

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

Appeal Nos. 73-09 A., 75-09 A.

FINDINGS AND ORDER

IN THE MATTER OF THE CONSOLIDATED APPEALS OF:

CLARA OWENS-MANIS and ANGELICA PETTWAY,

Appellant/Respondent (Pettway),

vs.

DEPARTMENT OF FINANCE, ASSESSMENT DIVISION, and the City and County of Denver,

Agency/Petitioner.

This matter is before the Career Service Board on the Agency's Petition for Review. After considering all the evidence in the record, the Board **REMANDS** this case to the Hearing Officer for further proceedings consistent with the findings and conclusions below.

I. BACKGROUND

In 2009, the Agency determined that a layoff was necessary in order to meet reductions in its fiscal budget. Three of six Assessment Information Technician (AIT) positions were to be eliminated and City Assessor Paul Jacobs decided to use proficiency rankings as the criteria for selecting which three AITs would be laid off.

The Agency utilized a time accountability system called TimeTracker to record the amount of time each AIT spent performing various job functions during the work day. Prior to the layoff, the AITs were instructed that all work time was to be input into TimeTracker and allocated to one of their April 2009 PEP duties: phones, deeds, mailing addresses, returned mail, document scanning, or other.

Three of these duties were used to measure proficiency for purposes of the layoff: 1) the processing of deeds; 2) the processing of changes of address, and 3) the processing of returned mail. Of the three, the processing of deeds was deemed to be the most critical AIT function and was assigned a weighted value of 2. The AITs

were evaluated over a five month period, April through August 2009. Their proficiency rankings were based on the volume and speed of their work in each of the three tasks, as determined from information imputed into TimeTracker.

Following the evaluation period, the Agency determined that Appellants Pettway and Owen-Manis ranked 4 and 6 respectively and were therefore selected for layoff. Both appealed to the career service hearings office where their cases were consolidated for hearing. The hearing was held on December 9, 2009, and January 25, 2010. Both appellants were represented by the same attorney.

The Hearing Officer found copying errors and miscalculations in the Agency's summary documents from which she determined that Appellant Pettway should have been ranked 3 while Appellant Owen-Manis should have been ranked 5. The Hearing Officer affirmed Ms. Owen-Manis' layoff, as her ranking remained in the bottom three and she did not appeal that decision. However, the Hearing Officer reversed the layoff of Appellant Pettway and this appeal follows.

II. FINDINGS

Contrary to the Agency's assertions, we do not find the Hearing Officer's decision to be the result of mathematical musings or made-up evidence. Rather, the problems we see in the appellate record are the result of the Agency's lack of notice in introducing evidence and its failure to explain what is not readily apparent in its exhibits.

Exhibits 47, 48, and 49, which were central to the Hearing Officer's decision, were introduced on the second day of the hearing, and although these exhibits were available prior to the hearing, they were not disclosed to Appellants and their counsel until the Agency sought to admit them into evidence. (Transcript, 1/25/10, pp. 96, 97, 112, 128, 131). Further, Ex. 49, which contains crucial backup information to both Exs. 47 and 48 (Transcript, 1/25/10, pp. 102-128), was admitted into evidence midway through the second day of the hearing (Transcript, 1/25/10, p. 131), but a copy was not provided to the Hearing Officer until after the hearing had closed. (Transcript, 1/25/10, p. 243). Thus, the Hearing Officer did not have the opportunity to review the backup documentation during the evidentiary portion of the hearing because the Agency failed to make copies of the exhibit prior to its admission into evidence.

Adding further confusion, Exs. 47 and 48 are mismarked. In the record, Ex. 47 consists of eight pages (Rec. 447-453), while Ex. 48 is a one page document (Rec. 454). However, it is clear from the transcript that Ex. 47 is a one-page summary document created by Mr. Jacobs from information in TimeTracker (Ex. 49) and information obtained from KRONOS. (Transcript, 1/25/10, pp. 98, 102-127). On the other hand, Ex. 48 is an eight page document; the first page is identical to Ex. 28, while

pages 2-7 are summary documents prepared by Mr. Jacobs from information in Ex. 49 to support the calculations found on the first page. (Transcript, pp. 110-112, 123-128).¹

As the Hearing Officer noted, there are numerous discrepancies between the information contained in the Agency's summary documents (Exs. 47 and 48) and the backup documentation from TimeTracker (Ex.49). Decision, pp. 5-8. More significantly, however, there appear to be numerous errors in the backup documentation for all six employees.

For example, Ms. Pettway's address changes for April are totaled as 270, when the daily columns for that month clearly total 286. (Decision, pp. 6-7; Ex. 49-1, Rec. at 455). Obviously, the total is off by 16, and we note that 16 address changes are reflected in the first day column on Ex. 49-1, but no hours are reflected under "time worked" and no "average" is recorded for that day. Although the Hearing Officer noted this error as to Ms. Pettway, we see the same "error" repeated during the five-month evaluation period for all six AITs in the address change category: (Ex. 49, Rec. at 461, 465, 467, 468, 470, 471, 473-477, 479- 483, 487, 488). In fact, this "error" occurs so frequently that it suggests a problem in the TimeTracker recording system or a problem in the spreadsheets.

Ordinarily, any fact-finder – a judge, a jury or an administrative hearing officer – has the right to assess the credibility of documents admitted into evidence. In assessing the credibility of Exhibits 47, 48 and 49, the Hearing Officer was free to disregard erroneous information, correct those errors and recalculate production rates and final rankings based on corrected information. Here, the Hearing Officer recalculated production rates by dividing the total number of tasks each employee completed by the total time spent on each task to arrive at an average work product per hour. The Hearing Officer's averaging methodology was consistent with Mr. Jacobs' testimony that proficiency was measured in terms of average work product per hour, and was consistent with the methodology Mr. Jacobs used to calculate averages in Ex. 47. (Rec. at 447: "The last row of the chart shows the simple average or mean value for each column.") It was certainly reasonable for the Hearing Officer to assume the methodology used in Ex. 47 was the same methodology used in Ex. 48.

Thus, if the only issue on appeal was the sufficiency of the evidence, we would affirm the Hearing Officer's findings. However, a layoff decision must be upheld unless it is arbitrary, capricious or contrary to rule or law. *Velasquez v. Dept. of Higher Education*, 93 P.3d 540 (Colo. App. 2003). The Hearing Officer concluded that the Agency's layoff was arbitrary and capricious because there was no Agency testimony

¹ We note that Exhibit A, attached to the Agency's Opening Brief, also contains incorrectly marked copies of Exs. 47 and 48, which would suggest the Agency mismarked these exhibits when they were introduced into evidence. Despite the mismarking, however, it is clear from the Hearing Officer's Decision that she understood Ex. 47 was a one page exhibit and that Ex. 48 consisted of eight pages.

explaining how it calculated its production rates, and the Hearing Officer was unable to reproduce those rates based on the information contained in Exs. 47, 48 and 49.

Like the Hearing Officer, we also had difficulty understanding the information contained in the Agency's exhibits. It was only after a second review of the evidence and the 1/25/10 transcript that we were able to ascertain the Agency's methodology in determining average hourly production rates.

For example, under the category "Deeds" in Ex. 48-2, Ms. Pettway has the following production rates listed for the month of April: 8.0, 5.0, 9.0, 5.5, 4.2, 8.2, 4.0, 6.8, 2.6, 6.7, and 4.2. These are hourly production rates for each of the 11 days that Ms. Pettway worked on deeds in April, which were obtained from Ex. 49. (See, Ex. 49-1; Transcript, 1/25/10, pp. 126-128, explaining the relationship between Exs. 48 and 49). Although not clearly reflected in the exhibits, it appears the Agency averaged the daily production rates to obtain a monthly average and then averaged the monthly averages to obtain the rates used in the final rankings.²

Nevertheless, there are other problems with the Agency's exhibits. First, we note that Ms. Pettway's monthly average production rate exceeded her PEP expectations of 8 deeds/hr. in May, June, July and August, (see f.n. 2 below). However, in April, five of the six employees evaluated failed to meet this PEP expectation: Pettway (5.8); Owen-Manis (6.8); Navarrete (4.7); Martinez L. (7.6); Martinez B. (8.5); Armijo (4.8). (See, Ex. 48-2). The Hearing Officer did not determine whether it was reasonable for the Agency to measure productivity in April, when the Agency was introducing a new PEP Plan and the new TimeTracker system in the same month, and the April productivity rates, at least for deeds, are significantly lower than the other four months in the evaluation period.

In addition to deed processing, the Agency also measured productivity in the processing of address changes and return mail. However, we note that in both July and August, there are very little data for any employee in processing address changes, and absolutely no data for any employee in processing return mail. (Ex. 48-5 and 6). We must question how the Agency could measure employee productivity in three job duties over five months with little or no data in two of those job duties for two of the five months evaluated.

The career service rules permit agencies to use proficiency standards instead of seniority to determine which employees will be subject to a layoff. However, if an agency chooses to use proficiency standards, those standards must be reasonable and

² For April, Ms. Pettway's daily production rates listed above total 64.2 deeds per 11 hours, which equals an average production rate of 5.8 deeds/hr. For May the total is 50.2 (10.3, 6.9, 5.5, 11.0, 8.5, 8.0), divided by 6 = 8.4. (Ex. 48-3). For June the total is 93.4 divided by 11 = 8.5. (Ex. 48-4). For July the total is 118.7 divided by 13 = 9.1. (Ex. 48-5). For August the total is 72.6 divided by 9 = 8.1. (Ex. 48-6). By totaling the average production rates for each month (5.8, 8.4, 8.5, 9.1 and 8.1 = 39.9) and dividing by 5, we obtain 7.98, which is the production rate listed for Ms. Pettway in Column 5 of Ex. 48-1.

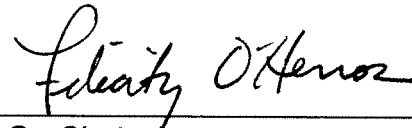
fair. Based on the evidence in the record, we cannot determine whether the Agency's actions in this layoff were in fact reasonable and fair, or arbitrary and capricious. Nor can we determine whether any errors in the Agency's exhibits would change the production rates or final rankings. We therefore remand this case to the Hearing Officer to make these determinations, consistent with our findings. We must stress, however, that this is a limited remand. The Agency will have the opportunity to provide testimony on the issues raised by our findings, but in fairness to both parties, the Agency may not introduce new spreadsheets or new summary exhibits, nor may it correct any of the errors that currently exist in Exhibits 47, 48 and 49. Appellant will have the opportunity to cross-examine Agency witnesses on the issues raised by our findings and may provide rebuttal testimony, if the Hearing Officer deems it necessary.

III. ORDER

IT IS THEREFORE ORDERED that this matter is **REMANDED** to the Hearing Office for further proceedings consistent with this opinion.

SO ORDERED by the Board on October 7, 2010, and documented this
21st day of October, 2010.

BY THE BOARD:



Co-Chair

Board Members Concurring:

Felicity O'Herron
Tom Bonner
Nita Henry
Colleen Rea

CERTIFICATE OF DELIVERY

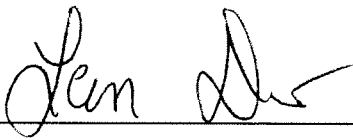
I certify that I delivered a copy of the foregoing **FINDINGS AND ORDER** on October 21, 2010, in the manner indicated below, to the following:

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