

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

Appeal No. 217-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **TANISHA M. ALFORD,**

And

Agency: Department of Public Works, Street Maintenance Division, and the
City and County of Denver, a municipal corporation.

NATURE OF APPEAL

The Appellant Ms. Tanisha Alford, ("Appellant" or "Alford") has challenged her dismissal from her probationary employment as a Senior Utility Worker with the Department of Public Works, Street Maintenance Division (the "Agency"), for the City and County of Denver. The Agency terminated Appellant during her probationary period and asserts that it was not required to prove just cause.

Ms. Alford alleges the termination was wrongfully motivated by racial (she is African American) and sex (gender) discrimination and claims that she is therefore entitled to reinstatement. The Agencies denies all wrongdoing and asserts that termination was for legitimate reasons and was not motivated by discrimination.

INTRODUCTION

The City and County of Denver shall be referred to as the "City". The rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held on June 11th 2001, before Michael L. Bieda, Hearing Officer for the Career Service Board. Appellant was present, and was represented by her attorney, Mr. David Lichtenstein, Esq. The Agency and City were represented by Assistant City Attorney Mr. Robert Nespor, Esq., with Mr. Matt Laumann serving as the advisory witness on behalf of the Agency and City.

The following witnesses were called and testified at hearing: Mr. Shane Savage from Street Maintenance Division; Mr. Emory Davis, Operations Supervisor; Mr. Wes Catrell, supervisor for Street Maintenance Division; Mr. Lamar Brant, Equipment Operator Specialist; Mr. Rich Marin, Senior Utility Worker; Mr. Levi Chavez, Senior Utility Worker; Mr. Jeff Goad, Equipment Operator; Mr. John Perez, Equipment Operator; Mr. Matt Laumann, Field Superintendent for the Agency; Mr. Steve Garcia, Director of Street Maintenance; and the Appellant, Ms. Tanisha Alford. Exhibits 1 - 7 were admitted into evidence by stipulation and were considered in this decision.

ISSUES ON APPEAL

Whether the Appellant has proved by a preponderance of the evidence that the Agency's decision to terminate her probationary employment was the result of discrimination based upon race or sex.

JURISDICTION

The Appellant was notified of the Agency's action terminating her probationary employment by letter dated March 13, 2001. Since this was not a disciplinary action, no predisciplinary meeting was held or required. The Appellant filed her appeal with the Career Service Hearing Office on March 22, 2001. Although the Agency raised jurisdiction as an issue in its Pre-hearing statements, it offered no evidence or argument in support of its challenge. The Appellant has not contested the jurisdiction of the Hearing Office to hear and decide this appeal.

Based upon these facts the Hearing Officer finds that this appeal has been timely filed, and that under CSR §§ 19-10 (c) and 19-27, the Hearing Officer has jurisdiction and authority to affirm, reverse or modify the actions of the Agency giving rise to this proceeding.¹

¹ CSR §19-10(b) provides:

Actions Subject to Appeal

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

* * *

c) **Discriminatory actions**: Any action of any officer or employee resulting in alleged discrimination because of race, color, creed, national origin, sex, age political affiliation, sexual orientation, or disability including:

* * *

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.

* * *

RELEVANT FACTS

Prior Discipline, Warnings and Performance Record.

The previous disciplinary record of the Appellant is not in issue in this proceeding.

Background

Alford's immediate supervisor is Mr. John Perez. It is unclear from the record as to her second level supervisor. Ms. Alford started out as an on-call employee in 1999. In approximately October of 2000, she gained probationary status for six months. Her duties involved minor unskilled labor, including fieldwork with the paving crew, crack seal crew and similar types of manual labor. In February 2001 Mr. Perez became her immediate supervisor. Within a few weeks thereafter her probationary employment was terminated.

Alford claims her termination was due to discrimination. In support of her claim she introduced testimony that:

- At one point her supervisor, John Perez had advised her that she could not "call her daddy" (referring to one of the other supervisors) every time she had a problem.
- That no one ever told her there were problems with her work prior to Perez. (However, the evidence does not support this contention.)
- That on occasion, Perez brought up her personal relationship with her significant other in a joking manner. Appellant claims she was offended by these comments, however she never reported them. That at one point Perez asked her if she was getting married to her significant other.
- That Perez occasionally referred to her as "this little girl".
- That Perez on one occasion made a comment about an African American coworker, allegedly stating that "those brothers are not too swift", supposedly referring to African American males in general.

In support of its decision to terminate the Appellant's probationary employment the Agency established by a preponderance of the evidence that:

- She could not keep up with the paving crew, because it was hard physical labor. She was unable to do it because it was too physically demanding for her. (She had to be put on the "crack seal" crew, which was less physically demanding.) Even her own witness, Wes

Catrell testified that she was unable to do the work and she could not keep up. He admitted that he had to assign her to less demanding work. Alford did not like either the paving crew or the crack seal crew.

- Alford indicated to other employees that she did not like working the crack seal crew.
- She had difficulty interacting and getting along with other crewmembers.
- She had been warned about her attitude on previous occasions by supervisors other than Perez. Shane Savage testified that he was concerned about her attitude and that she had been disrespectful to some of the other employees. He had talked to Alford about her attitude and especially the fact that she did not associate with the other crewmembers. Apparently her attitude improved after that, but only for a short period of time.
- In November of 2000, she was specifically asked if she was experiencing any gender or racial harassment from other employees. She denied any such harassment and complained only that sometimes she felt that other employees did not make her feel comfortable or that occasionally they "picked" on her.
- There had been concern by her supervisors that Alford was disrespectful to supervisors and other employees.
- Perez and Alford had a friendly relationship. They were seen by other employees to "joke" around and occasionally to "play around". This indicates that Perez had no personal animosity or bias towards Alford.
- Perez had complained to other employees prior to her termination that he had concerns with Alford's work performance and work habits. He was known to "get on her" about her performance.
- On one occasion, Alford was supposed to be helping clean snow plows, but instead was seen driving a tandem truck. When Alford was told by her supervisor Perez to go to the Fox location to work on a crew cleaning plows, Alford became angry and upset. She never showed up for the plow cleaning detail. Later Perez found her watching television in the TV room in the office. Perez learned that she had been watching television all morning. Perez investigated further and discovered that Alford could not have been doing filing all day, as she claimed. Later when Perez confronted about her failure to follow instructions, she told him in the presence of other witnesses, that "I will do what I want to do". During that conversation she was heard screaming at Perez

- Other employees testified that they have never seen Perez harass Alford. Likewise, they have never heard Alford complain about being harassed.
- Alford had a history of questioning authority and orders from Perez as well as other supervisors. This was often seen as insubordination.
- The decision to terminate was not made by Perez. Nor did he have input into the decision. Mr. Steve Garcia, the director of street maintenance, made the decision to terminate Alford. The decision was based upon problems with her work performance.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable law

Ms. Alford was a probationary employee. As such she is subject to termination at any time for any reason, without cause, except for discrimination.²

The City Charter, C5.25 (4) and CSR 2-104, and 2-10 (b) (4) requires 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 factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 532 P. 2d 751 (Colo. Ct. of App., 1975).

It is well established that the party advancing a position or claim has the burden of proving that position. In civil proceedings, including administrative hearings such as this, that burden is by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is

² CSR §5-61 provides:

Employees in Employment Probationary Status

An employee in employment probationary status:

- 1) May be terminated or demoted at any time for any reason without cause except for discrimination as defined in Rule 19, APPEALS.
- 2) May not appeal any decision relating to his or her employment, including termination, except for alleged discrimination.

CSR §16-53 provides:

A. Employees separated or dismissed during probation. During the probationary period following employment or re-employment appointment, separation or dismissal by the appointing authority shall be final. However, such action may be appealed only on the grounds of alleged discrimination because of race, color, religion, national origin, sex age, sexual orientation, disability, or political affiliation, in accordance with Rule 19 Appeals. The employee shall be given written notice of separation or dismissal on or before the effective date. A written confirmation of the separation or dismissal shall be mailed to the address of record of the employee within two (2) working days after the effective date.

more probably true than not.³ The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence.⁴

In this case, Alford claims discrimination and accordingly bears the burden of proving, by a preponderance of the evidence, that her termination was based upon discrimination.

Analysis of evidence presented

In this case, Appellant's evidence in support of her contention that her termination was based upon discrimination, either sex or race, is not persuasive. First and foremost, any alleged improper comments or conduct by her supervisor Perez are of little value, since the decision to terminate was clearly not made by him. Although he did precipitate the investigation into her conduct, the decision to terminate was ultimately made by someone in higher command, Mr. Steve Garcia. There is a dearth of evidence that would support a conclusion that Garcia had made any improper comments or was in any way biased towards either women or African Americans.

Some of the comments by her supervisor Perez, if in fact made, were improper and evidence of poor judgement. Comments like "little girl" and "calling your daddy" can be viewed as being in poor taste. However, given the context of a work crew such as this, they are not necessarily indicative of bias. They do not, taken as a whole and without much more, support a conclusion that Perez was biased against either women or African Americans.

Moreover, the evidence suggests that Perez had a normal and appropriate working relationship with Alford prior to taking over as her supervisor. He joked around with her and apparently she responded in kind. She did not complain about his conduct. Only when he began giving her orders did their relationship become strained. This evidence suggests that any problems between the two were not race or gender based.

On the other hand, the Agency had ample and legitimate reason to not want to continue Alford's employment. She was insubordinate, and had continually evidenced a poor attitude. She refused instructions and insisted on doing what she wanted. Most important of all, she was physically incapable or unwilling to do the type of heavy lifting required of her position. She had

³ Colorado Civil Jury Instructions, 3:1. 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.

⁴ Colorado Civil Jury Instructions, 3:5. The content of this instruction was approved as an instruction in *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3 P. 423 (1884) and *C. McCormick*, EVIDENCE § 339, at 957 (E. Cleary 3 ded. 1984).

demonstrated a preference for office work instead of the grueling physical labor of a paving crew or even a crack seal crew. It was obvious that her aptitude, attitude and desires were consistent with a different career path. The decision by the Agency cannot be said to have been a "pretext" for discrimination. It was real, based upon legitimate and reliable information.

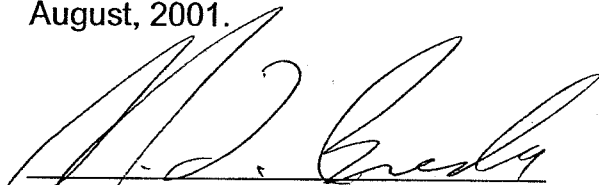
CONCLUSION

Upon full consideration of all of their statements, testimony and exhibits, the Hearing Officer finds and concludes that the Appellant has failed to demonstrate by a preponderance of the evidence that the termination of her probationary employment was due to discrimination based upon either race or sex. The Agency has demonstrated by a preponderance of the evidence, that its decision to terminate Appellant was not a pretext, and that it had legitimate reasons for doing so.

ORDER

For the foregoing reasons, the action of the Agency dismissing the Appellant, Tanisha Alford, from her probationary employment as a Senior Utility Worker with the Department of Public Works, Street Maintenance Division, is hereby **AFFIRMED**, without modification.

Dated this 8 day of
August, 2001.



Michael L. Bieda
Hearing Officer for the
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 9th day of August, 2001, addressed to:

David Lichtenstein
Attorney at Law
303 E. 17th Ave. Suite 1070
Denver, CO 80203

Tanisha M. Alford
3304 Pontiac
Denver, CO 80207

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** depositing same in interoffice mail, this 9th day of August, 2001, addressed to:

Robert D. Nespor
Assistant City Attorney

Jan Meese
Department of Public Works

Steve Garcia
Street Maintenance Division

V. Granada