

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

Appeal No. 109-04, 119-04

DECISION

IN THE MATTER OF THE APPEAL OF:

EMIT HURDELBRINK, Appellant,

vs.

DENVER OFFICE OF INFORMATION TECHNOLOGY, Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

These cases are the combined appeals of Mr. Emit Hurdelbrink. In case #119-04 he appeals the denial of his grievance dated July 1, 2004 from his Agency, the Denver Office of Information Technology [Agency]. In appeal #109-04 he appeals his demotion appointment in lieu of layoff from July 12, 2004 and subsequent layoff, effective July 27, 2004. A hearing concerning these appeals was held on October 26, 28, and November 1, 2004, before Hearing Officer Bruce A. Plotkin.

The Agency was represented by Robert Wolf, Esq., with Mr. Michael Locatis serving as the Agency's advisory witness. The Appellant was represented by Lawrence Katz, Esq.

Agency exhibits numbered 1, and 3-13 were admitted without objection. Agency exhibit #2 was admitted over objection. The Appellant's exhibits A, C, D, F-L, P, R-T, V, W, Y-AA, CC- FF, JJ-XX were admitted without objection. Appellant's exhibits B, E, M-O, Q, U, BB, and II were admitted over objection. Exhibits X and GG and HH were withdrawn. Exhibit YY was not offered.

The Agency presented Mr. Michael Locatis as its only witness for its case-in-chief. The Appellant testified on his own behalf and also presented witnesses Ms. Molly Rauzi, Mr. Michael Locatis, Mr. William Heldman, and Ms. Kelly Jean Brough.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant stated a claim upon which the Hearings Officer has jurisdiction to grant relief;
- B. whether the Agency complied with Career Service Rules in abolishing the Appellant's position and in its offer of a demotion appointment;
- C. whether the Agency engaged in unlawful age or political affiliation harassment;
- D. whether the Agency engaged in unlawful age or political affiliation discrimination against the Appellant when it abolished his position, in offering him a demotion appointment, or when it failed to hire him to the newly-created Director of Technology position in the ASPEN appropriation account;
- E. whether the Agency engaged in unlawful retaliation against the Appellant; and
- F. if the Agency violated any of the above rules, or engaged in unlawful discrimination or harassment against the Appellant, whether the Appellant is entitled to reinstatement to his former position, back pay and benefits.

III. BACKGROUND

The Appellant was a Career Service employee for twenty one years. In 2001 he became Acting Director of Technology for the Denver Office of Information Technology ("DOIT", or "Agency"). In May 2002, he obtained Career Service Employee status, and was appointed Director of Technology, the only person holding that position. On April 1, 2004, Mayor Hickenlooper appointed Michael Locatis to the position of Chief Information Officer for all of Denver's information technology services. The Mayor instructed Mr. Locatis (hereinafter "Locatis") to unify the disparate technology functions of Denver's myriad agencies into a single structure, and to present an initial plan for that restructuring within ninety days from Locatis' start date. [Locatis testimony, Exhibit 13, p.3],

In April 2004, Locatis had the Appellant prepare a "first pass" at restructuring the various agencies' information technology (IT) services. [Appellant testimony, Locatis testimony, Exhibit 13, p. 8]. That restructuring called for two directors to report to Locatis. To that end, Locatis directed the creation of a second Director of Technology position to be created from the All Systems Performance Enhanced Network (ASPEN) appropriation account. [Locatis testimony]. Locatis stated he intended to divide the IT responsibilities into Operations and Applications. [Locatis, Appellant testimony]. "Operations" consists of the computers, networks, servers and operating systems, in

short, the infrastructure of IT. "Applications" consists of the business-specific software such as PeopleSoft, which support that hardware. Some applications, such as PeopleSoft, are used city-wide, while other applications are specific to the Agency, such as the software to generate property tax returns. Thus, there is more hardware in operations and more software in Applications. The parties agreed the Appellant's role had been primarily in operations. [Locatis and Appellant testimony]. Since the second Director of Technology position was to focus on Applications, and ASPEN was an agency involved more in Applications than DOIT, Locatis directed the second Director of Technology position to be created under the ASPEN appropriation account. [Locatis testimony].

During the next month, Locatis changed his mind about the double reporting team. He saw too many managers would remain by reducing the various city IT functions to a unified structure. He decided to have one "Deputy Chief Information Officer" report to him, and to eliminate one of the two director positions - the Appellant's. [Locatis testimony, Exhibit 13, p.9]. Locatis stated the reason for that change was to have only one person in charge of both Applications and Operations reporting to him. In addition to abolishing the Appellant's position, Locatis decided to abolish the IT groups in the following Agencies as part of his plan for a unified IT reporting structure: DOIT (the Appellant's Agency), the ASPEN Applications Group, Denver Human Services IT Group and its thirty positions, Graphic Information Services (GIS), Safety Technology Services (known as OSI) and its 40 positions, Police (known as CHIP), Fire Department, Revenue, which included Treasury, Assessor, and Dept. of Motor Vehicles, 911 services, city-wide payroll and financial systems (formerly under the ASPEN group), Excise and Licensing, Fleet Management, and Human Services. Locatis stated none of these groups outside of DOIT reported to the Appellant previously. A total of eleven positions were abolished as part of this reorganization. [Locatis testimony].

Locatis asked the Career Service Authority (CSA) for approval of his plan to create the new Deputy Chief Information Officer position. [Locatis testimony]. The Director of the CSA, Ms. Kelly Jean Brough (Brough), responded by requesting that Locatis create the new position from the exiting classifications rather than create a new position, because the process for creating a new classification could take up to three months, and the CSA was seeking to consolidate, not expand, the classifications. [Brough testimony].

Following this instruction from Brough, and due to the time constraints imposed by the Mayor, Locatis opened a second "Director of Technology" position, rather than his intended "Deputy Chief Information Officer," from the ASPEN appropriation account in April 2004. [Exhibit C-1]. On June 22, 2004, CSA approved filling the new position. [Exhibit D]. Two days later, June 24, Locatis sought CSA approval to abolish the Appellant's Director of Technology position in the DOIT appropriation account. [Exhibit G]. Brough approved the abolishment the same day, and noted the Appellant was eligible to demote, in lieu of layoff, to one of two positions named "Information Technology Section Manager." One such position was occupied by Mr. William Heldman, the other by Ms. Sarah Harmer. Because Heldman had less seniority than

Harmer, then pursuant to CSR 14-45 b) 2), his position was offered to the Appellant. [Exhibit K]. Also on June 24, Locatis notified the Appellant of his impending layoff, effective July 23. [Exhibit L-1]. Based on the Appellant's request for additional information, Exhibit N, Locatis extended the effective date for abolishment to July 27, 2004. [Exhibit R-1]. On June 29, the Appellant accepted the demotion in lieu of layoff. [Exhibit T].

On July 1, Locatis appointed Molly Rauzi (Rauzi) to the newly created Director of Technology (in ASPEN), as Interim Director. Rauzi then contacted the Appellant to inform him she had become his supervisor. The Appellant questioned what duties he would retain as the Information Technology Section Manager. Rauzi replied on July 2, acknowledging the Appellant would not exercise the supervisory duties of a Section Manager as described in the "Description of Duties" for that position. [Exhibit W]. The Appellant then filed his appeal of the layoff on July 5, 2004, and wrote to Locatis, withdrawing his acceptance of the demotion appointment. [Exhibit Y]. The Appellant explained the duties in his demotion appointment were commensurate with a lower position than those in the job description for a Section Manager for CSA IT, and as such, would subject the position to further downgrading in classification. Locatis responded on July 15, by placing the Appellant on immediate administrative leave until his layoff, July 27, 2004. [Exhibit BB].

On July 14, 2004, the CSA certified (meaning "sent") to Locatis the names of the candidates for the vacant Director of Technology Position in the Aspen appropriation account. That list included the Appellant. [Brough Testimony]. On July 22, 2004, Locatis appointed Rauzi acting Director of Technology. The CSA approved Rauzi's appointment August 1, 2004. [Exhibit QQ].

Following his layoff, the Appellant was added to the Unit Layoff List on July 27, 2004, but he was not added to the General Layoff List, pursuant to CSR 4-30, and 4-32. Then, on September 1, 2004, Heldman was laid off. That position, Information Technology Section Manager in DOIT, was abolished shortly thereafter.

IV. FINDINGS AND ANALYSIS

A. Jurisdiction and Burden of Proof

The subjects of job abolishment, demotion appointments and layoff are properly before the Hearing Officer, pursuant to the CSR §4 and 14, cited above. Harassment and discrimination based on age and political affiliation also are proper subjects for appeal, pursuant to CSR §§15-30 D., 15-100 *et seq.*, 19-10 c), and 19-10 f).

The Agency claimed the grievance, appeal #119-04, was not served timely on the Agency. The Hearing Officer found that claim to be without merit. All jurisdictional filing dates were properly met by the Appellant.

Unlike a disciplinary action, in the context of a layoff due to job abolishment, the employee bears the burden of proof. Velasquez v. Dept. of Higher Edu., 93 P.3d 540 (Colo. App. 2003), In Re Dennis, 102-04. The Appellant was therefore charged with establishing a *prima facie* case for each of his claims, and proceeded first.

B. Alleged Career Service Rules Violations

In his grievance appeal, #119-04, the Appellant claims the Agency failed to comply with CSR 15-31D. and 15-100. In his appeal of the Agency's lay off and demotion appointment, appeal #109-04, the Appellant claims the Agency failed to comply with CSR §§4-30, 4-32 D., E.; 14-42, 14-44, and 14-45; 15-21; 15-30 D; and 19-10 b), c), and f). The Hearing Officer analyzes the claims in order, with these exceptions: the Appellant's claim under CSR 19-10 b) is analyzed as part of the other, more specifically-applicable rules; as the Appellant's evidence is the same for his claims under CSR 15-30 d), CSR 15-100, CSR 19-10 c), and CSR 19-10 f), those claims are considered together.

1. Harassment and Discrimination. The Appellant claimed the Agency violated the following Career Service Rules regarding harassment and discrimination.

CSR 15-31D. Policy

Employees are prohibited from engaging in political activities during working hours. Accordingly, the following practices are prohibited on City premises during work hours: D. engaging in solicitation or politically motivated behavior that is harassing or discriminatory..."

CSR 15-100 Harassment and/or Discrimination

15-101 Policy

It is the policy of the Career Service Authority that all employees have a right to work in an environment free of discrimination and unlawful harassment. The City maintains a strict policy prohibiting discrimination... and harassment because of...age...political affiliation....

CSR 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) Discriminatory Actions: Any action of any officer or employee resulting in alleged discrimination because of age, political affiliation...

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.

2. Harassment

The Appellant claimed harassment by the Agency based upon his lack of political affiliation and based upon his age. Harassment has been defined by the Courts as the creation of a hostile work environment. See e.g. Pa. State Police v. Suders, 124 S. Ct. 2342, 2352 (U.S., 2004), Mitchell v. City & County of Denver, 2004 U.S. App. LEXIS 21188 (10th Cir., 2004). Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required. Harris v. Forklift Sys., 510 U.S. 17 (U.S., 1993)

The Appellant's evidence in support of his harassment claim was as follows. (1) Managing the budget for his Agency was an essential duty for the Appellant. [Exhibit A-3, #8]. From late May to early June 2004, the Appellant had difficulty with the Budget Management Office in procuring an order. Nonetheless, when the Appellant asked Locatis to intervene, Locatis never assisted in resolving the problem. (2) Interviewing and selecting employees under him was an essential function of the Appellant. [Exhibit A-3, #12], nonetheless, Locatis hired a security officer for the Agency without consulting the Appellant. (3) In late May to early June, 2004 the Appellant was supposed to be involved in the transition of the Human Services IT department into the Appellant's agency. [Appellant testimony]. The Human Services IT manager did not provide necessary information to the Appellant, so the Appellant asked Locatis to intervene. According to the Appellant, Locatis first stated he was busy, then stated he would "get back with me," but never did. *Id.* (4) During the same period, the Appellant was supposed to be involved in the transfer of IT operations from the PeopleSoft project to DOIT. There was an impasse in the negotiations, so the Appellant asked Locatis to intervene. Locatis responded he would check into it, but the Appellant never heard back from Locatis. (5) The Appellant was not afforded weekly one-on-one meetings with Locatis, as were other staff members. [Appellant cross-examination]. (6) Locatis met with staff members under the Appellant without informing him. *Id.* (7) The Appellant stated he had no affiliation with the Hickenlooper campaign for Mayor.

The Appellant admitted he did not know if Locatis' actions were connected to his lack of political affiliation or age. There was nothing in this testimony to infer harassment against the Appellant as to any one of these actions or inactions.

The Appellant then offered the testimony of Ms. Molly Rauzi (Rauzi) in support of his harassment by political affiliation argument. Rauzi was hired to the new Director of

Technology position in the ASPEN appropriation account, although the Appellant also applied for that position. In her application, Rauzi wrote she was “an early supporter of Mayor Hickenlooper.” [Exhibit II]. She clarified she did not work for his campaign, did not contribute financially, nor did she solicit others to contribute money or services to the campaign. Rauzi first spoke with the Mayor in 2003 after her name came to his attention for her work at the airport. The Mayor telephoned Rauzi to ask for her thoughts on restructuring Denver’s IT. After that phone call, she saw the Mayor at a private campaign rally but did not speak with him. In 2003, after the Mayoral election, Rauzi joined the Mayor’s IT transition team. She was appointed after she responded to a newspaper or city-wide E-mail advertisement. She met informally with the Mayor twice briefly. In February, 2004 the Mayor appointed her to a panel created to select the newly-created Chief Information Officer (CIO) position to which Locatis later was appointed. [Rauzi testimony].

Although each of the actions or lack of response described by the Appellant was surely frustrating to him, there was no evidence that linked any of the Harris tests to the Appellant’s age or lack of political affiliation, according to any of the criteria, cited above. The Appellant admitted he did not know if there was any connection to his age or political affiliation; nor was there any other evidence which contained a nexus between any of the complained of-acts and age or political affiliation.

The Appellant failed to establish a nexus between his layoff and Locatis’ intent to harass him on the basis of political affiliation. Rauzi’s testimony did not provide any evidence from which the Hearings Officer could infer any politically motivated behavior, by either Locatis or Rauzi, after she became the Appellant’s supervisor, which was harassing to the Appellant. Rauzi contributed neither time nor money to the Hickenlooper campaign, had only two, non-political conversations with him, and declined to seek the CIO position under the Mayor. While Rauzi had expressed her support for the candidacy of John Hickenlooper, the Appellant failed to show Locatis was aware of her support, or that it affected his actions toward the Appellant

At the end of the Appellant’s case-in-chief, the Agency moved for a directed verdict, *inter alia*, as to the claims made under CSR 5-30, 15-100, 19-10 c) and f). Because the Appellant failed to establish a *prima facie* case for harassment based upon age or political affiliation, the Agency’s motion was granted.

3. Discrimination

a. Age Discrimination.

In order to establish a *prima facie* case for age discrimination, the Appellant must show: 1. he is member of a protected class (more than 40 years old); 2. he is otherwise qualified for the position; 3. a younger person was promoted instead of him; 4. the circumstances surrounding the agency action give rise to an inference of unlawful discrimination. In re Kanan, CSA appeal #09-02, p.9. Finally, if the above elements are satisfied, the Agency may avoid a finding of liability by demonstrating by a

preponderance of the evidence that it would have made the same decision even in the absence of age discrimination, Umbehr v. McClure, 44 F.3d 876 (10th Cir.1995).

The Appellant alleged in his testimony that the following evidence constitutes proof of age discrimination: (1) the Appellant is fifty-two years old. Locatis is forty-six, and Rauzi is forty-one years old. Locatis hired Rauzi to the newly-created Director of Technology position in the ASPEN appropriation account despite the Appellant's seniority; (2) soon after Locatis began working for Denver, he confided in the Appellant that the Appellant's longevity with the city was intimidating to him; (3) Locatis did not meet weekly with the Appellant as he did with other staff members; (4) Locatis had dealings with the Appellant's staff while excluding the appellant; (5) when the Appellant felt stonewalled by other agencies and needed Locatis' intervention, Locatis failed to intervene. For each of these alleged discriminatory acts or omissions, the Appellant testified he did not know if the basis was discrimination based upon age. [Appellant cross-examination].

As a fifty-two year old, the Appellant met the first requirement for a *prima facie* case of age discrimination. The Agency does not dispute he was qualified to perform the functions of the newly-created Director of Technology, thus, it is presumed he is capable of performing those functions, in keeping with the second criterion under Kanan. Rauzi is younger, and was promoted instead of re-hiring the Appellant, consistent with the third prong of the age discrimination test. The Appellant's evidence does not support an inference of discriminatory motive, in keeping with the fourth Kanan test. The circumstances surrounding the new Director of Technology appointment were as follows.

The Appellant's experience was primarily in IT operations, while Rauzi's was primarily in applications. [Appellant and Locatis testimony]. Locatis sought an applications background for his new hire. [Locatis testimony]. Even if Locatis told the Appellant "your longevity with the city is intimidating to me," there is no inference from which one could infer a discriminatory intent by the remark. Similarly, Locatis' failure to meet as regularly with the Appellant as with other staff, having dealings with staff to the exclusion of the Appellant, and failing to intervene when requested by the Appellant do not raise inferences of age discrimination, nor did the Appellant believe these actions did. Other than the existence of the differences in age, there were no circumstances that point to an unlawful intent with respect to age in any of Locatis' actions.

At the end of the Appellant's case-in-chief the Agency moved for a directed verdict, *inter alia*, as to the age discrimination claim. Because the Appellant failed to meet his burden of persuasion as to age discrimination pursuant to CSR 15-30 D, 15-100 et seq., 19-10 c), and f), the Agency's motion was granted.

b. Political Affiliation Discrimination

To establish a *prima facie* case for discrimination based on political affiliation, the Appellant must establish that (1) political affiliation and/or beliefs were "substantial" or "motivating" factors behind the adverse agency action; and (2) his position did not require political allegiance. Barker v. City of Del City, 215 F.3d 1134 (10th cir. 2000). Colorado has not addressed the situation where a political affiliation claim is based upon a lack of political affiliation; however there appears to be a valid first amendment argument for its inclusion. See, e.g. Whitfield v. Pennsylvania Gas Works, 1997 U.S. Dist. LEXIS 18550 (D. Pa., 1997).

The Appellant's evidence for discrimination based on his lack of political affiliation was contained within his claim of harassment due to his lack of political affiliation. He stated he supported neither Hickenlooper nor any political candidate, as he would have to work with whoever was elected. [Appellant testimony]. Conversely, Rauzi testified she was "an early supporter of Mayor Hickenlooper." [Exhibit 11]. At the end of the Appellant's case-in-chief, the Agency moved for a directed verdict as to the Appellant's political affiliation discrimination claim.

The Appellant met the second prong of his *prima facie* case, since his job as Director of Technology did not require political allegiance. However, the Appellant presented no evidence from which an adverse action based upon political affiliation could be inferred. The Appellant admitted he simply did not know why the agency abolished his position, why Rauzi was appointed, and why he was offered a demotion to a position that was about to be abolished. The Appellant did not refute that Rauzi's contacts with the Mayor were minimal, and not political. Because the Appellant failed to meet his burden to produce evidence for discrimination based upon his lack of political affiliation pursuant to CSR 15-30 D., 15-100 et seq., 19-10 c) and f), the Agency's motion for a directed verdict as to this claim was granted.

4. The Appellant's Layoff Claim. The Appellant claimed the Agency violated the following Career Service Rules concerning his layoff and demotion appointment.

CSR 4-30 Eligibility Lists Defined.

B. Order of Eligibility Lists Used in Certification.

1. Lay-off unit reinstatement list
2. General reinstatement list
3. Lay-off referral list
4. Employment list
5. On-call clerical list

CSR 4-32 D. Certification from a Unit Layoff List

1. Certification from the Lay-off Unit Reinstatement list is mandatory and exclusive. No other certification shall be made while any available eligible remains on this list. Certification shall consist of the highest ranking available eligible...

CSR 4-32 E. Certification from a General Reinstatement List: Certification from the General Reinstatement List is mandatory, but not exclusive....

The Appellant argues the list contained in CSR 4-30 B. contains an implicit requirement for the Agency to hire in the order enumerated above. The Hearing Officer respectfully disagrees. The word "certification" means simply "to send." See CSR 4-10 ("[c]ertification is the act of transmitting the names of eligibles to an appointing authority for the appointing authority's selection in making an appointment to a position"). Nothing in the rule requires the appointing authority to select an employee in the order contained in the 4-30B lists, although, by implication, the appointing authority will always hire from the Lay-off Unit Reinstatement List eligibles first because it is the only list that is both mandatory and exclusive. CSR 4-32 D. 1. This means no other list may be sent from the CSA to the hiring authority as long as anyone remains on the Lay-off Unit Reinstatement list. *Id.* Thus, while only the sending and not the selection is deemed "mandatory", selection from that list is *de facto* mandatory, since the appointing authority will have available only the Lay-off Unit Reinstatement List from which to select as long as any "eligible" remains on it.

The Lay-off Unit Reinstatement List includes those employees, such as the Appellant, who have been laid off. CSR 4-32 A. The names are added to that list as soon as administratively feasible with an effective date which is the layoff date. *Id.* Therefore, the effective date for the Appellant to be added to the Lay-off Unit Reinstatement List was July 27, 2004, the effective date of his layoff. A Lay-off Unit is defined as an appropriation account. The Appellant was laid-off from the DOIT appropriation account #3071110, whereas the new Director of Technology position was born in the ASPEN appropriation account, #123100. The Appellant, as the only layoff in DOIT, was entitled to be the exclusive candidate sent for consideration in hiring within the DOIT Unit, but not for the ASPEN appropriation account's new Director of Technology position. "The Lay-off Unit Reinstatement List shall only be used within the Lay-off Unit the employee was in when the lay-off took place." CSR 1, definition of "Lay-off Unit Reinstatement List. "

The Appellant also argues the Director of Technology position under ASPEN was the same classification and pay grade as the abolished DOIT Director of Technology occupied by the Appellant, and therefore the ASPEN position should be treated alike for all personnel purposes, presumably including treating the hiring to the ASPEN Director of Technology position as a re-hire for the Appellant. [Appellant Written Closing Statement]. The discussion immediately above, however, clarifies that the abolishment of

a position in one appropriation account does not grant the incumbent to the abolished position priority to be hired in any other appropriation account.

The Appellant also argues the Appellant's name should have been added to the Lay-off Unit Reinstatement and General Layoff Lists and certified to the Agency on July 27, 2004. [Appellant Written Closing Statement]. He contends CSR 4-21 requires multiple lists to be certified, presumably those described above at CSR 4-30. However, as previously stated, CSR 4-32 D. specifies if any eligible is on the Lay-off Unit Reinstatement Lists, no other list may be certified, thus his multiple-list argument fails.

The Appellant also claims he should have been added to the General Reinstatement List on July 27. [Appellant testimony]. Brough admitted the Appellant was not added to the General Reinstatement list on or after July 27; however, no harm was committed by the omission for two reasons. First, the date of certification was July 14. [Brough testimony] That date closed the list to additional eligibles. Since the Appellant was not eligible to be included until his layoff on July 27, then failing to add him after July 14 was not error. In addition, the Appellant's name was included in the Lay-off Referral List certified to Locatis on July 14, thus the Appellant was a candidate among those Locatis considered, prior to Locatis' hiring the Director of Technology in the ASPEN appropriation account.

The Appellant next argues the Appellant should have been added to the General Reinstatement List after his July 27 layoff, but before Locatis selected Rauzi on August 1, 2004. He premises this argument first on "[t]he intention of Rule 4-32(B) (1) and (C)... to allow a laid off employee to be considered for positions open within the class in which he has attained career status..." [Appellant closing]. This is true as far as it goes, but Brough responded, and the Hearings Officer agrees, it would be poor management practice to keep open the certification of eligibles for some indefinite time. An appointing authority would be hamstrung to move forward with his hiring needs.

The Appellant then argued Brough is in error in interpreting the Career Service Rules to establish a cut-off for adding to any list on the certification date because the practice is contrary to the "requirement" to certify multiple lists. [Appellant closing statement]. First, the "multiple lists" argument is incorrect as previously described. Secondly, as the Agency correctly responded, "[t]he logical extension of Appellant's argument is that an agency could never fill a position off a list because it would need to be waiting every single day, to see if new names were added to the lists." [Agency Closing Statement]. The Appellant's reasoning would impermissibly and indefinitely tie the hands of agencies needing to fill vacancies while awaiting a second list that might never arrive.

For the reasons stated immediately above, the Appellant failed to prove, by a preponderance of the evidence, that the Agency failed properly to follow CSR §§4-30, 4-32D, and 4-32E in hiring the ASPEN Director of Technology on August 1, 2004.

5. CSR 14-42 Order of Lay-off and CSR 14-44 Sequence of Lay-Offs.

The Appellant did not produce any evidence at hearing concerning a violation of these rules, therefore the claims are dismissed.

6. CSR 14-45 Actions in Lieu of Lay-Off

The Appellant's claim here is twofold: "[t]he offer of a demotion appointment was contrary to CSA Rule 14-45 since Mr. Hurdelbrink was not offered a position where he would be performing the duties of a the position;" and since the position to which he would demote was already stripped of its original duties it would be subject to a downgrade resulting in pay and retirement benefit reduction. [Appellant Written Closing Statement, p.11-13].

There was no dispute that the Appellant had bumping rights under Career Service Rules. [Brough testimony]. The demotion appointment offered by the Agency was to the position of Information Technology Section Manager in DOIT, which was occupied by Heldman [Exhibit MM]. It was also not disputed that, at the time the demotion appointment was offered to the Appellant, Heldman was no longer performing the duties of a Section Manager. [Exhibit W, Rauzi Testimony, Locatis Testimony, Heldman Testimony]. On July 27, 2004, the DOIT Information Technology Section Manager position occupied by Heldman was abolished, the same day the position occupied by the Appellant was abolished. The timing of the Agency's abolishment of the Section Manager position seems to lend credibility to the Appellant's argument that the demotion offer was not bona fide. Nonetheless, the demotion offered was within the Career Service Rules, which require only that the position be "existing" at the time of the offer CSR 14-45 b) 1). Equally important, assuming some bad motive on the part of the Agency, for example to rid itself of the Appellant by cutting not only his position, but the demotion appointment position as well, that argument fails since, had the Appellant accepted the demotion, when his new position, formerly occupied by Heldman, was in turn abolished, the Appellant would then have had the right to bump into Harmer's position. Harmer supervises, and otherwise performs the Section Manager duties that were the reason the Appellant rejected the demotion to Heldman's position. [Exhibit Y]. Thus, the Agency acted within the authority of the Career Service Rules in offering the Appellant the demotion appointment to Heldman's position, even though the position would have been abolished immediately after the Appellant's acceptance of it.

The Appellant does raise a troubling prospect for the current layoff rules. Even if applied properly, the rules appear to allow an agency to circumvent its obligation to terminate employees for cause, Charter sec. 9.1.1B, simply by abolishing the position in the appropriation account occupied by the employee, and creating the equivalent position in another appropriation account. In that fashion, the hiring authority may terminate any employee without due process as is required under the Career Service Rules. Accordingly, an appeal in which an Appellant claimed wrongful termination by use of the layoff process, as opposed to a claim of failing to follow the layoff rules, would be closely examined.

7. CSR 15-21 Acceptance of Compensation, Entertainment, Gifts, Favors and Gratuities

No evidence of this violation was presented by the Appellant at hearing, therefore this claim is dismissed.

V. CONCLUSION

The Appellant did not prove any of his claims in this case by a preponderance of the evidence. The Agency acted within its authority, pursuant to Career Service Rules and law, in establishing a layoff unit, abolishing the position occupied by the Appellant, and in offering him the demotion appointment to Section Manager. The Agency also acted within its authority in laying off the Appellant. The Appellant produced no evidence which established, by a preponderance of the evidence, that any of the Agency's actions were improperly motivated by harassment or discrimination based upon the Appellant's age or lack of political affiliation.

The Appellant's many years of work history for the city of Denver and obvious devotion to his work should be acknowledged. He received numerous "outstanding" reviews from different supervisors. It is unfortunate for the City that his talents could not have been incorporated into the transition sought by the Agency in its quest for economic efficiency.

VI. ORDER

Based upon the forgoing analysis and findings, the Agency's actions related to this appeal are AFFIRMED and the Appellant's claims are DISMISSED WITH PREJUDICE.

DONE this 5th day of January, 2005.

Bruce A. Plotkin
Hearings Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION**, by depositing same in the U.S. mail, postage prepaid, this ____ day of January, 2005, addressed to:

Mr. Emit Hurdelbrink
8225 Fairmount Circle
#5-203
Denver, CO 80247

Lawrence Katz, Esq.
Attorney at Law
410 – 17th Street Suite 1300
Denver, CO 80202

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION**, by depositing same in interoffice mail this ____ day of January, 2005, addressed to:

Robert Wolf, Esq.
City Attorney's Office
Litigation Section

Mr. Michael Locatis
Denver Office of Information Technology
