

FINDINGS AND ORDER

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.

This matter is before the Career Service Board on cross petitions for review. The Board has reviewed and considered the full record before it, and **AFFIRMS** the Hearing Officer's Decision of September 17, 2010, on the grounds outlined below.

I. FACTUAL BACKGROUND

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 unit was re-named the Projects Management Office (PMO) and transferred to the Department of General Services where it continued to do the same work. However, in August 2006, the Mayor's Office decided that the functions of the PMO should be transferred back to Public Works as part of the City's budget-cutting efforts. General Services was ordered to eliminate all ten PMO staff positions and transfer \$823,000 to Public Works to fund seven positions that would continue to perform project management functions. In addition, General Services was to retain spending authority over capital improvements projects after the work transferred to Public Works.

Both Agencies worked together to create and implement a transition plan.¹ Although the jobs created at Public Works were intended to handle the same functions as those performed by the PMO staff at General Services, the new positions had different titles and different pay classifications. Based in large part on the recommendations of an outside consultant, Public Works asked for and was granted authority to fill four jobs for its new Major Projects unit: two Project Managers, one Senior Architect and one Senior Engineer.

In October 2009, these four new positions were posted as open. The Agency informed the PMO staff that they would be required to apply and interview for these positions. At this time, Appellant was a PMO Senior Architect. She applied for both the Senior Architect and Project Manager positions. On November 2 and 3, sixteen applicants were jointly interviewed for these four positions, including all eight PMO architects and engineers whose positions were being eliminated, and eight other applicants. Hiring decisions were made solely on the basis of the scores given to the applicants by the interview panel.

On November 9, Public Works selected two PMO Senior Architects for demotions to the two Project Manager positions. Appellant was not offered any of the three positions for which she applied. One of the Senior Architects selected for demotion, Mark Guerrero, had two years seniority with the City, while Appellant's seniority exceeded eighteen years.

On November 16, 2009, Appellant received a notice that her position in General Services was being eliminated and that she would be laid off effective January 16, 2010. The two PMO Senior Architects who were given demotions to Project Managers at Public Works now perform the same duties in their demoted positions as they did when they were Senior Architects in General Services.

II. FINDINGS

A. Appellant's Whistleblower Claim

At the hearing, Appellant argued that she made disclosures protected under the City's Whistleblower ordinance and those disclosures were a motivating factor in the Agency's decision to lay her off and/or not hire her for a demoted position at Public Works. We agree with the Hearing Officer that Appellant did not establish her claims.

With regard to actions taken by General Services, Appellant failed to show that Mr. Brown selected her for lay-off based on her disclosures. Mr. Brown did not make the decision to abolish Appellant's position; all positions in the PMO team were slated

¹ When we use the term "Agency" in our decision, we refer collectively to General Services and Public Works, as the actions taken in this matter were part of the jointly devised transition plan. Both agencies were present and represented during the career service hearing.

for abolishment based on the Mayor's order transferring project management functions to Public Works.

With regard to actions taken by Public Works, hiring decisions for the new positions were made on the basis of the scores applicants received in the interviews. Appellant failed to show that any member of the interview panel knew of her disclosures. In fact, Mr. Williamson, General Services' representative on the interview panel, scored Appellant higher than the average score she obtained from the panel as a whole.

For these reasons, we need not decide whether "complaints of misconduct" under the City's Whistleblower ordinance include complaints about planned misconduct as well as complaints about concluded misconduct.

B. The transition of functions and lay-off

An agency action is arbitrary or capricious 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).

We agree with the Hearing Officer that the transfer of project management functions and reorganization of those functions in Public Works, as well as the abolishment of positions and corresponding layoffs in General Services, are all part of the transition plan devised and implemented by both agencies working in concert. We also agree that the starting point for our analysis is to look at job functions before and after the transfer and lay-off.

Julia Fitzpatrick, the Manager of the PMO team in General Services who was selected for one of the demotions to Project Manager in Public Works, testified that the work now performed by Project Managers is the same as that formerly performed by Senior Architects at General Services. Russell Luxa, Public Works Manager and creator of the Project Manager job description, testified that the new positions were "very, very similar" to the jobs performed by the Senior Architects who were laid off in General Services. There is no evidence in the record disputing this issue. Thus, the Hearing Officer's conclusion that "Project Manager I is the same 'aggregate composition of duties and responsibilities' as performed by the Senior Architect position" is supported by the evidence. Decision, p. 17, quoting CSR 7-10 G's definition of "position" under the career service rules.

The question we must now address is whether the abolishment of Appellant's position in General Services, which resulted in her lay-off, and the creation of substantially the same position in Public Works, which was filled by another employee through a competitive hiring process, violates the merit-based personnel system established by the City Charter and implemented through the career service rules. In

answering this question, we find the Colorado case law cited by the Hearing Officer persuasive. (Decision, pp. 18-20).

The City, through its Charter, and the state of Colorado, through its constitution, have both created merit-based personnel systems that grant employees a certain limited property interest in their government employment. The City Charter created the career service personnel system, which mandates appointment on the basis of “merit and ability”, and provides that dismissals of career service employees may be “only for cause.” City Charter, Article IX, Sec. 9.1.1. Employees in the Colorado personnel system “shall hold their respective positions during efficient service or until reaching retirement age, as provided by law.” Colo. Const. art. XII, § 13(8).² Both the City and the State have analogous procedures for lay-off that require consideration of seniority in the sequence and order of lay-offs, provide retention rights (through seniority and actions in lieu of lay-off), and reinstatement rights. See, CSR 14-42, 14-43, 14-44 and 14-45; Colo. Rev. Stat. § 24-50-124.

Two of the cases relied upon by the Hearing Officer offer guidance on the matter before us today. In *Bardsley v. Dept. of Human Services*, 976 P.2d 281 (Colo. App. 1994), the Governor abolished the Division of Disaster Emergency Services (DODES) as part of a budget reduction plan and transferred its functions to the Office of Emergency Management (OEM). DODES employees were required to apply for the newly created positions in OEM; however, more than 20 DODES employees were not selected for the new positions and were laid off. On appeal, they argued that the transfer of functions and creation of new positions in OEM, without recognizing their right to fill those positions, violated the Civil Service Amendment.

The Court of Appeals concluded that “the rights granted by the Civil Service Amendment to a certified state employee include the right not to be displaced by the abolition of the position occupied and the creation of a new position which is required to perform *substantially* the same service.” *Id.* at 648. Further, “to the extent that any of these new positions substantially duplicated the old positions, the affected former DODES’ employees were entitled to be transferred to those new positions without any loss of their previously vested benefits.” *Id.*

Similarly, in *Rice v. Auraria Higher Education Center*, 131 P.3d 1096 (Colo. App. 2006), the functions performed at the CU Denver Media Center were transferred to the Auraria Higher Education Center and the CU Denver employees received written notices of lay-off. At the same time, Auraria posted new positions. Mr. Rice, a CU Denver employee, unsuccessfully applied for two of the new positions at Auraria. Hiring decisions were made on the basis of the applicants’ interviews; Auraria did not consider seniority, prior job performance or retention rights.

² This provision of the Colorado Constitution is often called the Civil Service Amendment.

On appeal, Rice argued that the University could not abolish his position and lay him off when a new position was created in another department with substantially the same duties as his old position. The Court agreed. It upheld the hearing officer's findings that Auraria's actions in not considering seniority, prior job performance and retention rights, and in not selecting Rice as a transfer, were arbitrary and capricious.

We recognize, as the Court did in *Rice* with regard to the state lay-off rules, that our career service rules do not address the precise circumstances involved in this appeal. CSR 14-40, *et seq.* contain no provisions addressing the rights of a career service employee who is laid off when her position is abolished by one city agency and a new position is created by another city agency with substantially the same duties. Thus, although the Hearing Officer's Decision discusses actions in lieu of lay-off under CSR 14-45, the answer does not lie in the career service rules.

Applying the principles of *Bardsley* and *Rice*, the merit-based personnel system created by the City Charter, which requires appointment based on both merit and ability, and which grants career service employees a limited property interest in their employment, includes the right not to be displaced by the abolishment of a position occupied by a career service employee and the creation of a new position with substantially the same duties and responsibilities. As the Hearing Officer correctly recognized, an incumbent career status employee is not required to undergo a second competitive testing process in order to remain in her position.

Further, when an incumbent in a soon-to-be-abolished position is already performing the functions of a newly created position, consideration of length of service and prior job performance is consistent with the principles of hiring on the basis of merit and ability. It also has a practical application. At least three PMO Senior Architects applied for two Project Manager positions. Obviously, they could not all transfer into a reduced number of positions. However, consideration of length of service and prior job performance could have been used to make this determination, consistent with the principals of merit and ability embodied in the lay-off procedures of CSR 14-40, *et seq.*³ Because the duties and responsibilities of the new positions were substantially the same as the abolished ones, the Agency's use of interview scores to the exclusion of all other factors relevant to merit and ability was not reasonable.

Another significant factor in determining the reasonableness of the Agency's actions is the decision to delay the lay-off until after the completion of the hiring process. CSA HR Director Nyle Boyd testified that the reason for this decision (in part) was to

³ If General Services had transferred the entire PMO team to Public Works and a lay-off plan had been implemented in that agency, Mr. Guerrero, who was in Group A under CSR 14-42 and 14-44, would have been laid off instead of Appellant, who was in Group D. Instead, Mr. Guerrero, with two years of seniority, was permitted to transfer to the Project Manager position in Public Works, while Appellant, who had more than eighteen years of seniority, outstanding performance reviews, city performance awards and extensive experience performing project management duties at both General Services and Public Works, was laid off.

allow those not hired at Public Works to apply for early retirement under an incentive plan set to expire on November 13, 2009. However, as the Hearing Officer recognized, this reason was not supported by the evidence: the lay-off notices were not issued until three days after the retirement incentive expired. Further, Ms. Boyd's email is compelling evidence that the order of lay-off and hiring was reversed specifically to avoid any possible application of the lay-off rules: "We will need to be careful of the timing [of the lay-off notices] so it does not inadvertently trigger any of the lay-off rules." Exhibit GG.

In addition, the fiscal purpose behind the transition plan is relevant in assessing the Agency's actions. In order to reduce the City's operating costs, the Mayor's Office ordered General Services to eliminate all ten PMO positions and ordered Public Works to take over PMO functions with seven positions, which would save the City about \$343,000 in personnel costs. However, Public Works obtained approval for eight FTEs, and after the hiring process, transferred PMO Senior Engineer Greg Bertram to the Major Projects unit, adding a ninth FTE and Mr. Bertram's \$108,000 salary plus benefits to the unit's budget. The Agency also contracted out approximately one-third of the projects to be re-assigned after the lay-off, with an estimated cost of \$20,000 per month from September 2009 to July 2011, adding an additional \$240,000 per year to the new unit's budget until July 2011.⁴ Thus, the Hearing Officer's finding that the transition plan did not achieve the intended fiscal savings or the intended reduction of three FTEs is supported by the evidence.

For all these reasons, we affirm the Hearing Officer's conclusions that, with regard to the Agency's combined actions undertaken in the transition plan, it failed to use reasonable diligence to procure facts necessary to its decisions, failed to consider relevant evidence, and based its actions on conclusions that reasonable persons who are fairly considering the evidence could not reach.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision of September 17, 2010, is **AFFIRMED**. Further, consistent with our order regarding Appellant's reinstatement following the denial of a stay, and consistent with the findings and conclusions in this decision, the Department of Public Works is ordered to place Appellant in the position of Project Manager 1.

⁴ These figures do not include the cost of hiring an outside consultant, Jacobs GBNA, to recommend an organizational plan for the Major Projects unit in Public Works. Jacobs recommended eight FTEs in the new unit and also recommended the reclassification of PMO Senior Architect positions to Project Manager positions. As the Hearing Officer recognized, there is no evidence in the record that the Career Service Authority performed a classification audit under CSR 7.

SO ORDERED by the Board on February 3, 2011, and documented this
17th day of February, 2011.

BY THE BOARD:


Co-Chair

Board Members Concurring:

Patti Klinge, Colleen M. Rea, Felicity O'Herron, and Tom Bonner.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **FINDINGS AND ORDER** on
February 22, 2011, in the manner indicated below, to the following:

| | | |
|----------------------------------|-------------------------------------------|-------------|
| Elizabeth Hamilton | <u>Hamilton.elizabeth@comcast.net</u> | (via email) |
| City Attorney's Office | <u>dlefiling.litigation@denvergov.org</u> | (via email) |
| Rick Dindinger II, Esq. | <u>Frederick@dindingerlaw.com</u> | (via email) |
| Derek Brown, General Services | <u>Derek.brown@denvergov.org</u> | (via email) |
| Lesley Thomas, Public Works | <u>Lesley.thomas@denvergov.org</u> | (via email) |
| HR Services | <u>HRServices@denvergov.org</u> | (via email) |
| CSA Hearing Office | <u>CSAHearings@denvergov.org</u> | (via email) |


Leon Duran