

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

Appeal No. 103-04

DECISION

IN THE MATTER OF THE APPEAL OF:

DEBRA R. JACKSON, Appellant,

Agency: Denver Department of Human Services, and the City and County of
Denver, a municipal corporation.

The hearing in this appeal was held on March 15, 2005 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented herself. The Agency was represented by Assistant City Attorney Dianne Briscoe. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision:

FINDINGS AND ANALYSIS

This is an appeal of the lay-off of Appellant Debra Jackson from her position of Administrative Support Assistant (ASA) IV with the Agency's Operations Section, and her demotion as an action in lieu of lay-off to an ASA III position effective July 17, 2004. The timely appeal asserts that the lay-off and demotion violated Career Service Authority (CSA) rules relating to lay-off and pay, that she was demoted based upon her race, and that the actions were taken against her in retaliation for her prior successful Career Service appeal. Appellant requests reinstatement to her former position, reassignment from her current supervisors, and to be made whole.

I. **NATURE OF APPEAL**

On June 15, 2004, Appellant was informed she would be laid off from her position as an ASA IV within the Operations Section of the Denver Department of Human Services. She accepted a demotional appointment to an ASA III position on June 17, 2004. [Exh. 2.]

Appellant filed this appeal, claiming (1) her lay-off and demotion were in violation of Career Service Rules (CSR) 14 and 9 related to lay-off and pay, (2) she was selected for lay-off on the basis of her race, African American, and (3) she was selected for lay-off in retaliation for her 2003 appeal of a written reprimand. The Agency responds that the actions were taken in accordance with the lay-off plan, which did not target Appellant.

II. ISSUES

1. Did Appellant establish by a preponderance of the evidence that her lay-off and demotion violated Career Service Rules regarding lay-off and pay?

2. Did Appellant establish by a preponderance of the evidence that the Agency's decision to lay off and demote Appellant discriminated against Appellant on the basis of her race, African American?

3. Did Appellant establish by a preponderance of the evidence that the Agency's decision to lay off and demote Appellant was taken in retaliation against Appellant for prior conduct protected under CSR § 15-106?

III. EVIDENCE

The Agency's Exhibits 1 – 22 were admitted without objection. Appellant's Exhibit A was admitted over the Agency's objection, and Exhibit C was admitted without objection.

The facts in this appeal are largely undisputed. As a result of a number of factors unrelated to Appellant, including a \$3.5 million budget shortfall, the Agency determined in May 2004 that it would be forced to implement an Agency-wide lay-off to eliminate thirty-three positions and reorganize its six sections. The administrative team that shaped the lay-off plan consisted of then-Interim Deputy Manager Cecilia Mascerenas, all six section heads, and facilitator Elaine Huffman. The goals for the budget reduction process were set forth in a document written by the facilitator. [Exh. 14.] The lay-off plan recommended a reduction of thirty-three positions by position title, without the incumbents' names. It also recommended a reorganization of the Division's sections from six to five sections that was intended to reduce administrative and supervisory positions, combine functions, and re-balance sections hit by high turnover, while protecting case-carrying staff. The plan proposed that the ASA IV position performing the adoption rollover function could be eliminated based upon the ability of ASA IIIs to perform the duties as recently changed. Appellant was the incumbent in that ASA IV position. [Exh. 15; testimony of Donna Hamburg.]

After review and adoption by Agency executive management in June 2004, the plan was submitted to CSA Personnel Director Kelly Brough for approval. [Exh. 16, pp. 1 – 2.] CSA Senior Personnel Analyst Peter Garritt was assigned the task of determining whether the plan, which contained the position titles to be affected by the lay-off but not the incumbents' names, complied with Career Service Rules. A Rank Order List was produced from the CSA personnel software PeopleSoft. The list identified the names of the employees who would be affected by the lay-off by classification and in reverse order of seniority. [Exh. 18.] Ms. Brough approved the lay-

off plan after minor corrections, and returned it with the Rank Order List to the Agency for implementation. [Testimony of Peter Garritt.]

Senior Agency Personnel Analyst Julie Maerz coordinated the lay-off. Director Roxane White gave her a list of the job titles to be affected, and Ms. Maerz used the Rank Order List provided by the CSA to identify those employees to be laid off. Ms. Maerz identified that Appellant was the only ASA IV position within the lay-off unit, and that she was eligible to demote to an ASA III position. Thereafter, Ms. Maerz analyzed the effect of the lay-off by race and gender, and concluded that it imposed no adverse impact upon employees based upon their race or sex. Prior to that time, the Agency did not use information identifying employees by race or sex during the lay-off planning and implementation process. Ultimately, 28.5 positions were abolished as a result of the lay-off.

Director of Children and Family Services Allen Pollack and Senior Case Manager Donna Hamburg met with Appellant to inform her she would be laid off, and that she was eligible for a demotional appointment. Appellant told them she believed the lay-off was the result of her prior grievance.¹

After Appellant accepted the demotion to an ASA III position, she continued to perform adoption rollover duties for a time at the direction of her supervisor Dee Grayson. Those duties decreased substantially after the demotion because of delays in obtaining fingerprints and other factors. Appellant complained to Ms. Grayson about performing this higher-level assignment at her lower ASA III pay rate. In late September, the adoption rollover duties were reassigned to other ASA IIIs, and Appellant was assigned new duties consistent with her demotion and physical limitations.

At hearing, Ms. Hamburg conceded that Appellant performed adoption rollover duties longer than they had planned. She testified that the delay was caused by the Agency's attempt to reshuffle duties among the remaining employees in the reorganized agency, as well as Appellant's physical inability to perform some duties because of her repetitive motion injury.

IV. ANALYSIS

The City Charter requires that the facts at issue in a Career Service appeal must be determined *de novo*. C5.25(4). Such a determination requires an independent fact-

¹ In 2003, Appellant filed an appeal of her grievance of a written reprimand imposed by supervisors Donna Prince and Dee Grayson. After a hearing, the hearing officer reversed the action, mistakenly referring to it as a verbal reprimand. On petition to reopen, the Career Service Board remanded with instructions to clarify the nature of the reprimand. The correction was never made. It is clear from the totality of the hearing officer's findings and order that the decision was a reversal of a written reprimand. In re Jackson, CSA 34-03 (8/5/03.)

finding hearing and the resolution of factual disputes. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975.) Appellant has the burden of proof in an administrative lay-off. Velasquez v. Dept of Higher Education, 93 P.3d 540 (Colo.App. 2003); In re Vialpondo, CSA 100-03 (3/31/04). Appellant also has the burden of proof as to her discrimination and retaliation claims. Vialpondo, id. The standard of proof as to each claim is by a preponderance of the evidence. CRS § 13-25-127.

1. Lay-off

At hearing, Appellant challenged the deconsolidation of appropriation accounts prior to the lay-off under CSR § 14-42 b) 2). Appellant argues she would have attended the Career Service public hearing on the deconsolidation if the Agency would have notified her she could be affected by the deconsolidation. I find this argument without merit. The Career Service Rules do not require personal notice of public hearings to any person who may be affected thereby, and due process does not require such notice. CSR § 2-62; United States v. Florida East Coast R. Co., 410 U.S. 224 (1973).

Appellant argues that she was entitled to a transfer to other ASA IV positions created as a result of the reorganization, and cites similar transfers during the 2003 lay-offs in support of this argument. However, the evidence shows there was no other ASA IV position in Appellant's lay-off unit. [Exh. 18, p. 1.] Therefore, Appellant was not entitled to a reassignment or transfer appointment under CSR § 14-45 a), which gives transfer rights only within the lay-off unit.

Appellant also contends that her assignment of adoption rollover duties in her demoted position from July to September requires that the Agency pay her as an ASA IV. Appellant bases this argument on the fact that she previously performed that duty as an ASA IV, and that CSR § 9-10 requires "like pay for like work." The Agency counters that Rule 9 is inapplicable to the pay for a lay-off demotional appointment, since that rule governs the establishment of pay rates for job classifications. The Agency also makes a distinction between a position and an assignment within a position. A position is classified by its essential job duties, but the assignments given to each position are controlled by the supervisor. The temporary assignment of higher level duties during the transition after a lay-off does not require higher level pay. [Testimony of Mr. Garritt.] Such an assignment is not an effort to circumvent the Charter requirement of good cause for termination within the meaning of the cautionary language quoted by Appellant from In re: Hurdelbrink, CSA 109-04, 119-04 (1/5/05).

The Career Service Rules provide that "every position shall be allocated to a class in the classification and pay plan." CSR § 7-12. Once allocated to a class, only "permanent changes to essential duties that comprise a majority of work time and are most important to the position" will justify reallocation, and a resulting change in pay. CSR § 7-13. Since Appellant concedes her performance of those higher-level duties was temporary, spanning only a few months, her claim for higher level pay is not supported by the Career Service Rules.

Appellant also claims she was not assigned to the specific ASA III position identified in the lay-off plan. She presents as evidence the lay-off letter which identified her demoted position as #39682, in contrast with her personnel action form, which stated her demoted position as #40074. [Exh. 16, p.3; and Exh. C.] The Agency counters that the lay-off letter does not entitle an employee to any specific assignment, and that the Agency cannot foresee the effects of individual decisions after the lay-off is announced. I find that the Career Service Rules entitle an employee only to “an existing *position* in the same layoff unit” when the conditions enumerated in the rule are met. [CSR § 14-45 b), emphasis added.] Since it is undisputed that Appellant was demoted into an ASA III position within her lay-off unit, the demotion satisfied the requirements of the rule.

Based on the foregoing, it is determined that Appellant has not established that her lay-off or demotion violated the Career Service Rules.

2. Discrimination Claim

Appellant has properly raised a claim that the lay-off and demotion actions were taken as a result of her race, African American. Appellant makes five arguments in support of this claim: 1) in April 2002, supervisors Dee Grayson and Donna Prince favored the incumbent Faith Wildman for hire into the ASA IV position awarded to Appellant; 2) the 2004 lay-off was structured to deny later promotions to African American clerical employees into ASA IV positions; 3) the Agency intended to permanently assign Appellant her former higher-level duties after the lay-off; 4) after Appellant refused to perform those higher-level duties, the Agency re-assigned them to a Caucasian employee; and 5) during the 2004 lay-off, Appellant was treated less favorably than employees laid off in 2003.

Intentional discrimination requires proof of 1) membership in the protected class, 2) an adverse employment action, and 3) evidence supporting an inference of discrimination, such as disparate treatment of similarly situated employees outside the protected group. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996).

As to all the above claims, Appellant has proven the first element by establishing that she is African American. Appellant's first argument is without merit, since Appellant has failed to establish an adverse action, evidence supporting a discriminatory intent, and a timely appeal of such action. Appellant admits that she was selected for the promotion in 2002. The evidence indicated that both Appellant and Ms. Wildman are African American. [Testimony of Ms. Hamburg.]

Appellant's second claim, that the lay-off was structured to deny future promotions, must also fail for lack of supporting evidence of adverse action or discriminatory intent. The only testimony related to this contention occurred during Appellant's cross-examination of Ms. Hamburg. Appellant contends that the only ASA IV positions remaining after the lay-off were located in a unit containing African Americans who Appellant believed would not apply for promotion to ASA IV. Ms.

Hamburg responded that the other ASA IV positions were outside Appellant's lay-off unit. She also explained the organizational reasons for each of the questioned positions. Appellant offered no evidence to support her contention that the Agency intentionally placed her in a unit where there were no ASA IV positions into which she could promote, or that the Agency had reason to know the aspirations of other African American clerical employees who were laid off.

Third, Appellant argues the Agency intended to demote her, yet continue to require her to perform the adoption rollover duties of her ASA IV position. Appellant testified that Ms. Grayson informed her after her demotion that she was expected to continue performing those duties. However, it is undisputed that the Agency did in fact relieve Appellant from those duties at Appellant's request in September 2004. Therefore, evidence of an adverse employment action is not present.

Fourth, Appellant contends the Agency's assignment of the adoption rollover duties to a Caucasian ASA III employee supports her discrimination claim. Since the re-assignment was at Appellant's request, proof of an adverse action is absent.

Finally, Appellant claims that employees were treated more favorably during the 2003 lay-off. The Agency responds that the 2004 lay-off was governed by the lay-off rules as they were amended in March 2004. The 2003 lay-off rules did not require that demotional appointments be in the same class series, in contrast to the amended rules. [Compare CSR §14-45 b) 1) (b), as amended Mar. 19, 2004, and CSR §14-45 b), as amended Dec. 11, 1981.]

As to the lay-off itself, Appellant has proven the first two elements of a prima facie case by establishing that she is African American, and that she was laid off and demoted from her position. However, Appellant offered no evidence that discrimination was the motive for either her lay-off or demotion. Appellant's lack of positive interaction with Ms. Hamburg does not by itself raise an inference of discrimination. Likewise, the Agency's failure to make an exception to its own lay-off rules on lay-off unit and seniority is not proof of an intent to discriminate on the basis of race. Appellant offered no evidence that employees of a different race were treated more favorably than African American employees. Therefore, Appellant has failed to present evidence that the adverse actions were motivated by discriminatory intent, the final element of the prima facie case.

Throughout the hearing, Appellant also placed at issue whether the 2004 lay-off adversely affected African Americans at a disproportionate rate. I must therefore analyze the discrimination claim under the disparate impact theory.

In order to prove a prima facie case of disparate impact discrimination, Appellant must demonstrate by a preponderance of the evidence that "employment practices that are facially neutral in their treatment of different groups . . . fall more harshly on one group than another and cannot be justified by business necessity." International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977). It is necessary to show that

the employees whose treatment is being compared are similarly situated “in all relevant respects”. Ward v. Proctor & Gamble Paper Products Co., 111 F. 3d 558, 560 (8th Cir. 1997).

Appellant asserts that African Americans were denied future promotional opportunities by the structure of the 2004 lay-off. Appellant claims African American employees who aspired to promotion were not placed in units with promotional opportunities. The Agency responds by citing the business reasons for the reorganization and reassignment of duties for each challenged position, and by its conclusion after statistical analysis that the lay-off itself had no adverse impact based on race or gender. The testimony indicates that the criteria for actions in lieu of lay-off followed the race-neutral rules set forth in CSR § 14-45. Appellant was given the option of demotion consistent with CSR § 14-45 b). Appellant presented no evidence that the lay-off had a disproportionate effect on members of her race. Therefore, Appellant has failed to establish a prime facie case of adverse impact discrimination.

3. Retaliation Claim

Appellant has properly presented a claim that her lay-off and demotion were motivated by her prior successful Career Service appeal of a written reprimand. In re Jackson, CSA 34-03. “Retaliation against employees for reporting unlawful harassment or discrimination or assisting the City in the investigation of any complaint is against the law and will not be permitted.” CSR § 15-106. In order to establish retaliation, Appellant must demonstrate a causal connection between the adverse action and the protected activity; here, the filing of an appeal over discipline based in part upon an allegation of discrimination. Cf. Clark County School District v. Breeden, 532 U.S. 268 (2001).

Appellant claims that Ms. Grayson’s issuance of the 2003 reprimand and her role as Appellant’s supervisor after the demotion support a finding that the lay-off and demotion were taken in retaliation for her appeal of the reprimand. Appellant testified that in March 2002 she was selected for the ASA IV position from which she was later laid off. That position became vacant because Ms. Wildman, an African American employee, failed to qualify for the position after it was reclassified from an ASA III classification. Appellant believed her supervisor Ms. Grayson had favored Ms. Wildman for the position. Appellant argues that Ms. Grayson thereafter engaged in a pattern and practice of negative actions against Appellant, thereby creating a hostile work environment because of her preference for Ms. Wildman. She argues it is inconceivable Ms. Grayson would not have been in a position to influence a lay-off based on her status as a supervisor. Appellant claims Ms. Grayson persuaded those who created and approved the lay-off plan to include Appellant within the lay-off and then assign Appellant to Ms. Grayson’s unit. That result, under Appellant’s theory, would allow Mrs. Grayson to continue to harass Appellant. In support of this argument, Appellant testified that she and Ms. Grayson had a number of negative interactions during her employment in this position.

The allegations made in Appellant's closing argument are not themselves evidence. To the extent they are not supported by evidence brought forth during the hearing, they have not been considered in this decision.

Appellant's consistent position in this appeal has been that the Agency treated her negatively since she obtained an ASA IV position created by reclassification of the ASA III position held by Ms. Wildman, who was favored by both her supervisor and manager for that position. This theory does not support a claim of retaliation for Appellant's prior appeal, but instead is inconsistent with it. If the real reason for the adverse action was the Agency's retaliation against her for accepting a promotion that disadvantaged a favorite employee, then the motivation was not retaliation for filing an appeal under the Career Service Rules alleging discrimination. See Marx v. Schnuck Markets, Inc., 76 F.3d 324, 328 (10th Cir. 1996.) Since the favored employee is herself African American, the theory likewise does not aid Appellant's discrimination claim. Finally, Appellant presented no evidence that the Agency planning committee, Career Service personnel analyst and Agency personnel analyst worked together to pre-selected Appellant for lay-off during the planning and implementation of the lay-off.

Therefore, Appellant has failed to meet her burden to prove retaliation by a preponderance of the evidence.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the lay-off and demotion actions of the Agency are hereby AFFIRMED.

Dated this 13th day of
June, 2005.

Valerie McNaughton
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 14th day of June, 2005, addressed to:

Debra R. Jackson
2975 Glencoe St.
Denver, CO 80207

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail, this 14th day of June, 2005, addressed to:

Dianne Briscoe
Assistant City Attorney
Denver Department of Human Services
1200 Federal Blvd. 4th Floor
Denver, CO 80204

City Attorney's Office
Litigation Section

Tamara Tyler
Denver Department of Human Services
