

**ORDER ON APPELLANT'S MOTION FOR BACK WAGES, BENEFITS,
SALARY RESTORATION AND ATTORNEYS' FEES**

IN THE MATTER OF THE APPEAL OF:

ELIZABETH HAMILTON, Appellant,

vs.

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

Appellant Elizabeth Hamilton has moved for enforcement of the Career Service Board decision affirming reversal of the Agency layoff action. The Agency has filed a response objecting to the motion.

Procedural Background

These consolidated appeals challenge Appellant's Jan. 16, 2010 layoff from her position as Senior Architect in the city's General Services Department, and her non-selection for a Project Manager 1 position at the Department of Public Works. After the April 2010 hearing, the undersigned Hearing Officer reversed the layoff action. The Agency filed a Petition for Review with the Career Service Board, and also requested a stay of enforcement of the decision. The Board denied the motion for stay. On Nov. 30, 2010, Appellant was placed in a Project Manager 1 position at Public Works at an annual salary of \$101,420, about \$15,000 less than her previous salary. On Feb. 17, 2011, the Career Service Board affirmed the Hearing Office decision, and ordered the Department of Public Works to place Appellant in the position of Project Manager 1.

Appellant now seeks the following additional relief: 1) back pay and lost benefits from Jan. 16, 2010 to the date of her placement in the new position; 2) payment of the difference between her past and current pay; 3) restoration of her sick and vacation balances to their pre-layoff levels; 4) restoration of her seniority rights in the Public Works layoff group; 5) restoration of her parking space; and 6) payment of any other lost benefits. Appellant also requests an award of attorneys' fees as a sanction for the Agency's asserted disregard of the Career Service Rules and improper conduct.

The Agency response argues that the Hearing Officer has no jurisdiction of the appeal because the Board did not remand the case, the Agency plans to file a Rule

106 complaint challenging the Board decision, and the rules provide no authority to grant a salary restoration. It also cites CSR § 19-55 and *In re Muller*, 48-0 (3/10/2009) in support of its argument that there is no authority under the Career Service Rules to grant attorneys' fees. In the alternative, the Agency requests that the motion be set for an evidentiary hearing on the disputed facts.

I. Jurisdiction to Hear Enforcement Motions

The Agency contends that the Hearing Office has no jurisdiction to hear enforcement matters absent an order of remand by the Career Service Board. The Career Service Board has ruled that it "does not have jurisdiction to order the Agency to pay back pay and benefits. If the parties are unable to resolve matters involving back pay and benefits, the proper remedy is to set the matter for a hearing before the Hearing Officer." *In re Mestas et. al.*, CSA 64-07, 3 (CSA 8/12/08). Thus, the absence of a remand order does not deprive the Hearing Office of jurisdiction over enforcement motions.

The Agency also argues that the matter should not be heard because it intends to challenge the Board's decision by filing a Rule 106 action in Denver District Court. That rule provides for complaints alleging that an administrative body "exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law." C.R.C.P. Rule 106(a)(4).

The final decision for purposes of judicial review occurs when the Career Service Board issues its decision. CSR § 19-70. After a Rule 106 complaint is filed, "[t]he proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure." Rule 106(a)(4)(V). Rule 65 in turn requires a finding that "it clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard", and requires security "for the payment of costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(b) and (c). It is apparent that a temporary restraining order delaying relief flowing from a final agency action requires an application to the Denver District Court judge assigned to the Rule 106 complaint, supported by sworn statements or evidence at an expedited hearing on the issue. The Career Service Board has authority to stay the decision of a hearing officer upon a showing of "irreparable harm, injury or loss which would occur if the stay is not granted." CSR § 19-66(B). In contrast, the Career Service Hearing Office has no authority to stay enforcement of a Career Service Board decision. Thus, I find that the enforcement motion should be heard in the absence of a District Court or Career Service Board order staying proceedings below.

2. Pay and Benefits Issues

The Agency argues that an evidentiary hearing is necessary before a ruling on the issues presented in the motion. I agree that Appellant's motion requires resolution of factual and legal issues.

ORDER

1. The parties may file briefs in support of their legal positions by **March 21, 2011**. After all legal issues are resolved by order, a pre-hearing order will be issued establishing pre-hearing deadlines and setting the hearing date on the remaining factual issues.

2. The parties are encouraged to discuss stipulations in order to simplify the presentation of evidence at the hearing.

Done this 8th day of March, 2011.


Valerie McNaughton
Career Service Hearing Officer

I certify that on March 8, 2011, a copy of this Order was delivered to the following in the manner indicated:

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