ms. Sulley testified that Ms. Phillips was not privy to the answers to interview questions, or any other information that would have given her former co-worker an advantage over other candidates. The only information given to her at that meeting was also available to the other candidates through the CSA and city websites. Ms. Sulley asked Ms. Moreno to tell her who told her about the meeting, and specifically asked if it was Appellant. Ms. Moreno refused to reveal her source, but testified that she believed they already knew it was Appellant. [Testimony of Ms. Moreno, 9/21/10, 9:26, 9:54 am.]

On Nov. 23, 2009, Ms. Phillips called Appellant into her office to discuss a personnel matter. She appeared red-faced and angry, and told Appellant that Ms. Sulley had instructed her to meet with the candidate. She asked Appellant how she had learned of the meeting. Appellant did not respond directly, but said, "[w]hatever person gave me that information, I believe it to be true." Thereafter, Ms. Phillips shared less information with Appellant, causing her to feel "iced out". [Testimony of Appellant, 9/21/10, 11:25 am.]

Appellant made no report of unethical behavior or official misconduct during her employment. [Testimony of Appellant, 9/21/10, 2:01 pm.] Appellant chose not to make the disclosure for two reasons: Ms. Phillips controlled her performance ratings, and Appellant did not want to place the Auditor's Office "in a bad light." [Testimony of Appellant, 9/21/10, 2:25 pm.] Ms. Phillips later mentioned the incident in Appellant's performance review as contributing to a "below expectations" rating in the categories of accountability and ethics. Appellant earned an overall rating of successful. [Exh. D-4.]

After Ms. Moreno's meeting with Ms. Sulley about the same matter, Ms. Moreno began to feel excluded from meetings and deprived of information she needed to do her job. She requested mediation in an attempt to resolve her whistleblower issue. During the mediation, Ms. Moreno asked for a meeting to review her Performance Enhancement Program (PEP) in order to clarify what she perceived as Ms. Sulley and Ms. Phillip's misunderstandings about her duties. Instead, they sought a job audit to reallocate her position from an Associate IT Analyst, pay grade 811, to an Administrative Support Assistant IV, grade 612. Ultimately, CSA reclassified Ms. Moreno's position from a pay grade 811 to an 807. However, the change resulted in an increase in salary of about \$100 per year. Shortly thereafter, Ms. Moreno gave two weeks' notice of her resignation, effective Sept. 10, 2010. [Testimony of Ms. Moreno, 9/21/10, 9:26, 9:55, 10:59 am.]

In January, 2010, Appellant broke her arm and was out of the office on approved FMLA leave for two weeks, and intermittently thereafter. Appellant had surgery on Apr. 30th, and took FMLA leave from then until the beginning of June. Ms. Phillips performed Appellant's work while she was gone. Upon her return, Anna Hansen gave Appellant a long list of things that needed to be changed on the Agency website. Appellant concluded that management had reassigned her website planning duties to Ms. Hansen. Appellant also noticed that she was not getting responses to

some of her emails, and testified that she attributed these new developments to retaliation for her exercise of rights under the FMLA. Appellant returned with a medical restriction from lifting, and therefore asked other employees to help her set up and break down tables for employee meetings. [Testimony of Appellant, 9/30/10, 11:37 am.]

In early March 2010, Ms. Phillips asked Appellant to provide a list of her duties in preparation for her annual performance review due April 1, 2010. Ms. Phillips informed Appellant that management was concerned about what was going on in the city, and whether there was enough work for both herself and Appellant. [Testimony of Appellant, 9/21/10, 1:28 pm.] Ms. Phillips told Appellant she thought the HR budget would be examined for cost-cutting opportunities if the need arose. Appellant replied that she had been through furloughs before, and that she did not need the information Ms. Phillips was providing. In response to Ms. Phillip's request for information about her duties, Appellant marked her PEP with the percentages of time she spent on each of the listed tasks, and gave it to Ms. Phillips. [Testimony of Ms. Phillips, 9/21/10, 4:13 pm.] Appellant explained at hearing that she did not give additional feedback "because she knows what I do." [Testimony of Appellant, 9/30/10, 10:41 am.]

Appellant testified that her duties were website data entry, production coordination of various city communications, and general employee relations and HR duties such as serving as employee liaison for their payroll and benefits questions. Appellant concedes that Ms. Phillips assumed her recruitment and new employee duties in 2009, and performed her remaining duties while she was on FMLA leave.

Mr. Gallagher testified that the Auditor's Office experienced a steep drop in the number of Agency employees after a 2006 charter change removed payroll and accounting from the Auditor's Office, a change designed to prevent conflicts of interest during audits of those functions. As a result, 30 to 35 payroll employees were transferred out of the Auditor's Office and into the Controller's Office within the Department of Finance. As a part of the same changes, the Agency obtained additional authority to conduct audits of city agencies. Pursuant to the Mayor's order to stagger its staffing growth for the audit function, the Agency has gradually added audit teams over the past two years. In spite of that hiring, the Agency now has about 30 fewer employees than it did before the charter change. [Testimony of Ms. Sulley, 9/30/10, 9:10 am; Exh. 11.]

As a part of continuing efforts to reduce Agency costs in light of the difficult financial situation faced by the City, Mr. Gallagher asked Ms. Sulley to examine all positions and make recommendations as to whether any could be consolidated. Deputy Auditor Sulley conducted weekly strategy meetings to identify budget cuts in order to avoid lay-offs. All vacant positions were eliminated, and other positions were consolidated. The education, conference and supply budgets were trimmed. As a part of these efforts, Ms. Sulley recommended that the Management Services budget should be decreased first, since it was not essential to the Agency's mission.

In the spring of 2010, in preparation for Appellant's annual performance review, Ms. Phillips calculated the amount of time Appellant spent on various tasks. Based on

the time it took her to perform Appellant's work during her medical leave, Ms. Phillips determined that the work done by Appellant could be performed in about 35 to 40 days per year. Later, in preparation for her testimony in this hearing, Ms. Phillips drafted two charts of Appellant's duties, one detailed and one a summary. [Exhs. 12, 13.] Appellant reviewed the charts during her testimony, and confirmed that they include the broad details of the tasks she performed. [Testimony of Appellant, 9/30/10, 9:47 am.]

At around the same time, Ms. Sulley spoke to Ms. Phillips about her unit's workload in pursuit of her efforts to control the Agency's budget. Ms. Sulley and Ms. Phillips examined Appellant's tasks in detail, and both agreed that the work did not justify a full-time position. Ms. Sulley determined that the decrease in the total number of Agency employees permanently removed a large portion of the technical HR work formerly performed by Appellant. Ms. Phillips advised Ms. Sulley that the website work could be given to Mr. Berckefeldt, and the employee recognition tasks could be assumed by the Auditor's Assistant, Ava Giron. Ms. Phillips volunteered to perform Appellant's remaining HR duties. The charts prepared by Ms. Phillips reflect those reassignments in column three. [Exhs. 12, 13.]

Ms. Sulley then recommended the elimination of Appellant's position based on this analysis. On June 21, 2010, Mr. Gallagher submitted a lay-off request to CSA Personnel Director Jeff Dolan. [Exh. 4.] The request was supported by a Rank Order List, which showed there were no vacant positions in Appellant's classification. [Exh. 5.] The Agency informed CSA that they were overstaffed in HR. CSA HR Supervisor Pete Garritt, who reviewed the lay-off plan, examined Appellant's employment history to identify the classifications previously held by Appellant for purposes of demotion opportunities. He determined that there was no lower level position in her series into which she could bump. On June 24, 2010, CSA Personnel Director Jeff Dolan approved the lay-off plan based on Mr. Garritt's recommendation. [Testimony of Pete Garritt, 9/21/10, 1:39 pm; Exh. 3.] Appellant appealed the lay-off decision, asserting that the lay-off was the result of her raising an ethics violation, taking FMLA leave, and other claims later withdrawn.

IV. ANALYSIS

1. Standard of Review

An employee challenging a layoff must overcome the "presumption of regularity afforded an agency in fulfilling its statutory mandate" with a showing that it was arbitrary, capricious, or contrary to rule or law. Motor Vehicle Mfrs. Ass'n, 463 US at 44, fn.9; In re Vasquez and Lewis, CSA 08-09, 4 (5/20/09); Brennan v. Department of Local Affairs, 786 P.2d 426 (Colo.App. 1989); Velasquez v. Dept of Higher Education, 93 P.3d 540 (Colo. App. 2003). An agency acts in violation of that standard if it 1) fails to use reasonable diligence to procure authorized evidence; 2) fails to give fair consideration to that evidence; or 3) exercises its discretion in an unreasonable manner. See Maggard v. Department of Human Services, 226 P.3d 1209 (Colo.App. 2009).

2. Was layoff of Appellant arbitrary, capricious, or contrary to rule or law?

The Agency contends its decision to lay off Appellant was justified by its reduced employee headcount, resulting in less support work for the HR unit. The Agency also supported the decision by its need to trim costs based on the financial challenges facing City government in 2010. Appellant does not dispute the Agency's need to control its budget during a downturn in city revenue. She argues however that she was selected for lay-off by a subjective analysis performed by two managers who were motivated by animosity towards her: Ms. Sulley and Ms. Phillips.

The Career Service Rules governing lay-offs mandate that lay-offs must be based on positions, not employees. CSR § 14-41 d). The evidence indicates that Ms. Sulley and Ms. Phillips based their recommendation on an analysis of the duties of the position, rather than factors personal to Appellant. They determined that the time required to complete the assigned duties was 35 to 40 days per year, which is approximately 15% of a full-time position. They further concluded that those duties could be consolidated into the work performed by employees now on staff, resulting in the savings of a full-time salary with no loss of efficiency. Although Ms. Phillips was annoyed by the ethics allegation she suspected Appellant of supporting during her probationary period, Ms. Phillips' objectivity in the job analysis is bolstered by the fact that Ms. Phillips herself performed Appellant's duties for months, and agreed to continue to perform them on top of her regular duties. The latter indicates that the duties were minimal and would not interfere with her ability to execute all the other duties of her position as Agency HR Director.

Appellant presented no evidence that these conclusions are inaccurate, and conceded at hearing that the persons now assigned to perform her duties are capable of doing the work. [Testimony of Appellant, 9/30/10, 10:36 am.] When she had the opportunity to provide input about her duties to her supervisor, Appellant declined to do so, stating that her supervisor "knows what I do." She disagreed that her job was only 20% of a full-time position, but presented no evidence that this analysis of her duties was colored in any respect by subjectivity, dislike or personal bias.

Appellant argues that the Agency should have had a classification audit done on her position. However, an audit is intended to determine the appropriate classification of the duties of a position, not, as here, the time consumed by those duties. CSA § 7-34.

Appellant also argues that the lay-off was arbitrary and capricious because it was fiscally unwise, in that some of her work³ is now being performed by directors paid at a higher hourly rate. She presented no evidence comparing either the amount of time consumed by the duties, or the personnel costs to cover those duties, before and after the lay-off. There was no evidence that the directors given Appellant's website

³ Content management of Denvergov. was reassigned to Mr. Berckefeldt, Director of Communications, and data entry for various HR tasks is now performed by HR Director Tammy Phillips. [Exhs. 12, 13.]

and HR duties were unable to complete their own duties after the re-assignment. An agency has discretion to assign duties as it deems appropriate in the best interest of achieving its mission. As a result of this lay-off, duties were consolidated and substantial costs were eliminated. The methodology employed by the Agency in making the lay-off decision was based on factors that a reasonable administrator would use in arriving at a business decision: i.e., a detailed analysis of the tasks performed, the time needed to complete them, and whether they could be done in a more cost-effective manner by reassignment. Appellant did not establish that the Agency acted in an arbitrary or capricious manner by eliminating Appellant's full-time position, and re-assigning some of her duties at no additional cost to higher-level employees already on salary.

Next, Appellant argues that she should have been offered a demotion to the vacant Agency Support Technician position, shown on the Sept. 2010 organizational chart as unfunded. [Exh. K.] Appellant concedes that the position became vacant in July 2009 upon the retirement of the incumbent, and has not been filled. Appellant did not rebut the testimony of Mr. Garritt that there were no demotional positions in a class below Appellant. The only evidence about this position was that it had been left unfilled for a year, and was not funded. Its existence as a square on an organizational chart that Appellant herself prepared does not overcome that evidence, or prove that the Agency arbitrarily denied her a demotion into that position.

Finally as to this issue, Appellant contends that the Agency should have transferred additional duties to her from other employees who were overworked, such as the Executive Assistant in Audit Services. Appellant cites no Career Service Rule in support of this theory. The rules do not require an agency to transfer duties from other employees in order to avoid lay-offs. CSR § 14-40 *et. seq.*

3. Whistleblower Claim

The Whistleblower Protection Ordinance prohibits retaliation "on account of the employee's disclosure of information about any official misconduct to any person." D.R.M.C. § 2-108(a). The plain meaning of the ordinance requires personal action by the employee herself. That interpretation is also supported by the legislative declaration that the purpose of the law is to encourage employees "to speak out fully and frankly on any official misconduct which comes to their attention without fear of retaliation." D.R.M.C. § 2-106.

Appellant testified that she chose not to report the ethics charge to Mr. Vigoda for her own reasons, one of which was fear of a negative evaluation by Ms. Phillips. In any event, it is undisputed that Appellant did not herself report the incident, and that Ms. Moreno did not disclose her name to Mr. Vigoda as the source of the information. Thus, Appellant did not establish a necessary element of her whistleblower claim: engaging in an activity protected from retaliation.

4. Retaliation for Use of FMLA Leave

A prima facie case of retaliation is made by showing 1) a protected employee action, 2) an adverse action by an employer either after or contemporaneous with the

employee's protected action, and 3) a causal connection between the two. In re Owoeye, CSA 11-05, 7 (6/10/05); citing Poe v. Shari's Mgmt. Corp., 188 F. 3d 519 (10th Cir.1999.)

Appellant claims that her lay-off constituted retaliation for her exercise of rights under the Family Medical Leave Act (FMLA), 29 U.S.C. § 2615. Appellant established a prima facie case of retaliation by her proof that she was granted and took FMLA leave from January to June 2010 to obtain treatment for a broken arm, and that she was laid off shortly after her return.

In rebuttal, the Agency established that Ms. Phillips herself approved the leave, and that two other employees who used FMLA leave are still employed by the Agency. The lay-off action was supported by a thorough analysis of the position and a conclusion that the duties consumed only 35 to 40 days per year. Appellant denied that conclusion, but presented no evidence rebutting it, either while the position was being evaluated or at hearing. There is no evidence linking her use of leave to the lay-off action, or showing that the Agency's articulated reasons for the lay-off were pretextual. Therefore, Appellant failed to prove her claim of retaliation. See Schaaf v. Smithkline Beecham Corp., 602 F.3d 1236 (11th Cir. 2010).

Order

Based on the foregoing findings of fact and conclusions of law, it is ordered as follows:

- 1) The Agency layoff action dated July 9, 2010 is affirmed.
- 2) Appellant's whistleblower claim is dismissed.
- 3) The claim of retaliation for use of FMLA leave is dismissed for lack of jurisdiction.

Dated this 29th day of October, 2010.


Valerie McNaughton
Career Service Hearing Officer