

**DECISION AND ORDER**

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IN THE MATTER OF THE APPEALS OF:

**ELIZABETH HAMILTON**, Appellant,

vs.

**FACILITIES PLANNING MANAGEMENT, DEPARTMENT OF GENERAL SERVICES,  
DEPARTMENT OF PUBLIC WORKS**, and the City and County of Denver, a municipal  
corporation, Agency.

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The hearing in these consolidated appeals was held on April 15 and 16, 2010 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Rick Deninger, Esq. The Agency was represented by Assistant City Attorney Robert Nespore. Director Derek Brown of the Department of General Services and City Engineer Lesley Thomas of the Department of Public Works served as the Agency's advisory witnesses for their respective departments. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following decision:

I. STATEMENT OF THE APPEALS

Appellant Elizabeth Hamilton was a Senior Architect with Facilities Management in the City and County of Denver's General Services Department prior to her lay-off, effective Jan. 16, 2010. On Nov. 25, 2009, Appellant filed Appeal No. 100-09 challenging the lay-off and asserting claims of discrimination on the bases of sex and age. On Dec. 15, 2009, Appellant filed Appeal No. 107-09, which claims that the lay-off was retaliation for her whistleblower activity. The appeals were consolidated on Dec. 17, 2009 based on Appellant's unopposed motion. Appellant withdrew her discrimination claims in her Notice of Claims filed on Mar. 24, 2010.

The Agency's Exhibits 1 – 10 and Exhs. E – R, V, Z, AA, CC – FF, and HH – KK were admitted by stipulation. Exhibits A, C, X and GG were admitted over objection. Exhibits A – D, S, U, X, GG, and NN were admitted during the hearing.

## II. ISSUES ON APPEAL

The issues presented for decision are as follows:

1. Was the lay-off of Appellant arbitrary, capricious, or contrary to rule or law?
2. Was the Agency's failure to grant Appellant an action in lieu of lay-off arbitrary, capricious, or contrary to rule or law?
3. Did Appellant establish that her whistleblower disclosures were a substantial or motivating factor in the lay-off decision?
4. Did Appellant establish that her whistleblower disclosures were a substantial or motivating factor in the decision not to transfer Appellant to the Department of Public Works?

## III. FINDINGS OF FACT

The parties have stipulated to the following facts by means of Appellant's Proposed Stipulations and the Agency Response dated April 1 and 5, 2010:

Stipulation 1: The city entered into a professional consulting agreement with Augusta Consulting, LLC on Sept. 22, 2009. [Exh. G].

Stipulation 2: On Nov. 12, 2009, Regina Garcia sent an email to Peter Garritt, which identified the positions to be abolished, but does not identify Appellant by name. [Exh. JJ].

Stipulation 3: On Nov. 13, 2009, Derek Brown, Interim Manager of General Services, transmitted a lay-off plan to Jeff Dolan, Executive Director of the CSA for audit and approval. The lay-off plan contained certain information regarding the positions to be abolished, including the names of the incumbents in the affected positions. [Exhs. L, N.] That same day, Mr. Dolan approved the lay-off plan. [Exh. M.]

Stipulation 4: Mark Guerrero has a continuous service date of Feb. 20, 2007, and was still employed by the Agency as of November 13, 2009. [Exh. O.]

Stipulation 5: Mr. Guerrero accepted a demotional appointment to a Project Manager 1 position with Public Works effective Nov. 16, 2009. [Exh. P.]

Stipulation 8: Appellant complained about the improper use of the bond funds to Mr. Hergenrader of CH2MHILL, and Denver City Council members Jeanne Robb and Doug Linkhart.

Stipulation 9: On May 4, 2009, Councilman Linkhart called Appellant and asked her about the funding issue. That same day, Mr. Linkhart spoke out against it at the Bond Implementation meeting.

Stipulation 11: Appellant complained about outside contracts of city employee work to Michael Henry on Sept. 28, 2009 and by telephone that same week to City Council members Doug Linkhart, Chris Nevitt and Peggy Lehman.

Appellant was hired in May 1991 as an Architect with the city's Design Construction Management unit within the Department of Public Works, where she performed project management duties. In January 2006, the entire unit was re-named the Projects Management Office and transferred to the Department of General Services' division then known as Public Office Buildings (POB), where it continued to do the same work. POB itself was thereafter re-named Facilities Management. [Exh. D.] Appellant remained a Senior Architect in the Project Management Office (PMO) at General Services' Facilities Management Division until her lay-off effective Jan. 16, 2010.

In November 2007, the voters passed the \$10.35 million Better Denver Bond (BDB), which provided funding for maintenance and preservation of city buildings, including \$7 million for the City and County Building (CCB). In early 2009, Appellant served as co-Project Manager for the CCB with Senior Architect Dave Thomas. In that capacity, Appellant worked with the Infrastructure Priorities Task Force (IPTF) to plan and implement the order of projects to be funded by the bond. At the April 15, 2009 meeting of the task force, Director of General Services Derek Brown proposed that repair of the front stairs could be put on hold to free up that money for interior restacking<sup>1</sup> at the new Denver Justice Center. [Exh. R.] Appellant expressed her objection to the proposal, arguing that the current condition of the stairway constituted a public safety hazard. She reminded the task force that it had named the stairway a number one priority, and that this recommendation was instrumental in getting the bond passed. Appellant distributed pictures of the stairs, which showed gaps in the concrete steps and water damage inside the records storage area below the stairs. [Exhs. S, T.] Appellant informed the group that the storage area held 150 years of irreplaceable historical documents, including a letter expressing the

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<sup>1</sup> Appellant defined restacking as reconfiguring the interior rooms and spaces of a building for a new use.

sadness of the people of Denver over the death of Abraham Lincoln. After she spoke, Appellant noticed that Mr. Brown appeared angry. Mr. Brown testified that Appellant educated the group on the issue, and that her presentation was well-received. [Testimony of Mr. Brown, 4/16/10, 10:30 am.]

On April 20, 2009, Appellant met with Michael Henry, Staff Director of the Denver Board of Ethics. Appellant informed Mr. Henry that her manager wanted to misallocate bond funds provided by the voters for CCB preservation to a non-bond project, the backfill of the Justice Center. She solicited his advice about whether that would be ethical or legal under the strict regulations governing bond expenditures. [Testimony of Appellant, 4/15/10, 9:34 am.] Mr. Henry testified that he spoke with Assistant City Attorney Shaun Sullivan about Appellant's complaint. Mr. Sullivan later phoned Mr. Henry that he had spoken with the city's bond counsel, who informed him it was a valid concern and would be addressed. [Testimony of Mr. Henry, 4/15/10, 4:28 pm.] Appellant thereafter tried to set up a meeting with Councilman Doug Linkhart to discuss those same concerns.

At the next task force meeting held on April 22, 2009, Appellant came very well prepared with a proposal suggesting alternatives for funding the stair repairs, including state and federal grants. [Testimony of Julia Fitzpatrick, 4/15/10, 2:42 pm.] According to the minutes prepared by task force member Scott Hergenrader, a city contractor with CH2MHill, "FPM will continue to explore available options and timing. The group enthusiastically supported Elizabeth's leadership of this forward effort." [Exh. NN-2.] Mr. Brown testified that he asked Appellant a number of times to take her seat so the group could move on. [Testimony of Mr. Brown, 4/16/10, 10:32 am.] He later instructed Appellant's supervisor, Julia Fitzpatrick, to convey his order not to monopolize future meetings on the stair issue, since "enough time had been spent on that topic." [Testimony of Ms. Fitzpatrick, 4/15/10, 3:21 pm.] Thereafter, Appellant sent an email to a number of people in the city, in which she "once again voiced her exception to not having the stairs as part of the bond scope." [Testimony of Ms. Fitzpatrick, 4/15/10, 2:48 pm.] Appellant also left a message for City Councilman Doug Linkhart, and talked to Councilwoman Jeanne Robb and Mr. Hergenrader about what she believed was the improper use of bond funds. [Stip. 8.]

I was trying to assess whether or not what was being proposed was legal, and I was trying to protect the city. Because my fear was that in my history in working with the city this was the third time that money had been allocated for the repair of the stairs, and this . . . would have been the third time that the money was spent on something else. And I had a fear that if someone fell down the stairs, and broke an hip and died, . . . if it got out that the citizens three times had allocated money

toward repair of the stairs, and three times we had neglected to repair them, that the one million in savings could turn into a ten million dollar liability for the city.

[Testimony of Appellant, 4/15/10, 9:31 am.]

On May 4, 2009, Councilman Linkhart called Appellant on her cell phone while she was on vacation in Florida, attending a birthday celebration for her mother. Mr. Linkhart told Appellant he understood she had been trying to reach him. He said there was a meeting about the CCB that afternoon, and asked Appellant what was going on with it. Appellant informed him she was concerned about a proposal to move bond money allocated for repair of the stairs to pay instead for backfill of the Justice Center, and wanted to know if he thought it was ethical and legal. [Testimony of Appellant, 4/15/10, 9:37 am.] The parties stipulated that Mr. Linkhart spoke out against the proposal at the Bond Implementation meeting later that day. [Stip. 9.] The parties agree that the bond money at issue was not diverted to pay for backfill at the Justice Center.

On May 6, Mr. Brown instructed Appellant's supervisor, Julia Fitzpatrick, to remove Appellant as Project Manager of the CCB based on her dissemination of an email to several persons about the stair issue after she had been told to drop the subject by her manager. [Testimony of Ms. Fitzpatrick, 4/15/10, 2:47, 3:30 pm; and Mr. Brown, 4/16/10, 10:53 am.] Mr. Brown explained in his testimony that the task force needed to know the reason why the stairs were settling before committing over \$1 million for their repairs. He issued the order removing Appellant from the CCB project because he believed she was complicating that effort by trying to get full funding for the stairway repairs before the structural analysis of the stairs had been done. [Testimony of Mr. Brown, 4/16/10, 10:34 am.] Ms. Fitzpatrick agreed with that order because Appellant's widely-distributed email was critical of management's stated position. [Testimony of Ms. Fitzpatrick, 4/15/10, 2:46, 3:16 pm.] When Appellant returned from Florida on May 7, Ms. Fitzpatrick informed Appellant she had been removed from the project. Appellant told Ms. Fitzpatrick "at some point afterward" that she had spoken to Mr. Linkhart. [Testimony of Ms. Fitzpatrick, 4/15/10, 2:48 pm.]

Appellant immediately called Mr. Brown and asked to meet with him about his decision to remove her as Project Manager. "I begged him to keep me on the project." She argued that she had a lot of background that would be valuable to anyone working on the building, and offered to write grants to raise money for the project if he no longer wanted her to be the spokesperson. Mr. Brown angrily refused, stating she "talked too loud, was too passionate

about the building, and that was reflecting negatively on General Services."  
[Testimony of Appellant, 4/15/10, 9:43 am.]

At the end of May, Ms. Fitzpatrick prepared Appellant's Performance Enhancement Program Report (PEPR), rating her performance exceptional for the previous year. Both Ms. Fitzpatrick and Appellant signed it, and the former submitted it to Mr. Brown for his review. Mr. Brown refused to sign it unless Ms. Fitzpatrick added the following language:

Her success with completing her primary responsibilities (projects) outweighs performance challenges in other areas during this period. Those issues have been discussed with Elizabeth so we expect that they have been resolved and that she will act with greater temperance during this next evaluation period. She is also to be aware that when directed by her supervisor or manager to do or not do something, that is the final word – failure to follow this direction will result in consequences.

[May 26, 2009 PEPR, Exh. B-1.]

In the performance category of "teamwork" in the original PEPR, her supervisor had stated:

Elizabeth is a dedicated employee who is always willing to go the extra mile to complete required work. This is an area of strength for her; she can be counted on to be at work and to fully participate in all work activities.

Mr. Brown conditioned his approval of Appellant's performance review on the addition of the following language to the "teamwork" section:

Conversely, she did take actions that were not conducive to promoting a positive image for the department; there were consequences for her and her supervisor as a result of her actions. This matter was thoroughly discussed with her in the presence of her supervisor and the department manager; a verbal warning was issued.

[Exh. B-6; testimony of Ms. Fitzpatrick, 4/15/10, 2:48 pm.]

Appellant testified, "[m]y take on it was it was basically a threat to be fired. . . I think the action that they were alluding to was that I just didn't go

along with the program that it was okay to take two million dollars out of the City and County Building and spend it on another project, that I checked it out with Doug Linkhart and with Michael Henry because I had some concerns about the ethics and legality of doing that." Ms. Fitzpatrick told her that "if I didn't follow the direction of Derek Brown, I wouldn't be working there very long", and she didn't want to see that happen. "And I said I will follow any direction Derek Brown gives me, but not if it's unethical and not if it's illegal." [Testimony of Appellant, 4/15/10, 9:50 am.]

In mid-August, Mr. Brown was informed by the Mayor's Chief of Staff Kelly Brough that the functions of the PMO, Appellant's unit, would be transferred to Public Works as a part of the city's budget-cutting efforts. That team had previously operated out of Public Works until its transfer to General Services in 2006. Mr. Brown was later informed that the \$1,166,200 annual budget for the Project Management team would be removed from Facilities Management, and its ten full-time staff members (FTEs) would be eliminated. Correspondingly, the Public Works Department was to receive "an increase of \$823,000 and 7.0 FTE and operational expenses resulting from the consolidation of functions from Facilities Project Management". [Exhs. 7-2, E, F.]

Mr. Brown thereafter communicated with his human resources and budget staff as well as Manager Bill Vidal and City Engineer Lesley Thomas of Public Works to implement the transition. Jacobs Global Buildings North America (Jacobs or Jacobs GBNA) was retained to develop an organizational plan to handle the PMO workload. The group instructed Jacobs to base its plan on industry standards, and limit the recommended operating budget to \$823,000, the amount to be transferred from General Services. In achieving that budget reduction, Jacobs was advised to capitalize on already-available resources within the larger Public Works Department to accomplish workload sharing. Mr. Brown transmitted a list of the projects being handled by PMO, and briefed Public Works on the status of projects funded by the Better Denver Bonds. On Sept. 15, Mr. Brown met with the PMO team to inform them their jobs were not funded for 2010, and that all projects management functions would be transferred to Public Works. Internal communications by Mr. Brown sometimes characterized the transition as a transfer of the Projects team itself to Public Works, and at other times referred to it as a transition of the team's function to Public Works. [Exh. DD-1, 2.]

On Sept. 16<sup>th</sup>, Program Manager Dick Gillet of Jacobs GBNA prepared a scope of services to provide recommendations regarding the most productive staffing level and classifications based on typical industry practice. [Exh. 7-7.] City Engineer Lesley Thomas testified that she prepared the first five pages of the resulting Workload Transition Plan. That portion of the plan stated the criteria used by the contractor, including industry standards, and summarized the

staffing and organizational recommendations made by Jacobs. [Exhs. 7-2 to 7-5.] The workload plan submitted on Sept. 30<sup>th</sup> noted that PMO's work was a combination of capital improvement and bond projects. The BDB bond projects were winding down, and were scheduled to be completed by 2011. The plan suggested using specialized contractors, Senior Architects and Engineers for complex projects or those requiring subject matter expertise, and using Project Manager 1 positions to perform standard projects. The Architect and Project Manager positions require baccalaureate degrees in architecture or a related field. Senior Architects are required to have three years of professional experience, and Project Managers must have two years' experience. [Exhs. 7-50, 56.] Jacobs recommended a staff of two Project Managers, one Senior Architect and one Senior Engineer who could also perform project management duties, as well as two other support staff and a manager, for a total of seven employees. [Exh. 7-23.]

The plan included a graph of the projected salaries for the Public Works staff members who would do the work. The salaries were based on assumptions developed by Ms. Thomas and the Public Works' budget director for the purpose of demonstrating that it could perform the work within the \$823,000 budget increase, the amount to be transferred from General Services to Public Works to perform the project management function. [Testimony of Lesley Thomas, 4/16/10, 12:26 pm.] The salary assumption for the Project Manager position was \$79,410, which was step 11 of classification 813E. The Senior Architect salary was assumed to be \$99,190, step 12 of classification 816E. [Exh. 7-32.] The projection showed that the salaries and benefits for the eight-member staff would total \$794,729, well within the \$823,000 expected budget increase for the function. Based on its research into best industry practices, the report recommended two options, one of which added four FTEs to Public Works' Major Projects office: a Senior Architect and Senior Engineer at pay step 12, and two Project Manager I positions at step 11. [Exhs. 7-12, 7-32.] Public Works ultimately selected that option. [Exhs. 7-25, 7-32.] Ultimately, a second Senior Engineer was approved for that unit. [Testimony of Ms. Fitzpatrick, 4/15/10, 3:01 pm.]

Sometime during the week beginning Sept. 28, Appellant complained to Mr. Henry of the Board of Ethics and Council members Linkhart, Chris Nevitt and Peggy Lehman that Mr. Gillet had a conflict of interest based on his financial interest in recommending elimination of Career Service jobs and substitution of outside contractors to do their work. [Stip. 11; Exhs. Z, AA.] When it was communicated to him, the Public Works Director rejected this argument: "They [Jacobs] stand to gain nothing from this budget strategy as the plan is still to manage these projects with city staff". [Exh. AA-1.]

A week later, the city entered into a professional services agreement with Augusta Consulting, LLC to provide on-call project management for the infrastructure projects included in the Better Denver Bond Program, in the amount of \$490,000. [Stip. 1; Exh. G.] At that time, bond projects were 41% of the Project team's workload, and Appellant was handling \$2.4 million in bond projects. [Exh. OO.]

Both agencies worked together to implement the transition of the project management function to Public Works. [Testimony of Mr. Brown, 4/16/10, 11:01 am.] General Services was to retain spending authority over capital improvement projects after the work transferred to Public Works. [Exh. CC.] The other portion of the PMO team's work, projects funded by the 2007 Better Denver Bond, was expected to be completed by 2011. [Exh. 7-11.] The transition process was timed in part to give employees who were to be laid off an opportunity to take advantage of the city's early retirement incentive program ending in November. [Testimony of Nyle Boyd, 4/16/10, 9:12 am.]

The agencies then "determined the number and level of positions needed to manage these projects once they transition". Based in large part on the recommendations in the Jacobs plan, Public Works asked for and was authorized to fill four jobs for its new Major Projects unit: two Project Managers, one Senior Architect and one Senior Engineer. In addition, another four staff positions were recommended, for a total of eight FTEs for the new unit. [Exh. 7-32.] "[T]he goal is to post all positions . . . interview candidates and make offers no later than the week of November 9, 2009." [Exh. EE-2.] Public Works Manager I Russell R. Luxa developed the job descriptions for the three new jobs. The classification of Project Manager had been created in Sept. 2007<sup>2</sup>, and was considered by Jacobs to be appropriate "to handle the standard projects for FPM PM." [Exh. 7-32.] The jobs created at Public Works were intended to handle the same functions as those performed by the General Services' Project Management staff, which included Appellant and the other three Senior Architects in the PMO. [Testimony of Mr. Brown, 4/16/10, 11:05 am.] Mr. Luxa described the new positions as "very very similar" to the jobs performed by the Senior Architects who were to be laid off from General Services. [Testimony of Mr. Luxa, 4/15/10, 2:18 pm.]

On Oct. 12, the four professional positions were posted as open to all employees eligible for transfer, demotion, re-promotion or re-employment, and the agencies informed the PMO staff that they would be required to apply for the jobs at Public Works. At Appellant's request, Councilman Linkhart asked Public Works Manager Bill Vidal about the situation:

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<sup>2</sup> Both Senior Architect and Project Manager I perform project management work and require a bachelor's degree: the former in architecture, and the latter in architecture or a related field. [Exhs. 7-h, 7-j.]

Someone in the POB Facilities Mgt Group has told me that their division is being abolished and that everyone has to apply for new positions in a new division of Public Works regardless of their seniority with the city. I understand that this group of people was previously with Design & Construction Mgt in Public Works until three years ago when they were transferred as a group to POB.

Mr. Vidal replied,

Yes it is true that this group was in Public Works before and was transferred to GS three years ago. The "applying for your job" comment may be accurate, although it is still a little early for us to say until our exploratory work is completed, but this is simply a matter of math. Just like the Payroll consolidation that happened last year, when you find that a consolidation determines that you can do the work with a lesser number of people, and then you find that you have more employees than positions, then it seems only fair that all of those employees should be able to compete for those jobs.

[Exh. AA.]

On Oct. 9, General Services Human Resources (HR) Director Regina Garcia informed CSA Director of HR Services Nyle Boyd, who was advising the transition planners, that the job classifications established by Public Works made it possible that

some of the General Services employees may end up being offered demotions. . . .However, since the General Services positions held by the projects staff are going to be abolished by the end of the year, and they have been told this fact, does this qualify the demotions in the Public Works positions to be viewed as "demotions in lieu of lay-off"?

The assumption is that a demotion in lieu of lay-off only applies if the employee has received a written notice that his/her position is being abolished and the employee is "offered a demotion in lieu of lay-off." However, I am aware of a situation where an employee took a demotion because she was told her job was going to be abolished (the employee found the position on her own); and, although she had not yet received written notice from the agency that her job was being

abolished, her demotion pay was set in accordance with the demotion in lieu of lay-off rule.

I wanted to get clarification on if any of the project's staff accept a demotion will the demotion be viewed as a voluntary demotion or a demotion in lieu of lay-off?

Ms. Boyd replied,

[N]one of these employees have been given lay-off notifications so at this point they would voluntarily accept a position offered to them.

You bring up a point that we need to make sure we stay on top of and on the same page with. I know you mentioned it was GS's intention to give them lay-off letters sometime in mid-Nov. We will need to be careful of the timing so it does not inadvertently trigger any of the lay-off rules, that is not the intention of this process and the goal of PW is to get this complete to allow folks to decide on retirement which will give plenty of notice for lay-off purposes. Please let me know if this does not make sense.

[Exh. GG, emphasis in original.]

The day after the jobs were posted, Ms. Fitzpatrick, Manager of the PMO team scheduled to be eliminated, sent a four-page memo to five cabinet-level officials and the Mayor's Office. The memo outlined her argument that the posted positions did not adequately address the continuing level of work performed by the team. [Exh. HH.] Ms. Fitzpatrick testified that she received no response to the memo. [Testimony of Ms. Fitzpatrick, 4/15/10, 2:55 pm.] A few weeks later, Appellant sent a letter to Public Works Manager Bill Vidal and three others, suggesting ideas for \$955,000 in potential savings as an alternative to "break[ing] up a team that is producing such outstanding results". [Exh. X.] Mr. Brown testified that he did not review or consider the suggestions made in either memo.

Appellant applied for both the Senior Architect and Project Manager openings on Oct. 15th. [Exhs. J, K.] On Nov. 2 and 3, joint interviews for the positions of Project Manager I, Senior Architect and Senior Engineer were held by a panel of five representing General Services, Public Works, Environmental Health and Oz Architecture. Sixteen applicants were interviewed for those three jobs, including all eight PMO architects and engineers whose positions were being eliminated. Another eight applicants were city employees eligible for

transfer, demotion, or re-promotion, or former employees eligible for re-hire. Their interview performances were scored separately by each panel member. [Exh. 9.]

On Nov. 5, Ms. Garcia from General Services Human Resources requested a Rank Order List for consolidation group G02. [Exh. JJ-2.] The list was run that day, and showed all four Senior Architects: David Thomas and Mark Guerrero in lay-off group A, with seniority of about three years, and Appellant and Kenneth Matthews in group D, both of whose seniority exceeded eighteen years. [Exh. 6-7; CSR § 14-42 e.)]

The next day, Public Works Administration sent a spreadsheet with the salaries and years of service of the PMO staff, including Appellant, to Chief Engineer Lesley Thomas, among others. [Exh. II.] The following Monday, Nov. 9<sup>th</sup>, Public Works selected Mark Guerrero and Julia Fitzpatrick for demotions to the two Project Manager positions, and selected Ken Matthews and Robert Alson for transfers to the new unit as Senior Architect and Engineer, respectively. All four offers were accepted. The only factor considered in making the hiring decisions was the scores received during the interviews. [Testimony of Lesley Thomas, 4/16/10, 12:11 pm; Exh. 9.] Another Senior Engineer position was later added to the new unit, bringing its FTE total to nine. PMO Engineer Gregory Bertram was given a transfer to that position.

On Nov. 12, 2009, Regina Garcia again requested a Rank Order List from CSA, this time identifying Appellant's position number, 38379, as one of two to be abolished in the Senior Architect job code. [Stip. 2; Exhs. JJ, II-2]. CSA sent the rank order list later that day, which showed all four employees in the Senior Architect job code. [Exh. 6-7.]

The next day, Nov. 13, Mr. Brown transmitted a lay-off plan to CSA Executive Director Jeff Dolan for audit and approval. [Exhs. L, N.] In accordance with the Agency's intention to time the lay-off plan to occur after the Public Works positions were offered and accepted, the plan named only "the people that were not offered positions in Public Works": Senior Architects Appellant and David Thomas, and two others. [Testimony of CSA HR Supervisor Pete Garritt, 4/16/10, 9:25 am.] Mr. Brown testified, "[t]hese employees were not offered positions as part of the movement to Public Works, and for that reason these positions were then abolished." [Testimony of Mr. Brown, 4/16/10, 10:23 am.] The Personnel Director approved the lay-off plan the same day. [Stip. 3; Exh. M.] That day was also the deadline for electing early retirement under the special incentive program. [Testimony of Appellant, 4/15/10, 10:45 am.]

The following Monday, Nov. 16, Appellant received a notice that her position was being eliminated, and that she would be laid off effective Jan. 16,

2010. "After reviewing the rank order list for this agency, it had been determined that there are no positions available for you to transfer or demote to in lieu of lay-off per Career Service Rule 14-45." [Exh. 3.] Mr. Guerrero and Ms. Fitzpatrick were also given demotions to the position of Project Manager I at Public Works. Both now perform the same duties for Public Works in their demotional positions as they did as Senior Architects at the General Services Department. [Testimony of Ms. Fitzpatrick, 4/15/10, 3:04.] The Personnel Action Form prepared to memorialize Mr. Guerrero's demotion states that he was eligible for reinstatement, which indicates that his demotion had been determined to be the result of a lay-off under CSR §§ 3-42 A and 14-45 f)(1). [Exh. P.] Mr. Guerrero's pay was set at \$99,190 per year, the same level as his pre-demotion pay in the Senior Architect position. [Exh. P.] Thereafter, Appellant's capital improvement and bond projects were transferred to Public Works or contract Project Managers. [Exhs. G, H, I.]

#### **IV. ANALYSIS**

##### **1. Standard of Review**

A lay-off decision must be upheld unless it is determined to be arbitrary, capricious or contrary to rule or law. Velasquez v. Dept. of Higher Education, 93 P.3d 540 (Colo. App. 2003). An employee challenging a lay-off 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 Mfgs. Assn. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 44, fn. 9 (1983); In re Vasquez and Lewis, CSA 08-09, 4 (5/20/09).

"The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir.1994). The reviewing body must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

A decision is an abuse of discretion if it is made without a rational explanation, departs from established policies, or rests on considerations not intended by the governing law. Wong Wing Hang v. INS, 360 F.2d 715, 719 (2<sup>nd</sup> Cir. 1965). A discretionary agency action is capricious or arbitrary if the agency 1) fails to use reasonable diligence to procure facts necessary to its decision, 2) does not consider relevant evidence, or 3) bases its action on conclusions reasonable persons could not reach. Maggard v. Dept. of Human Services, 226 P.3d 1209, 1212 (Colo.App. 2009.)

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

The transfer of Project Management to Public Works was intended to accomplish budget savings and workload sharing, and to leverage the expertise of on-call consultants. [Exh. 7-2.] The Mayor ordered General Services to transfer the PMO functions to Public Works, with a \$343,200 reduction in budget and with three fewer employees. The appointing authority for General Services was responsible for lay-off planning, which includes actions in lieu of lay-off. CSR § 14-46. In this decision, "the Agency" includes both General Services and Public Works officials who were part of the lay-off and transition planning process.

The Agency contends that the decision to lay off Appellant was required by the fact that the PMO team had been eliminated, and Appellant was not selected for one of the replacement positions at Public Works. Appellant does not challenge the Agency's claim that lay-offs were a financial necessity. She does argue that the Agency violated the lay-off rules and deprived her of seniority rights by filling the Public Works positions as it did: as regular hires, outside the Rule 14 lay-off process, before the lay-off of any employees, and without consideration of her experience, performance, or seniority. De novo review of that action requires an analysis of whether the Agency made its lay-off and hiring decisions after careful consideration of appropriate evidence, and came to reasonable conclusions flowing from that evidence.

a) Applicable Rules

The Denver City Charter created the Career Service personnel system, directed by the five-member Career Service Board,

to foster and maintain a merit-based personnel system according to the principles set forth in this Part I . . .

B. All appointments and promotions of employee in the Career Service shall be made solely on the basis of merit and ability. Dismissals, suspensions or disciplinary demotions of non-probationary employees in the Career service shall be made only for cause, including the good of the service. . . .

C. The City Council shall by ordinance enact a classification and pay plan and attendant pay rates for all classifications in the Career Service . . . based upon the duties of the several classifications. The pay rates as reflected in the pay plan shall provide like pay for like work within such classifications. . . .

D. In order to attract and retain a qualified and competent work force, the policy of the City and County of Denver shall be to provide generally prevailing compensation to employees in the Career Service personnel system.

Denver City Charter, § 9.1.1 Career Service personnel system.

In aid of these principles, the Career Service Board adopted rules governing procedures to be used by agencies in conducting lay-offs. CSR § 14-40 et. seq. The rules mandate audit and approval of lay-off plans, lay-offs by position and lay-off group from a board-approved lay-off unit in inverse order of seniority group, actions in lieu of lay-off, and placement on a reinstatement list and other hiring preferences under Rule 3, SELECTION. Based on these rules, employees who have served for longer periods are entitled to more protection from lay-off than those with less seniority within their lay-off unit and classification. CSR § 14-44.

“The basic purpose of civil service laws is to secure governments, local, state and national, efficient public servants. Such laws seek to promote the welfare of the individual civil servant but an overriding policy is promotion of the best interests of the public as a whole.” Turner v. City & County of Denver, 361 P.2d 631, 634 (Colo. 1961). Denver furthers those public interests by providing merit selection, like pay for like work, discipline only for cause, and other protections set forth in the Career Service Rules.

The CSA classification process is intended to “ensure like pay for like work within the City’s merit-based personnel system through the use of a systematic method of individual or group classification reviews.” Rule 7, Purpose Statement. A position is the “aggregate composition of duties and responsibilities performed by one employee.” § 7-10 G. CSA bears responsibility for maintaining classifications of positions “so nearly alike in the essential character of their duties and responsibilities that the same pay grade, title and specification can be applied, and such that they can fairly and equitably be treated alike under like conditions for all other personnel purposes.” § 7-10 C. “When the duties of an existing position are changed to the extent that the position is more similar to positions in other classifications than to positions in its own classification, the position should be re-allocated to a more appropriate classification in accordance with this Rule 7.” § 7-33 A.

b) Transition Plan

The lay-off plan developed by the appointing authority was based largely on the recommendation of private contractor Jacobs GBNA, using as its guideline industry best practices. The Agency’s written scope of services

specified that the contractor was to apply industry standards, but was silent as to the application of city merit principles. [Exh. 7-1 to 7-5.] Jacobs recommended using the city classification of Project Manager 1 for standard projects, work then performed by PMO Senior Architects and Senior Engineers. [Exh. 7-19.] The Agency adopted this recommendation and sought budget approval for two Project Manager 1 positions, one Senior Architect and one Senior Engineer<sup>3</sup>, along with four other positions. Appellant challenges the decision to change the job title but not the work performed by her position, claiming a deprivation of her retention and seniority rights.

The duties of the new position of Project Manager 1 at Public Works were the same as those previously performed by Senior Architects and Senior Engineers at General Services: project management of capital improvement and bond projects. [Exh. 7-16.] Appellant performed this same work for fifteen years at Public Works from 1991 to 2006, before the unit was transferred to General Services and renamed the Project Management Office (PMO). She continued to perform that work under the working job title of Project Manager for the three years the unit functioned at General Services. [Exhs. B-33, B.-39, B-50, C-12, H, HH-3.] Appellant's job description defined the work as project management. [Exh. 7-46.] Likewise, her performance evaluations described the work as project management of Better Denver Bond projects and capital improvement projects. [Exh. B.] The Workload Transition Plan referred to both the Senior Architects and Senior Engineers as Project Managers, and categorized their work as project management. [Exh. 7-19, 7-20.] Candidates for the Senior Architect and Project Manager positions were interviewed together for the two Project Manager openings. [Exh. 9.] Most notably, Appellant's former supervisor Julia Fitzpatrick, who was selected for one of the Project Manager positions, testified that the work now performed by Project Managers at Public Works was the same as that performed by Senior Architects at General Services. The Agency presented no evidence that its lay-off planning took into consideration the similarity of duties of the two positions in making its employee selections. There is no evidence that the type and level of work done by General Services' Senior Architects was different in any respect from the work to be assigned Public Works' Project Managers.

The Agency implemented the transition by transferring the duties performed by Senior Architects, salary grade 816, to the position of Project Manager, grade 813. It was the Agency's intent to include the same duties and level of responsibilities in the Project Manager position. Both positions were

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<sup>3</sup> The Agency later added another Senior Engineer position, which Mr. Bertram obtained by transfer from PMO.

assigned the same duties and had almost identical qualifications.<sup>4</sup> I conclude that Project Manager 1 is the same "aggregate composition of duties and responsibilities" as performed by the Senior Architect position. § 7-10 G. The Agency with responsibility to plan the lay-off abolished and re-created the same jobs in a different agency, while maintaining spending authority over capital improvement projects. Nevertheless, the new position was approved in a different classification, at a salary grade three levels below the Senior Architect's grade. The evidence does not show that in making that change the Agency sought either allocation of a new position or re-allocation of an existing position under CSA Rule 7. There was no testimony that the Agency considered or applied the Charter or Career Service Rules in creating or filling the two Project Manager positions.

The absence of a re-allocation audit to justify the reduction in pay grade appears to run contrary to the classification rules. "The lay-off rules do not support an exception to Rule 7 for demotional lay-offs." In re Romberger, CSA 89-04, 9 (3/2/05). See also Hanley v. Murphy, 255 P.2d 1, 4 (Cal. 1953.) As noted above, Jacobs made its recommendations based on best industry practices, and without an analysis of their impact on vested employment rights or merit principles applicable to career status employees under the Rules. The Agency relied on the Jacobs recommendations without requesting a CSA audit or re-allocation, or itself determining whether they complied with the classification or lay-off rules. As a result, the re-classification of those duties bypassed the CSA process and framework intended to ensure "like pay for like work", a core principle of the merit system under the Denver Charter. Appellant was not directly affected by this informal reclassification, as she was not selected for demotion. However, the Agency's failure to seek re-allocation prior to downgrading the Senior Architect position is one factor to consider in determining whether the Agency lay-off and hiring decisions were arbitrary, capricious or contrary to rule or law.

In addition, the Agency decided to fill the replacement jobs by a competitive hiring process open to all qualified current and former city employees. The recruitment was restricted to employees entitled to transfer, demotion, re-promotion or re-employment under § 3-32 A.1.d. As a result, half of the employees interviewed were not members of the lay-off unit or classifications affected by the lay-off plan, diluting the rights of employees selected for lay-off to use their lay-off status or seniority to obtain an action in lieu of lay-off.

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<sup>4</sup> The sole exception is that Senior Architects were required to have three rather than two years of professional experience. [Exh. 7-50, 7-56.]

For these reasons, the Agency failed to consider the applicability of career service classification and lay-off protection, evidence that would be considered by a reasonable administrator in devising its lay-off and transition plans.

c) Selection of Project Managers

Appellant challenges the Agency's decision not to grant her a demotion to Project Manager based on the following arguments: 1) the new Project Manager job was essentially her Senior Architect job under a different job title, 2) the Agency failed to consider seniority in its selections, 3) the position was opened for competitive hiring to non-PMO employees, 4) the Agency failed to give Appellant available vacancies as demotions in lieu of lay-off, and 5) the Agency contracted out project work to private contractors, eliminating the work of career service employees.

Appellant argues that the Agency in making its demotion decisions should have considered her seniority and the fact that the jobs were the same. The Agency contends that Appellant had no right to the demotion in a different lay-off unit and classification series under § 14-45 b). I have already found that the two positions contained the same aggregate of duties, and were therefore the same position under the Career Service Rules. The issue then is whether the Agency acted in an arbitrary and capricious manner in transferring the work of Appellant's position to a different agency under a different classification by competitive hire, without considering her seniority as a factor in favor of retention.

Appellant relies on a line of Colorado cases reversing lay-offs of state employees whose jobs were formally abolished but re-established elsewhere. In May v. Dept. of Human Services, 976 P.2d 281 (Colo.App. 1998), the educational program offered juvenile offenders at Lookout Mountain Youth Services Center was reorganized as the Lab School under the direction of Metro State College. Lookout teachers were offered the choice of keeping their instructional jobs at Lookout, but under the supervision of Metro State College outside the classified system, or transferring to other civil service jobs within the state personnel system. In either event, the teachers remained state employees. The Court of Appeals held that their rights under the state constitution were violated when the agency abolished their positions, created new jobs with substantially the same duties, and required the employees to choose between their civil service status and their Lookout teaching jobs.

That holding was subsequently reversed by the Colorado Supreme Court. In Dept. of Human Services v. May, 1 P.3d 159 (Colo. 2000), it was determined that a reorganization to promote the agency's strategic goals did not violate

civil service laws if it did not alter an employee's pay, status or seniority. The court confirmed an agency's authority to eliminate the jobs of public employees based on "a change in the fundamental structure, positions, and/or functions" within their control. The court cited City and County of Denver v. Norris, 281 P.2d 160 (1955), for "restating the 'well established' principle that civil service positions may be abolished if they are no longer a public necessity." While concluding that "transfers may not be made under the rubric of a 'reorganization' if the agency's true motive is to remove positions from the classified system", the court instructed finders of fact to "look to the position's actual duties, not the title" in determining the propriety of a transfer during a lay-off. May, supra, at 168, 169. The May court cited Bardsley v. Colorado Dept. of Public Safety, 870 P.2d 641 (Colo.App. 1994), for its holding that the state could not terminate civil service employees and fill their jobs with new employees in another department if the qualifications and duties of the positions in the new department were substantially similar to those in the old one.

Bardsley in turn drew on Colorado cases from 1922 to 1991 and decisions from eight other jurisdictions to conclude that changing only the job title and hiring a new employee to perform substantially the same duties would render the state Civil Service Amendment "a nullity". People ex rel. Fulton v. O'Ryan, 204 P. 86, 87 (1922); People ex rel. Kelly v. Milliken, 223 P. 40 (1923); Colorado Ass'n of Public Employees v. Board of Regents, 804 P.2d 138 (Colo. 1990); Tising v. State Personnel Board, 825 P.2d 1011 (Colo.App. 1991). "[T]he question of similarity in positions is the decisive question that must be addressed in assessing complainants' claim that the denial of their right to be transferred was violative of the Civil Service Amendment." Bardsley, supra, at 648.

In 2005, the Colorado Court of Appeals re-affirmed Milliken, Bardsley and May in a case very similar to this one, likewise involving the transfer of a media center's function to a different agency. In Rice v. Auraria Higher Education Center, 131 P.3d 1096 (Colo.App. 2005), a state agency's denial of a transfer was held to be arbitrary and capricious based on its failure to consider seniority, retention rights, evaluations, personnel files, and the fact that the qualifications for the two positions were substantially the same. The court affirmed the Administrative Law Judge's finding that the unit's move from one agency to another was not a reorganization:

[T]here was no fundamental change to the Media Center's structure, positions, or functions. The Media Center continued to provide the same services after transfer of administrative control. The overall structure was modified only by a reduction in the number of positions, and the positions themselves continued to be substantially similar. Further, the ALJ found that UCD retained title to the Media Center equipment.

Id. at 1101.

Decisions in other states are in accord with these Colorado cases, and likewise hold that a public employee may not be laid off when the job title is changed but the duties remain the same. See City of San Antonio v. Wallace, 338 S.W.2d 153 (Tex. 1960); Jersey City v. Dept. of Civil Service, 153 A.2d 757 (N.J. 1959); Pellet v. Dept. of Civil Service, 76 A.2d 273 (N.J. 1950); Phoenix v. Powers, 113 P.2d 353 (Az. 1941); Wipfler v. Klebes, 30 N.E.2d 581 (N.Y. 1940); Winslow v. Bull, 275 P. 974 (Cal. App. 1929); State v. City of Seattle, 208 P. 1092 (Wash. 1922); State ex rel. Sonnenberg v. Board of Com'rs of Port of New Orleans, 90 So. 417 (La. 1921); People ex rel Jacobs v. Coffin, 119 N.E. 54 (Ill. 1918); see also 15A Am.Jur. 2d Civil Service § 79.

In an appeal arising out of Denver's merit civil service system which covers its classified fire and police departments, the Supreme Court of Colorado upheld the Civil Service Commission's reversal of non-disciplinary demotions from the rank of Captain back to Lieutenant. "Of course, a civil service employee can be dismissed, suspended, or demoted for disciplinary reasons, but these actions must be taken according to the procedures and under explicit authority granted by the City Charter." City and County of Denver v. 2<sup>nd</sup> Judicial District, 582 P.2d 678, 682 (Colo. 1978).

Denver's Career Service shares similarities with Colorado's civil service system. Both are merit systems for public employees, intended to promote the

good of the public service, and remove employment from the patronage system, seeking instead to offer an employee the inducement of promotion for conscientious, faithful, honest, and efficient service, with such appointments and promotions based on fitness and merit, and not on political affiliation. Indeed, the historical and fundamental purpose of the civil service and its merit system principles is to insulate a state work force from political influence so as to improve the effectiveness and efficiency of the state government.

15A Am. Jur. 2d Civil Service § 1.

The Denver Charter created the Career Service personnel system, which mandates appointment by merit and ability, and discipline "only for cause." Employees in the Colorado personnel system "shall hold their respective positions during efficient service or until reaching retirement act, as provided by law." Colo. Const. art. XII, § 13(8). Layoffs of both Denver and Colorado public employees must be conducted according to procedures established by the

adopted layoff rules. Both require consideration of seniority, and provide retention and reinstatement rights to employees. CSR § 14-40 et. seq.; CRS § 24-50-124.

There are also notable differences in the laws and rules governing Colorado and Denver public employees. The Colorado statute lists “lack of work, lack of funds, or reorganization” as appropriate justifications for layoff. CRS § 24-50-124. The Colorado Personnel Rules mandate a detailed lay-off plan explaining the reasons for the change, how the work will be absorbed, the anticipated benefits, including cost savings, a list of the classes in which positions will be abolished, and any modifications to special qualifications. Dept. of Personnel (DOP) Reg. No. 7-7, 4 Code Colo. Regs. 801.

In contrast, the Denver rules do not require any specific business reason for a lay-off, noting only that employee separations must be designated as one of six types, including layoff. CSR § 14-10. Denver’s rules require a CSA audit and approval of the lay-off plan. CSR § 14-46 b). An agency’s stated reason for lay-off decisions may be examined on appeal to determine whether it is consistent with the evidence of the real reason for the lay-off, and to assure that it is based on a need to reduce positions and not aimed at the incumbents of those positions. See In re Foley, CSA 19-06 (11/13/06); In re Hurdelbrink, CSA 109-04, (1/5/05). A city agency’s lay-off decision, like all decisions affecting substantial employment rights, must be based on the type of factors that would be considered by a reasonable administrator, and a rational connection between the facts and the decision made.

An agency acts in an arbitrary and capricious manner if it fails to consider factors that a reasonable administrator would consider under the same circumstances. As noted above, lay-off planning under the Career Service Rules includes actions in lieu of lay-off, and is the responsibility of the appointing authority. “The decisive question” in determining eligibility for demotional appointments in lieu of lay-off requires the appointing authority to consider the essential functions and qualifications of a position. Bardsley, supra, at 648. An agency’s failure to give proper consideration to the functions and qualifications of a demotional position has been held to be arbitrary and capricious. In re Romberger, CSA 89-04, 9 (3/2/05). Where the duties and qualifications of the eliminated and newly created positions are the same, the incumbent’s on-the-job experience is one of the factors that would be considered by a reasonable administrator attempting to fill the position “on the basis of merit and ability” under the Denver City Charter.

Here, the Agency lay-off plan included a decision to downgrade Appellant’s position to Project Manager, without seeking a CSA re-allocation of the position. The plan also opened that position up to others beyond the

employees affected by the lay-off, and conducted the actions in lieu of lay-off as recruitments under the competitive hiring process. Those decisions disregarded the important fact that the duties and qualifications of Appellant's job and the new position are nearly identical, and gave no more weight to the expectations of the employees affected by the anticipated lay-off than those of other candidates.

Moreover, the underlying duties of the old and new positions were performed by Appellant at Public Works for at least fifteen of the past eighteen years, until those duties and Appellant were moved to General Services. Appellant and all but four PMO employees originated at Public Works and were transferred together in 2006, without lay-offs or changes in classifications. [Exhs. D-1, II-2.] In light of these facts, a hiring administrator would have been reasonable in considering that history, as well as each candidate's past performance of those duties at both General Services and Public Works.

The Agency presented no evidence that experience and performance of these same duties would not be relevant to merit-based selections for these positions. In fact, the classification descriptions indicate that additional years of professional experience justify a higher grade and additional pay, both of which indicate that job experience is a favorable qualification that should be considered in making hiring decisions. [Exhs. 7-50, 7-56.]

Given the un rebutted fact that the work performed by the old and new positions was the same, a reasonable administrator may also have considered performance evaluations, personnel files, and relative qualifications and experience. On these criteria, Appellant would have compared favorably with other candidates, having extensive project management experience, excellent performance reviews, city performance awards, and having served eighteen years performing project management duties at both agencies affected by the transition. [Exhs. A – C.]

In contrast, the selection criteria applied here was limited to the interview scores of the candidates, which included both PMO staff and other applicants. The evidence is silent as to the criteria used to develop or score the interview questions. The Agency's use of interview scores to the exclusion of all other factors relevant to merit and ability deprived Appellant of consideration of her many years of experience and accomplishments on the same job, factors highly relevant to merit and ability. Moreover, there is no evidence that CSA developed or approved the interview questions as a selection examination under CSR § 3-30, or approved the examination scoring method used by the Agency pursuant to its responsibilities under CSR § 3-35.

The Agency argues that the competitive hiring process was consistent with selection on the basis of merit and ability, and that the real reason for Appellant's non-selection was her failure to score well during the interview. However, Appellant had already successfully competed for her position in 1991, and had performed that job for the past eighteen years. Where the duties and qualifications of a position are identical, an incumbent career status employee is not required to undergo a second competitive testing process in order to remain in her position. Moreover, the unvalidated results of a single interview session cannot be deemed to outweigh more directly relevant factors on the issues of merit and ability, including years of experience and performance of the same duties to be performed in the new position.

An agency's use of procedures not in conformity with the personnel rules is also relevant to the determination of whether its action is arbitrary and capricious. "When a governmental agency promulgates rules governing the discharge of its employees, it must strictly comply with those rules." Brennan v. Dept. of Local Affairs, 786 P.2d 426, 427 (Colo.App. 1989), citing Mercer v. Bd. of County Com'rs, 671 P.2d 435 (Colo.App.1983). The Agency conducted the lay-off and actions in lieu of lay-off according to its overall transition plan, and therefore those issues are analyzed together.

As a part of the transition plan, the Agency decided to delay the lay-off until after completing the hiring process to fill the Public Works Major Projects Unit, for reasons that do not bear close scrutiny. CSA Supervisor and lay-off advisor Nyle Boyd stated in Sept. 2009, and confirmed during her testimony, that the reason for that decision was to allow those not hired at Public Works to apply for early retirement under an incentive plan set to expire on Nov. 13, 2009. [Exh. GG; testimony of Nyle Boyd, 4/16/10, 9:15 am.] However, the incentive plan deadline did not require a delay in the lay-off itself. In fact, the PMO staff was informed on Sept. 15th that their positions would be abolished. If the lay-off plan would have been submitted to CSA before the October hiring process, all ten employees in the PMO would have been "employee[s] selected to be laid off" eligible for actions in lieu of lay-off under CSR § 14-45. All ten would have had sufficient time to both apply for positions at Public Works, and opt for the early retirement incentive if unsuccessful. In fact, lay-off notices were not issued until three days after the retirement incentive expired. Thus, the employees laid off were not given actual notice of their lay-off until after their opportunity to accept early retirement had passed.

Ms. Boyd also stated that the order of lay-off actions was designed to give organizations time to figure out the best way to accomplish the transition. [Testimony of Ms. Boyd, 4/16/10.] However, conducting the hiring before the lay-offs required the transition team to decide organizational and work details before it abolished the entire PMO unit, an act that required no exercise of

discretion or decisions on the details of the transition. Thus, the Agency's stated reasons for delaying the lay-off plan are not supported by the evidence.

The rules provide that lay-offs shall be by positions, not incumbents, and the order of lay-off must be in accordance with the lay-off rules. Actions in lieu of lay-off are intended to be determined after a lay-off, as shown by the rule's use of the phrase "an employee selected to be laid off" in four different subsections to describe those eligible for actions in lieu of lay-off. CSR § 14-45 a), b), d) and e).

The lay-off rules distinguish between demotions to a lesser classification within the lay-off group, and other demotions. "An employee selected to be laid off shall be entitled" to a demotion to a position in a lower class series. § 14-45 b), emphasis added. In addition, employees may seek and accept other demotions to any other type of position "during a period of agency lay-offs . . . prior to the actual lay-off date." § 14-45 f), emphasis added. The rule strictly limits demotion rights to those in the class series from which the employee was laid off, and requires that the employee must be affected by the lay-off. The rule therefore makes a reasonable distinction between mandatory rights in a limited number of positions, and minimal rights based on any other demotion accepted during a lay-off period.

Here, lay-offs occurred by incumbents, not positions, as a result of the Agency's reversal of the order of lay-off and actions in lieu of lay-off. In addition, the Agency did not consider seniority in filling the vacancies created by the transfer of function, as it may have if it had conducted the lay-offs before the actions in lieu of lay-off. The Agency opened the hiring process to others beyond the classifications affected by the lay-off, and later determined that at least one of those hired under this process was entitled to reinstatement rights as if subject to the lay-off. The Agency never laid off or abolished the positions of two of the incumbents in the Senior Architect classification. Finally, the lay-off notice incorrectly stated there were no available actions in lieu of lay-off under § 14-45. [Exh. 3.]

Contemporaneous emails indicate that the order of lay-off and hiring was reversed in order to avoid the lay-off rules. "We will need to be careful of the timing [of the lay-off notice] so it does not inadvertently trigger any of the lay-off rules". [Exh. GG.] As a result, Appellant, with eighteen years of seniority, was laid off instead of an employee with two years of service. Mr. Guerrero, the Senior Architect demoted under the hiring process, was in lay-off Group A, with two years of seniority. Appellant, who was not selected, was in Group D based on her eighteen years of service.

The Agency used a combination of procedures to fill its vacancies: competitive hires, transfers, promotions, and demotions in lieu of lay-off. It conducted the selection process for the Major Projects Office as competitive recruitments, rather than actions in lieu of lay-off. Eight employees from outside PMO were interviewed by the panel, a number equal to the PMO staff interviewed. The unit's new supervisor, Joseph Cordts, was first selected by promotion from another Public Works division, and then joined the panel that interviewed and rated the applicants. At least one of the PMO employees hired by Public Works was later determined to be eligible for reinstatement, and his pay was set consistently with a demotion in lieu of lay-off, indicating that his selection was deemed an action in lieu of lay-off. [Exh. P, §§ 3-42, 14-45, 9-33 B.] Five of the FTEs selected for the new unit were transferred from PMO in their same job title. This hybrid hiring procedure applied lay-off rights only after the selections were completed, and failed to consider seniority or retention rights during the selection process itself. The lay-off rules require that lay-offs and certain actions in lieu of layoffs shall be according to seniority.

Thus, the lay-off plan diverged in some respects from the standards and procedures in the Career Service Rules. The Agency accepted the recommendation of an outside consultant in informally reclassifying the duties performed by Senior Architects to the classification of Project Manager, without submitting the issue to CSA for reclassification, in accordance with the responsibilities imposed on the Personnel Director under Rule 7. The Agency also reversed the order of lay-off and actions in lieu of lay-off for reasons that were not supported by the evidence, rendering the lay-offs a process of elimination rather than a selection by lay-off seniority groups, in violation of §§ 14-42 d) and 14-44. The Agency used a competitive hiring process but used only interview scores as the selection examination. Appellant's position was identified in the Agency's request for the Rank Order List, and the lay-off notice stated there were no actions in lieu of lay-off available to her. In fact, one demotion was later acknowledged as an action in lieu of lay-off, making it clear that the selections by competitive hire were part of the same lay-off process.

Just prior to the hiring decision, the Agency received a spreadsheet with the salaries of the PMO staff, all of whom had applied for positions in the new unit. The spreadsheet showed that Appellant's salary after eighteen years was above the ultimately successful candidates for the Project Manager positions, both of whom had only two years of seniority. [Exh. II.] Given the cost-saving purpose of the transition, Appellant's higher salary placed her at a disadvantage as against those two candidates. In contrast, consideration of seniority could have given Appellant some protection from lay-off based on the presence of others with less seniority in her classification.

The fiscal purpose behind the transition is also relevant to an evaluation of the reasonableness of the Agency's actions. The Mayor's instructions ordered the Agency to reduce its budget by \$1,166,299, the operating budget for the PMO team, and to transfer \$823,000 of that amount to Public Works. The Agency was also ordered to eliminate all ten staff jobs at PMO, and replace them with seven funded positions at Public Works to perform the unit's functions. Thus, the city would save about \$343,000 by elimination of the personnel costs of three full-time employees.

In fact, the Agency obtained approval for eight FTEs, and later added a ninth. Senior Engineer Greg Bertram was given a transfer to the unit some time after the hiring interviews, adding \$108,000 plus benefits to the unit's budget. [Testimony of Ms. Fitzpatrick, 4/15/10, 3:02 pm.; Exh. II; CSR § 9-32.] Five of the employees in the Major Projects Unit (Melendez, Herting, Matthews, Alson and Bertram) were direct transfers from PMO. Thus, those personnel costs remained the same under § 9-32. Two (Guerrero and Fitzpatrick) were demoted to Project Manager positions, but those demotions reduced personnel cost by only about \$12,000.<sup>5</sup> In addition, Joseph Cordts was promoted from Senior Engineer to Engineer/Architect Supervisor. There was no evidence presented as to the salary of the person hired to fill the Management Analyst III vacancy, a position not in existence at PMO. [Exhs. 7-32, II-2.] This evidence indicates that the transition achieved neither the planned personnel savings nor the intended reduction of three FTEs, despite the expenditure of additional money for the Workload Transition Plan to achieve permanent saving.

In addition, the Agency contracted out a substantial portion of the PMO workload at considerable cost during the development of the transition plan, further placing in doubt the transition's achievement of actual dollar savings. The Agency engaged Augusta Consulting to provide on-call project management at \$115 to \$132 per hour for eight Better Denver Bond projects, and others as assigned, for an amount not to exceed \$490,000. [Exh. G.] That amount was intended to pay for project management work previously performed by employees who had been laid off or demoted. In Dec. 2009, Augusta's key personnel, Raphael Augusta, was assigned fourteen capital improvement and bond projects, which was approximately one-third of the projects to be re-assigned after the lay-offs. [Exh. H-2.] Compensation was estimated to be earned at the rate of over \$20,000 per month from Sept. 2009 to July 2011. At that rate, an additional \$240,000 per year would be added to the new unit's budget until July 2011. [Exh. G-22.]

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<sup>5</sup> Mr. Guerrero's pay remained the same [Exh. P], and Ms. Fitzpatrick's pay was reduced from \$113,358 to \$101,420, which was the last step of the new pay grade. See CSR § 9-33 B.

Finally, the Agency failed to review or consider the money-saving and other suggestions presented by Appellant and Ms. Fitzpatrick. [Exhs. X, HH.] In a similar lay-off for the purpose of economy, a university employer's failure to consider its police chief's alternative proposal constituted a failure "to give candid and honest consideration to evidence before it on which it was authorized to act in exercising its discretion." Lawley v. Dept. of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001).

Under these circumstances, I conclude that the Agency neglected to diligently procure evidence it was by law authorized to consider in exercising its discretion to manage its workforce, including experience and performance factors. It also failed to give candid and honest consideration to evidence before it on which it was authorized to act by failing to consider the identical nature of the jobs and alternate cost-saving proposals. The Agency based its transition plan on a contractor's recommendation instead of the requirements of the Career Service Rules, and deviated from the lay-off rules in several respects. Its decisions to supplement the workforce of the new unit by adding another FTE and a contractor at additional cost, and its consideration of interview scores to the exclusion of more relevant factors, demonstrates that it exercised its discretion in a manner that indicates it based its conclusions on factors reasonable persons who are fairly considering the evidence could not reach.

Based on the above findings and conclusions, Appellant's argument that she should have been considered for available vacancies within the lay-off unit is moot.

### 3. Whistleblower claims

Appellant claims that her whistleblower disclosures were a substantial or motivating factor in the Agency's decision to lay her off and reject her for actions in lieu of lay-off. She supports that argument by evidence of her April and May disclosures to the Infrastructure Priorities Task Force (IPTF), Michael Henry and Councilman Linkhart. Therein, Appellant alleged that implementation of the Agency Director's recommendation would be a misuse or misallocation of city bond funds. Shortly thereafter, Appellant suffered several adverse actions, including a verbal reprimand and her removal as Project Manager from the CCB project. Appellant also contends that the Agency transition plan targeted her for lay-off five months later, and that the Agency did not consider her for any action in lieu of lay-off because of her whistleblower activities.

A whistleblower claim is established by proof that 1) an employee disclosed official misconduct to an appropriate reporting authority, 2) the

agency imposed or threatened to impose an adverse action, and 3) the disclosure was a substantial or motivating factor for the adverse action. D.R.M.C. § 2-106 et. seq.; In re Harrison, CSA 55-07, 59 (6/17/10).

The evidence revealed that Appellant's statements at the April IPTF meeting and her subsequent email irritated Director Brown, leading to his later statement in her PEPR that any future failure to obey orders would result in consequences. Mr. Brown testified that Appellant's loud, passionate and widely distributed advocacy for the stairs repairs was reflecting negatively on General Services. The incident indisputably affected Mr. Brown's opinion of Appellant. However, the only formal discipline he is said to have imposed<sup>6</sup> was a verbal reprimand, a convincing indication that Mr. Brown did not view the incident as serious.

More importantly, Appellant did not establish that her statements were a disclosure of official misconduct, as required by the ordinance. D.R.M.C. 2-107(d). At best, Appellant expressed her opinion that Mr. Brown's proposal that bond funds should be used for another purpose would be unethical or illegal. The proposal, however, went no further, and no bond money from this source was spent on the new Denver Justice Center. Therefore, Appellant failed to prove an essential element of a whistleblower claim: the commission of an act that she reasonably believed was official misconduct. See In re Harrison, CSA 55-07, 62 (6/17/2010).

Moreover, Appellant failed to establish that Mr. Brown selected Appellant for lay-off based on her disclosures. All positions in the PMO team were slated for abolishment based on the Mayor's order, not by virtue of any action by Mr. Brown. While General Services was represented by James Williamson on the interview panel that scored the demotion applicants, there is no evidence that Mr. Brown communicated his opinion of Appellant to Mr. Williamson, the other panel members, or to the managers who recommended or made the final selections for the new unit. In fact, Mr. Williamson scored Appellant slightly higher than the average score she obtained from the panel as a whole. Therefore, I conclude that the decision not to grant Appellant a demotion in lieu of lay-off was not motivated by her earlier statements.

Finally, Appellant claims that her September disclosure to Mr. Henry about Mr. Gillet was the motivating factor in the Agency's decision to lay her off or not grant her an action in lieu of lay-off. Appellant told Mr. Henry that Jacobs and Mr. Gillet had a conflict of interest in undertaking the Workload Transition Plan. First, Mr. Gillet is a private contractor and not a city officer or employee, and he

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<sup>6</sup> Mr. Brown's statement in Appellant's PEPR indicates he gave her a verbal reprimand, although there is some dispute as to whether a reprimand was ever placed in Appellant's personnel file. [Exh. B-6.]

did not in fact accept a contract to do any of the PMO project work. Thus, Appellant failed to prove she disclosed official misconduct, defined in part as "any act or omission by any officer or employee of the City and County". D.R.M.C. 2-107(d). Further, the evidence did not demonstrate any connection between the disclosure and the lay-off, as Appellant was not identified as the employee who made the statement to Mr. Linkhart. For those reasons, I conclude that Appellant's conflict of interest disclosure regarding Mr. Gillet were not a motivating factor in her lay-off.

Order

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

1. The Agency lay-off action dated November 16, 2009 is REVERSED.
2. Appellant's whistleblower claims in Appeal No. 107-09 are DISMISSED.
3. Appellant withdrew her discrimination claims in her Notice of Claims filed on Mar. 24, 2010.

Dated this 17th day of September, 2010.

  
Valerie McNaughton  
Career Service Hearing Officer