

HEARING OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF  
DENVER, STATE OF COLORADO

Appeal No. 54-02

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

Appellant: SHERYL AGUILAR

And

Agency: DEPARTMENT OF SAFETY, OFFICE OF SAFETY INFORMATION and  
THE CITY AND COUNTY OF DENVER, a municipal corporation.

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NATURE OF APPEAL

The Appellant Sheryl Aguilar, is a Career Service Employee and has appealed a decision by the Agency to reassign a male employee rather than Appellant. The basis for the appeal is gender discrimination. Appellant alleges the Agency violated Career Service Rule (CSR) 19-10 f) by making this reassignment.

INTRODUCTION

A hearing on this appeal was held on May 3<sup>rd</sup>, 2002, before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was present and represented by David C. Schott, Esq. The Agency was represented by Assistant City Attorney Jack M. Wesoky, Esq., with Patrick Klein serving as advisory witness for the Agency.

The following witnesses testified at the hearing. Sheryl Aguilar, Tiffany Parker, Martha Bean, Lisa Slater, Anthony Gonzales, Patrick Klein and Steven Browne.

Exhibits 5, 6, C, D, K, and J were admitted into evidence and were considered in this decision.

ISSUES ON APPEAL

Whether the Agency discriminated against Appellant, on the basis of gender, in violation of Career Service Rules.

Whether Appellant proved by a preponderance of the evidence the Agency discriminated against Appellant on the basis of gender.

## JURISDICTION

The alleged discriminatory conduct by the Agency occurred on February 25<sup>th</sup>, 2002. Appellant filed this appeal on March 7<sup>th</sup>, 2002, within the 10 day requirement of the CSR. Appellant's allegation was the Agency violated CSR § 19-10, f).<sup>1</sup> This rule is specifically for the appeal of discrimination that has not stopped after the employee has followed the steps required by CSR § 15-100, *et. seq.*

In this appeal, Appellant did not file a complaint under § 15-100, *et. seq.* Appellant has however, presented evidence of an alleged of CSR § 19-10, c), by the Agency.<sup>2</sup> Therefore, I find this appeal has been timely filed and I have authority under CSR § 19-27 to affirm, reverse or modify the actions of the Agency.<sup>3</sup>

## RELEVANT FACTS

1. On February 25<sup>th</sup>, 2002, Patrick Klein, Deputy Director, Office of Safety Information Systems, issued a directive asking for persons interested in the opportunity to possibly become an Associate IT System Administrator to notify their supervisor no later that 12 noon that day.
2. The directive stated: "The nature of this position requires that the person assigned attend a number of professional courses to include: Win2000 Administration, Network Management, SQL Server Administration, MaCAD System Administration, MaCAD User Training and several other related courses."

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<sup>1</sup> Section 19-10 Actions Subject to Appeal

An applicant of employee who holds career service status may appeal the following administrative actions relating to personnel.

- f) Harassment or discrimination: The disposition by a supervisor or other appropriate official of a complaint of harassment or discrimination may be appealed if such disposition has not resulted in stopping the prohibited behavior.

<sup>2</sup> Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- c) States in part:  
Discriminatory actions: **Any action** (emphasis added) of any officer or employee resulting in alleged discrimination because of race, color, creed, national origin, sex, age, political affiliation, sexual orientation, or disability...

<sup>3</sup> CSR § 19-27 provides:

The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

3. The directive also stated: "Depending on final classification by Career Services [sic] Authority, the pay class could be: 619-14, 809-14, or 811-14."
4. Appellant, Anthony Gonzales, Lisa Slater, and Martha Bean, employees of the Computer Help Desk, all expressed interest in the position.
5. All of these employees are in a lower pay class than the lowest one proposed for this new position.
6. The position was given to Anthony Gonzales, who has overwhelmingly less education and experience than Appellant, and has not been employed by the Agency long enough to have received a performance evaluation.

### DISCUSSION AND CONCLUSIONS OF LAW

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter "de novo". The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and a resolution of the factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this one, has the burden of proving that position by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).<sup>4</sup> The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civic Jury Instruction 3:5).<sup>5</sup> The ultimate credibility of the witnesses and the weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Appellant testified that she believed Anthony Gonzales got the job because he was a man. Because Appellant has alleged discrimination on the basis of her gender, she has the burden of setting forth a prima facie case of discrimination. The test is outlined in *Sanchez v. Denver Public Schools*, 164 F.3d 527 (10<sup>th</sup> Cir. 1998):

- 1) she is a member of the class protected by statute; 2) she suffered an adverse employment action; 3) she was qualified for the position at issue; and 4) she was treated less favorably than others not in the protected class. *Cites omitted*.

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<sup>4</sup> The notes on use of Instruction 3.1 state: Generally, in all civil cases, "the burden of proof shall be by a preponderance of the evidence,..." citing C.R.S. § 13-25-127.

<sup>5</sup> The content of this instruction was approved as an instruction in *Swain v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded, 1984).

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the action. If the defendant does so, the plaintiff must show the defendant's proffered reasons are pretextual. *Cite omitted.*

Citing other cases, this test has also been adopted by the Colorado Supreme Court in *Lawley v. Department of Higher Education*, 36 P.3d 1239 (Colo. 2001).

In this appeal, Appellant established the elements of a prima facie case as follows:

- 1) As a woman, she is a member of a protected class.
- 2) She suffered an adverse employment action. There was conflicting testimony from the witness regarding whether this "position" was a promotion, transfer, or reassignment.

CSR § 9-61 Promotion provides in part:

- a) If an employee is appointed to a new class in the same pay schedule, which class has a higher pay grade number than the class previously held...

This "position" is not a promotion. There is no higher pay grade number. In fact testimony was the "position" had not been submitted to the Career Service Authority for classification. The person selected for the "position" would remain in the same pay grade they are currently in.

CSR § 9-62 Transfers provides in part:

- a) Within a nonexempt schedule or an exempt schedule:  
Movement from one class to another class shall be treated as a transfer if the first three digits of the pay grade of both the old class and the new class are the same.

This "position" is not a transfer. Testimony from Patrick Klein was there has been no class change. There will be a change after the system is up and running, but the future does not apply to this appeal.

The Agency argued this was nothing more than a reassignment because there has been no change in salary, or class. For Appellant to sustain her burden as to step 2, a reassignment must be an adverse employment action.

"conduct is adverse employment action if it constitutes a significant change in employment status, such as ... reassignment with significantly different job responsibilities, or a decision causing a significant change in benefits." *Sanchez, id.*, citing other cases.

There is no question that this "position" is a reassignment with significantly different job responsibilities:

- Only one person from the Computer Help Desk will be reassigned.
- There is significant extra training associated with the "position".
- It is very technical compared to the general Computer Help Desk Responsibilities.
- It has a different work location. This "position" is located at the Combined Communications Center, not at the Office of Safety Information Systems where the other Computer Help Desk employees are assigned
- The person serving in this "position" will be reallocated upward when the "position" is audited because that person will be the incumbent in the "position."

Appellant has suffered an adverse employment action.

3) She was qualified for the position at issue.

Appellant has been in the Internet Technology (IT) field for approximately 10 years. She has worked for the City for 8 years, 7 of which have been in IT and 2 years with the Agency. Appellant also has a Bachelor of Science degree in Information Systems along with several advanced computer certifications.

Anthony Gonzales, the person selected for the "position," has had "some college," no formal computer training, 3 years of help desk training, all on the job training, and only worked for the Agency for 8 months.

I find Appellant was qualified for the "position" because Appellant's qualifications were overwhelmingly greater than the person selected for the "position." There were no interviews conducted for the "position." None of the interested persons' education, training, past performance evaluations, or length of service with the Agency was evaluated. Patrick Klein testified he is not sure he would have picked Gonzales for the "position." Klein stated he thought the qualifications were for someone who would fit the team, meet the potential to manage the CADD system.

Steven Browne, Deputy Director of the Communications Center, testified he chose Gonzales because he was thorough, worked well with people and had good attention to detail. When asked how he evaluated the other candidates he stated past observations in the work environment. No specifics were given as to when he observed who, what he observed, when he observed them or what he was looking for when he

observed them. Simply stated, the Agency picked the person they wanted for the "position," without regard for the others.

- 4) She was treated less favorably than others not in the protected class.

As explained above, Appellant was treated less favorably than others not in the protected class. She was a highly qualified person interested in the "position," the advanced training and reallocation upward that would come with it, summarily passed over for an overwhelmingly less qualified male. The Appellant has met her burden on all 4 elements of the prima facie case of gender/sex discrimination.

Next, the burden shifts to the Agency to articulate a legitimate nondiscriminatory reason for the action. *Sanchez, Id.* Decisions based on sound business judgement like:

- Posting the desired qualifications in a position announcement similar to; education, computer training, experience, length of service in the Agency;
- Conducting interviews during which objective and subjective reasoning methods are used to evaluate the applicant's qualifications, along with past performance evaluations, compared to the desired qualifications,

would be examples of legitimate nondiscriminatory reasons for the action. Anything less is arbitrary and capricious by management.

Patrick Klein testified he believed the qualifications for the "position" were primarily someone who would fit in with the team, meet the potential to manage the CADD system. Klein further testified he selected Gonzales because Steven Browne told Klein he preferred Gonzales because he liked the way Gonzales worked, liked his attitude, he responded quickly to requests and was a positive influence in the IT community at the Communications Center. These reasons are not based on sound business judgement.

Therefore I find the Agency has not met the burden of articulating a nondiscriminatory reason for selecting Gonzales instead of Appellant. Because the Agency has not met its' burden, the burden does not shift back to Appellant to show the Agency's reasons were a pretext for discrimination. However, had it become necessary, Appellant could have met this part of the test also. The disparity in qualifications between she and Gonzales were not just overwhelming, the difference in qualifications of applicants was so apparent as "to jump off the page and slap us in the face" which supports a finding of pretext. *Bullington v. United Airlines*, 186 F.3d, 1301 (10<sup>th</sup> Cir. 1999) citing other cases. In this appeal, the Agency did discriminate against Appellant because she was a woman.

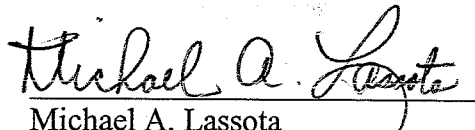
The question now becomes: What is the appropriate remedy? The Appellant requests more professional training classes (no specifics) and a position upgrade to an Associate IT System Administrator. Under this set of facts, I cannot order the Agency to

provide Appellant with more training classes. Also, the "position" in question is not currently classified any differently than the position Appellant now holds. Therefore, I cannot order a position upgrade.

ORDER

To uphold the Agency after finding it discriminated against Appellant would likely fuel the animus, the female employees displayed while testifying, towards the Agency's decision making process for this "position". The decision of the Agency is reversed. The Agency is ordered to reassign Appellant forthwith, to the "position" in the Combined Communications Center, currently occupied by Anthony Gonzales.

Dated this 28<sup>th</sup> day of May, 2002.



Michael A. Lassota  
Hearing Officer  
Career Service Board

**CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**, by depositing same in the U.S. mail, postage prepaid, this 29<sup>th</sup> day of May, 2002 addressed to:

David C. Schott  
Attorney at Law  
1600 Stout St. Suite 610  
Denver, CO 80202

Sheryl Aguilar  
3871 W. Rutgers Pl.  
Denver, CO 80236

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the interoffice mail, this 29<sup>th</sup> day of May, 2002, addressed to:

Jack M. Wesoky  
Assistant City Attorney  
Employment Law Section

Ari Zavaras  
Manager of Safety

Captain Jennifer Steck  
Denver Police Department

Virginia Granada