

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Consolidated Appeals Nos. 73-09 and 75-09

DECISION AND ORDER

IN THE MATTER OF THE APPEALS OF:

CLARA OWENS-MANIS and ANGELICA PETTWAY, Appellants,

vs.

DEPARTMENT OF FINANCE, ASSESSMENT DIVISION, and the City and County of Denver, a municipal corporation, Agency.

The hearing in these consolidated appeals was commenced on Dec. 18, 2009 and concluded on Jan. 25, 2010 before Hearing Officer Valerie McNaughton. Appellants were present and represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Robert A. Wolf. 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:

I. STATEMENT OF THE APPEALS

Appellants Clara Owens-Manis and Angelica Pettway appeal their Sept. 15, 2009 layoffs from their positions as Assessment Information Technicians with the Assessment Division of the Denver Department of Finance (Agency). Appellants filed timely appeals of the action pursuant to the jurisdiction provided in the Career Service Rules (CSR) §§ 14-49 and 19-10 A.1.e. The matters were consolidated for hearing, along with five other appeals filed by other employees laid off from the Assessment Division. The latter appeals were resolved by withdrawal or settlement prior to the close of this hearing. [Appeal Nos. 64-09 to 69-09.]

The parties stipulated to the admission of Agency Exhibits 1 – 49 and Appellants' Exhibits A-2, B, D-1, E, F, H and I.

II. ISSUE ON APPEAL

Appellants' claims of discrimination on the basis of age and sex were dismissed on motion for judgment at the close of the evidence based on the lack of evidence to support those claims. The sole issue presented for decision is whether the layoffs of Appellants were arbitrary, capricious, or contrary to rule or law.

III. FINDINGS OF FACT

The City and County's Assessment Division determines "ad valorem tax shares used by all of Denver's taxing authorities" to generate \$760 million in annual revenue. Its work includes recording and valuing real and business personal property, defending valuation appeals, and calculating tax rates for the city and its special districts. Appraisers perform the Agency's core function of valuation. After the Division's records were automated over the past two decades, support staff transitioned from hand-processing data to correcting property addresses and clearing backlogs of unprocessed deeds. [Exh. 29.]

Appellant Clara Owens-Manis was employed by the city for 20 years prior to her layoff in Sept. 2009, 17 of them with the Assessment Division in various clerical positions. In Jan. 2009, her job was reclassified from Administrative Support Assistant IV to Assessment Information Technician (AIT). Her duties included processing real estate deeds filed with the Clerk and Recorder to update chains of title for tax assessment purposes, examining legal descriptions, making address changes on the tax database, correcting addresses on returned mail, and handling taxpayer inquiries. Ms. Owens-Manis also assisted with training two new employees on an informal basis. Her performance evaluation complimented her for her positive attitude and volunteering to help where needed. [Exh. 15.]

At the time of her layoff, Appellant Angelica Pettway had been with the city 24 years, and the Agency for 13 years. She was reclassified in Jan. 2009 from the position of ASA IV to Assessment Information Technician, and performed the same duties as Ms. Owens-Manis: processing deeds, address changes and mail returns, and customer service. In addition, Ms. Pettway electronically scanned documents.

At the end of April 2009, the city's Budget Management Office informed the Assessment Division that it would need to reduce its \$5,910,000 budget by 7%. After input by three internal teams, the Division developed a plan to accomplish a 6.44% budget cut by reducing expenses, abolishing vacant positions, and terminating a contract for outside appraisals.

That same month, a new Performance Enhancement Plan (PEP) was approved for the job of Assessment Information Technician (AIT). City Assessor Paul Jacobs and Division Supervisor RaeAn Cantrall reviewed the new PEP with the AITs at a meeting on Mar. 24, 2009, and invited their questions. The position's duties were listed by order of their priority: processing deeds, customer service, address corrections, and returned mail corrections. The PEP continued the performance standard of processing eight property transfers per hour, and added two more standards: average 40 address changes per hour, and complete corrections to returned mail addresses at the rate of 35 per hour. [Exh. 46.] The latter two standards were later changed when management concluded they were too high: address changes was modified downward to 35 per hour, and returned mail to 25 per hour. [Testimony of Ms. Cantrall.]

In April, the Division also introduced Time Tracker, a software program used by employees to enter their activity codes when they begin and end a task. The program produces a report showing the total number of work items completed in a category, and the time consumed by each activity. When the new PEP standards were announced that month, employees were instructed to enter all their time in Time Tracker. In July, Ms. Cantrall discussed with each employee the Time Tracker reports showing their performance statistics in each of their work duties. [Testimony of Ms. Cantrall; Exh. 49.]

Every day, Ms. Cantrall handed to each AIT an approximately equal stack of deeds from the Clerk and Recorder's Office for processing. Address changes were sorted into two groups: written requests from property owners, and USPS change of address cards. The requests and cards were placed in separate boxes, and taken by employees once they were done with their assigned deeds. Some of the address changes required GIS research to locate the property, and others were difficult to read. USPS cards without parcel numbers needed additional work to make the corrections. If the name of the property owner was missing, AITs were instructed to have another employee research the matter. Returned mail, the lowest priority measured under the new PEP, was kept in buckets, and each employee selected as many as she wanted. Completion of that task was straightforward and required no research.

In addition to these duties, AITs were sometimes assigned to handle customer inquiries that came in by phone or at the front desk. This was coded as "Public Info" on the Time Tracker system. While at the front desk, employees were encouraged to perform other duties if there were not working with customers, and informed that they would be credited for that extra work. The final coded duty was scanning documents, which employees were informed should be done only when higher priority work was finished.

On July 19, 2009, Mr. Jacobs met with the city's Chief Financial Officer, and learned that the Division's share of required cuts had been increased to 14% of its budget. As 91% of its budget was personnel cost, Mr. Jacobs knew at that time that the Division would be required to abolish eight positions in order to achieve that level of savings. Thereafter, the management team discussed five different scenarios for redistributing the work of the Agency. [Exhs. 29, 30; testimony of Paul Jacobs.]

The team reviewed all operations of the Division, and determined as an initial matter that personnel directly involved in the appraisal function were indispensable to the Division's success in preparing the 2011 assessed valuations. It viewed archive project activities, including address corrections, as adding only minimal value. Mr. Jacobs and his senior managers then decided to consolidate the Appraiser Technician and Information Management teams into a smaller group to perform both the valuation and record-keeping functions. They also determined that only three AITs would be retained under the new organization plan.

On Aug. 28, 2009, CSA Human Resources Supervisor Pete Garritt produced rank order lists from the approved consolidation codes showing each position in the

Agency by seniority. [Exh. 9.] The list of Assessment Information Technicians showed seven employees, one in seniority Group C (10 – 15 years of service), and six in Group D (15 or more years of service). [Exh. 9-21; CSR § 14-42 e). The employee in Group C was selected for layoff based on her lesser seniority. The Division then needed to decide whether to use seniority or proficiency to abolish an additional three positions from Group D.

The management group determined that the Division would be better served by retaining the most proficient employees within the AIT layoff group. To rank employees by proficiency, the group selected three high-priority tasks for which performance could be judged on the most objective basis: deeds, addresses, and returned mail. The first task, deeds, was given a weight of two based on its importance. Each employee was ranked by both the volume and speed of their work for each of the three tasks. Inaccurate work was not counted in an employee's performance numbers. An employee's ability to multi-task was also factored into the grading scale. Two sources for these numbers were used: Kronos time records and the Time Tracker reports from April to August for each AIT. [Exh. 49.]

Based on the five months of production numbers from Time Tracker, Mr. Jacobs prepared or had prepared a summary chart of production rates and ranking of each of the six remaining AIT employees. [Exhs. 48, 49.] The numbers indicated that Appellants Pettway and Owens-Manis were ranked at 4 and 6, respectively. Mr. Jacobs then prepared a background summary and a layoff plan which explained the methodology used to rate proficiency, including the tasks rated and their importance in the job classification. [Exhs. 7, 29.] The plan proposed that the three employees who ranked the lowest in proficiency under the stated criteria be subject to layoff. It stated that those who multi-tasked or took on special projects were given additional consideration. In addition, the plan noted that Ms. Navarrete, the employee with the lowest proficiency score of the three retained, is bilingual. "While not essential to this position, no others in this layoff group possess a special qualification which might give reason for additional consideration and possibly change the outcome." [Exh. 7-3.] Both Appellants were identified for layoff under the plan, which was then submitted to the Career Service Authority for audit and approval of the criteria and procedures of the plan under CSR §§ 14-44 c) 2) and 14-46 b). [Exh. 7.]

CSA Human Resources Supervisor Pete Garritt audited the plan based on whether the criteria was business-related, reasonable, and in compliance with CSR § 14-44 c). Mr. Garritt then obtained clarification on a number of questions, and recommended approval of the layoff plan. On Sept. 14, 2009, the plan was approved by the CSA Personnel Director. [Exh. 8.] The next day, layoff notices were sent to the Appellants and others affected by the layoff. [Exhs. 5, 6.]

a) Task One: Processing of Deeds

A comparison of the numbers in the Time Tracker and the Agency summary reveals the following discrepancies in the category of deeds completed:

| <u>Employee</u> | <u>Time Tracker</u> | <u>Agency Summary¹</u> | <u>Difference</u> |
|------------------|---------------------|-----------------------------------|-------------------|
| Bridget Martinez | 357 ² | 309 | 48 |
| Linda Martinez | 444 ³ | 414 | 30 |
| Angelica Pettway | 415 ⁴ | 362 | 53 |
| | | | <u>131</u> |

The Agency used the data in the Time Tracker as the source of the information it summarized in the layoff plan and its attachments. Therefore, the numbers contained in the Time Tracker are correct, and the above numbers from the Agency summary were copied in error from the Time Tracker. The difference between those numbers led to the following incorrect totals for deed completed during the five-month testing period:

Bridget Martinez: 1,656
Linda Martinez: 2,038
Angelica Pettway: 1,475 [Exh. 48-7.]

If the actual number of deeds completed in July is added to the other four months, the following are the correct deed totals, listed in bold:

Bridget Martinez: **1,704**
Linda Martinez: **2,068**
Angelica Pettway: **1,528**

Thus, total deeds produced during that period should have been increased by the 131 uncounted deeds, from 9,393 to 9,524. The AITs' recalculated deeds and work shares for deeds should have been as follows, with corrections shown in bold⁵:

| <u>Employee</u> | <u>Deeds</u> | <u>Share⁶</u> | <u>Share Rank</u> |
|-------------------|--------------|--------------------------|-------------------|
| Margaret Armijo | 1,049 | .1101 | 6 |
| Bridget Martinez | 1,704 | .1789 | 2 |
| Linda Martinez | 2,068 | .2171 | 1 |
| Linda Navarrete | 1,591 | .1671 | 3 |
| Clara Owens-Manis | 1,584 | .1663 | 4 |
| Angelica Pettway | 1,528 | .1604 | 5 |

¹ Exh. 48-7.

² Exh. 49-28.

³ Exh. 49-22.

⁴ Exh. 49-4.

⁵ The corrections did not change any of the share rankings for deeds listed in column two of Exh. 48.

⁶ "Share" is the number of deeds completed by each employee divided by the total number of deeds completed by the entire group, which was 9,524 (9,393 plus the 131 deeds not counted in the totals for Bridget Martinez, Linda Martinez, and Angelica Pettway). [Exh. 48-7.]

The above three errors also affect calculation of the second factor related to deeds, which was the average number of deeds an AIT could process per hour. The PEP sets forth the performance standard for a satisfactory rating as eight deeds per hour. [Exh. 17-7.] An employee's rate is determined by dividing the number of deeds processed by the time used to do the work, as shown on the Time Tracker. Because Ms. Pettway completed her 1,528⁷ deeds in 188.5 hours over this period, her productivity rate should have been calculated as 8.1 deeds per hour, instead of 7.98, as shown on the Agency's summary of production rates. [Exh. 48-1.] The following indicates the speed rates and ranks for all of the AITs, after corrections based on the above errors, shown in bold:

| <u>Employee</u> | <u># of deeds</u> | <u># of hours</u> | <u>Rate per hr.</u> | <u>Speed Rank</u> |
|-------------------|-------------------|-------------------|-------------------------|-------------------|
| Margaret Armijo | 1,049 | 210.5 | 4.98⁸ | 6 |
| Bridget Martinez | 1,704 | 203.5 | 8.37 | 1 |
| Linda Martinez | 2,068 | 247.5 | 8.35 | 2 |
| Linda Navarrete | 1,591 | 210.5 | 7.56 | 4 |
| Clara Owens-Manis | 1,584 | 223 | 7.10 | 5 |
| Angelica Pettway | 1,528 | 188.5 | 8.10 | 3 |

In order to produce the rankings in the deeds category, the Agency added each employee's share and speed rankings, and doubled their sum based on the importance of the task. Thus, the following are the correct rankings for deeds:

| <u>Employee</u> | <u>Share Rank</u> | <u>+ Speed Rank</u> | = <u>Sum</u> | <u>x 2 (weight)</u> |
|-------------------|-------------------|---------------------|--------------|---------------------|
| Margaret Armijo | 6 | 6 | 12 | 24 |
| Bridget Martinez | 2 | 1 | 3 | 6 |
| Linda Martinez | 1 | 2 | 3 | 6 |
| Linda Navarrete | 3 | 4 | 7 | 14 |
| Clara Owens-Manis | 4 | 5 | 9 | 18 |
| Angelica Pettway | 5 | 3 | 8 | 16 |

b) Task Two: Address Changes

Next, the Agency ranked the employees by the size of their work share and speed in performing address changes. The Agency made four errors in recording the numbers relevant to this category. First, Ms. Pettway's July total for address changes was shown as 84 on the Agency summary, although the Time Tracker records indicate that she completed 86 that month. [Exhs. 48-7; 49-4.] Second, her April number was

⁷ This number is the Agency total on Exh. 48-7, increased by the correct total of July deeds completed, shown on Exh. 49-4.

⁸ None of the production rates listed on Exh. 48 accurately show the average number of each task processed per hour, despite the Agency testimony that the rate was intended to compare the employees' average productivity in each area. There is no evidence of the actual mathematical formula used by the Agency to calculate these rates.

incorrectly added on the Time Tracker as 270, when in fact 286 were completed. [Exh. 49-1.] Third, the time worked on addresses by Margaret Armijo is shown in the Agency's summary as 36.25 hours, whereas the Time Tracker, the source of that information, indicates she completed the work in 11.25 hours. [Exhs. 47; 49-31 to -35.] Fourth, the summary lists Ms. Owens-Manis' time spent on addresses as 35 hours, while the Time Tracker indicates she did the work in 36 hours. [Exhs. 47; 49-7 to -12.] The total addresses performed during the testing period then must be changed from 5,352 to 5,354.

These errors change the speed rankings for the addresses category as follows, with corrections in bold:

| <u>Employee</u> | <u># addresses</u> | <u># hours</u> | <u>Rate/hr</u> | <u>Speed Rank</u> |
|-------------------|--------------------|----------------|----------------|-------------------|
| Margaret Armijo | 273 | 11.25 | 24.26 | 4 |
| Bridget Martinez | 1,732 | 53 | 32.67 | 1 |
| Linda Martinez | 588 | 26.25 | 22.4 | 5 |
| Linda Navarrete | 1,107 | 45 | 24.6 | 3 |
| Clara Owens-Manis | 487 | 36 | 13.53 | 6 |
| Angelica Pettway | 1,183 | 44 | 26.89 | 2 |

The correct numbers also result in changes to the work share, speed rankings and total rankings for the addresses category, as follows:

| <u>Employee</u> | <u>Share</u> ⁹ | <u>Share Rank</u> | <u>+ Speed Rank</u> | <u>= Total</u> |
|-------------------|---------------------------|-------------------|---------------------|----------------|
| Margaret Armijo | .0508 | 6 | 4 | 10 |
| Bridget Martinez | .3225 | 1 | 1 | 2 |
| Linda Martinez | .1095 | 4 | 5 | 9 |
| Linda Navarrete | .2061 | 3 | 3 | 6 |
| Clara Owens-Manis | .0907 | 5 | 6 | 11 |
| Angelica Pettway | .2203 | 2 | 2 | 4 |

c) Task Three: Return Mail Corrections

Another three errors occurred in the Agency's summary of the employees' performance of returned mail corrections. The Agency's summary of work hours on this task and the Time Tracker show the following numbers, one of which must be in error:

⁹ Share is the number of addresses completed by each employee divided by 5,370, the corrected total of addresses completed by the group for the testing period.

| <u>Employee</u> | <u>Time Tracker</u> | <u>Measured Proficiency Summary¹⁰</u> |
|-------------------|---------------------|--|
| Margaret Armijo | 38.75 ¹¹ | 13.75 |
| Linda Navarrete | 71.25 ¹² | 68.50 |
| Clara Owens-Manis | 31.00 ¹³ | 30.75 |

The detailed Time Tracker Summary was the source of the numbers used in the Measured Proficiency Summary. In addition, it is clear that the 13.75 hours listed for Ms. Armijo in the Measured Proficiency Summary under "Retn Mail" included only the hours she worked on that task in the month of June. It excluded the 25 hours performed in May, although the 612 corrections Ms. Armijo completed in May were counted as a part of her 902 returns for the entire testing period. [Exhs. 47, 48-7, 49-32, -33.] Thus, the Time Tracker numbers contain the correct work hours and volume of work.

After inclusion of the correct work hours from Time Tracker, the following rankings in the returned mail task should have been added to each employee's total score:

| <u>Employee</u> | <u># Returns</u> | <u># Hrs.</u> | <u>Rate/hr.</u> | <u>Share</u> | <u>Share Rank</u> | <u>Speed Rank</u> | <u>Total</u> |
|-------------------|------------------|---------------|-----------------|--------------|-------------------|-------------------|--------------|
| Margaret Armijo | 902 | 38.75 | 23.3 | .1082 | 5 | 4 | 9 |
| Bridget Martinez | 2,498 | 52.5 | 47.6 | .2996 | 1 | 1 | 2 |
| Linda Martinez | 1,299 | 36.25 | 35.8 | .1558 | 4 | 3 | 7 |
| Linda Navarrete | 1,627 | 71.25 | 22.8 | .1951 | 2 | 5 | 7 |
| Clara Owens-Manis | 469 | 31.00 | 15.1 | .0562 | 6 | 6 | 12 |
| Angelica Pettway | 1,541 | 40.25 | 38.3 | .1848 | 3 | 2 | 5 |

d) Multi-tasking, Accuracy and Bi-lingual Skill

The last two proficiency factors were multi-tasking and accuracy in completing tasks. Mr. Jacobs testified that the Agency gave extra credit to employees who accomplished other work while staffing the front desk to serve customers. Employees were instructed to add that work to the Time Tracker numbers, and so their extra work performed while at the front desk is already reflected in the rankings. [Exh. 48-1.] All six employees were rated as having achieved a 95% accuracy rate in their latest PEPRS. Thus, accuracy and multi-tasking added nothing to the rankings. [Exhs. 15-7, 17-7, 35-7, 37-7, 38-7, 40-7, 42-7.]

The layoff plan appears to have considered Ms. Navarrete's ability to speak Spanish as a potential special qualification which could have been considered as a part

¹⁰ Exh. 47.

¹¹ Exh. 49-31 to -35.

¹² Exh. 49-13 to -17.

¹³ Exh. 49-7 to -11.

of proficiency. [Exh. 7-3.] The plan concedes that the skill was not essential to the position, and it was not a part of the eight-factor formula on which the layoff decisions were based. [Testimony of Mr. Jacobs.] Under CSR § 14-42 f), a special qualification sufficient to constitute an exception for layoff purposed must be “essential to the performance of the duties of the position”, and must be approved by the Personnel Director. The evidence demonstrates that Ms. Navarrete’s ability to speak both English and Spanish was neither treated as a special qualification by the Agency nor approved as such by the Personnel Director.

e) Final Rankings

Based in part on the above errors, the Agency ranked the employees as follows:

| <u>Employee</u> | <u>Task</u> | <u>Share Rank</u> | <u>Speed Rank</u> | <u>Sum</u> | <u>x2</u> | <u>Subtotal</u> | <u>Score</u> | <u>Total Rank</u> |
|-------------------|-------------|-------------------|-------------------|------------|-----------|-----------------|--------------|-------------------|
| Margaret Armijo | Deeds | 6 | 6 | 12 | 24 | 24 | 40 | 5 |
| | Addresses | 6 | 2 | 8 | | 8 | | |
| | Returns | 5 | 3 | 8 | | 8 | | |
| Bridget Martinez | Deeds | 2 | 1 | 3 | 6 | 6 | 10 | 1 |
| | Addresses | 1 | 1 | 2 | | 2 | | |
| | Returns | 1 | 1 | 2 | | 2 | | |
| Linda Martinez | Deeds | 1 | 3 | 4 | 8 | 8 | 23 | 2 |
| | Addresses | 4 | 5 | 9 | | 9 | | |
| | Returns | 4 | 2 | 6 | | 6 | | |
| Linda Navarrete | Deeds | 3 | 2 | 5 | 10 | 10 | 24 | 3 |
| | Addresses | 3 | 4 | 7 | | 7 | | |
| | Returns | 2 | 5 | 7 | | 7 | | |
| Clara Owens-Manis | Deeds | 4 | 5 | 9 | 18 | 18 | 41 | 6 |
| | Addresses | 5 | 6 | 11 | | 11 | | |
| | Returns | 6 | 6 | 12 | | 12 | | |
| Angelica Pettway | Deeds | 5 | 4 | 9 | 18 | 18 | 30 | 4 |
| | Addresses | 2 | 3 | 5 | | 5 | | |
| | Returns | 3 | 4 | 7 | | 7 | | |

When the above errors in the Agency summary are corrected, the below rankings should have been applied:

| <u>Employee</u> | <u>Task</u> | <u>Share Rank</u> | <u>Speed Rank</u> | <u>Sum</u> | <u>x2</u> | <u>Subtotal</u> | <u>Score</u> | <u>Total Rank</u> |
|-------------------|-------------|-------------------|-------------------|------------|-----------|-----------------|--------------|-------------------|
| Margaret Armijo | Deeds | 6 | 6 | 12 | 24 | 24 | | |
| | Addresses | 6 | 4 | 10 | | 10 | | |
| | Returns | 5 | 4 | 9 | | 9 | 43 | 6 |
| Bridget Martinez | Deeds | 2 | 1 | 3 | 6 | 6 | | |
| | Addresses | 1 | 1 | 2 | | 2 | | |
| | Returns | 1 | 1 | 2 | | 2 | 10 | 1 |
| Linda Martinez | Deeds | 1 | 2 | 3 | 6 | 6 | | |
| | Addresses | 4 | 5 | 9 | | 9 | | |
| | Returns | 4 | 3 | 7 | | 7 | 22 | 2 |
| Linda Navarrete | Deeds | 3 | 4 | 7 | 14 | 14 | | |
| | Addresses | 3 | 3 | 6 | | 6 | | |
| | Returns | 2 | 5 | 7 | | 7 | 27 | 4 |
| Clara Owens-Manis | Deeds | 4 | 5 | 9 | 18 | 18 | | |
| | Addresses | 5 | 6 | 11 | | 11 | | |
| | Returns | 6 | 6 | 12 | | 12 | 41 | 5 |
| Angelica Pettway | Deeds | 5 | 3 | 8 | 16 | 16 | | |
| | Addresses | 2 | 2 | 4 | | 4 | | |
| | Returns | 3 | 2 | 5 | | 5 | 25 | 3 |

Thus, Appellant Pettway should have been ranked in the top three employees for proficiency, using the correct numbers from the Time Tracker.

The Agency explained that its rate calculations were intended to combine the share rank and speed ranks listed in columns two and four on Exh. 48, times any weight factor applied. However, the rates listed in that exhibit bear no simple mathematical relation to the production numbers and time expended for each task, and the Agency failed to present any evidence that would support the mathematical or other basis for how it calculated those rates.

IV. ANALYSIS

1. Standard of Review

Under the Career Service Rules, the raw evidentiary facts upon which an agency bases its decision must be reviewed de novo by the career service hearing officer; i.e., we must “consider all the evidence on all the issues presented in the appeal as though no previous action had been taken.” In re Luna, CSB 42-07, 4 (1/30/09), citing Turner v

Rossmiller, 532 P.2d 751 (Colo. App. 1975). The layoff decision itself must be upheld unless it is determined to be arbitrary, capricious or contrary to rule or law. Velasquez v. Dept of Higher Education, 93 P.3d 540 (Colo. App. 2003). An employee challenging a layoff must overcome the “presumption of regularity afforded an agency in fulfilling its statutory mandate” with a showing that it was arbitrary, capricious, or contrary to rule or law. Motor Vehicle Mfrs. Ass'n, 463 US at 44, fn.9; In re Vasquez and Lewis, CSA 08-09, 4 (5/20/09); In re Foley, CSA 19-06, 8 (11/10/06); Brennan v. Department of Local Affairs, 786 P.2d 426 (Colo.App. 1989).

Capricious or arbitrary exercise of discretion by an administrative board can arise in only three ways, namely: (1) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (2) by failing to give candid and honest consideration to evidence before it on which it is authorized to act; or (3) by exercising its discretion in such a manner as to indicate clearly that its action is based on conclusions from the evidence which reasonable persons fairly and honestly considering the evidence could not reach.

Maggard v. Department of Human Services, 2009 WL 2960920 (Colo.App. 2009).

Put another way, “[t]he duty of a court reviewing agency action under the ‘arbitrary or capricious’ standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.” Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir.1994); citing Motor Vehicle Mfrs. Assn. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). In reviewing the agency's explanation for its decision, the reviewing body must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. Id., citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Where there are no competent evidentiary facts to support the agency's findings of ultimate fact, the decision must be reversed as arbitrary, capricious or contrary to rule or law. See Womack v. Industrial Commission, 451 P.2d 761, 764 (Colo. 1969); Ricci v. Davis, 627 P.2d 1111, 1118 (Colo., 1981).

As a part of a de novo review of agency action, a career service hearing officer is duty-bound to evaluate the evidence considered by the agency, and determine whether it warrants a reasonable belief in the existence of facts supporting the action.

An agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’ [citation omitted] . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n, supra.

When an agency fails to explain the reason for its action, “[w]e may not supply a reasoned basis for the agency's action that the agency itself has not given.” SEC v. Chenery Corp., 332 U.S. 194, 196, (1947). However, a reviewing body will “uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.” Bowman Transp. Inc. v. Arkansas-Best Freight System, supra, 419 U.S., 281, 286 (1974).

2. Were layoffs arbitrary, capricious, or contrary to rule or law?

Appellant do not challenge the Agency's claim that layoffs were a financial necessity, given the 14% budget reduction mandated by the city's Chief Financial Officer in Aug. 2009. Appellants claim instead that the method used to determine proficiency rankings under CSR § 14-44 c) was arbitrary, capricious, or contrary to the Career Service Rules.

Appellants both assert that their layoffs were improper because the tasks measured to establish proficiency did not properly reflect their actual levels of proficiency. Ms. Pettway claims that she was not given credit for her scanning work, which she testified consumed about 30% of her work time. In response, the Agency submitted its Time Tracker reports of scanning work performed over the testing period, as recorded by each employee. The Time Tracker scanning entries are accurately summarized in the Agency's Measured Proficiency Duties chart, Exhibit 47. The chart shows that Ms. Pettway spent only 4% of her work time scanning, and scanned less than the two highest ranked employees, Bridget Martinez and Linda Martinez. [Exhs. 47, 49.] Thus, her argument that scanning prevented her achievement of better numbers in the rated tasks must be rejected. Moreover, since scanning was not done by all six employees [See Exh. 47], the Agency's conclusion that it was not an appropriate task to rank each employee's proficiency was reasonable.

Appellant Pettway also contends that she should have been informed her scanning would not be counted in her favor in the event of a layoff. Appellant claims she would have spent less time scanning had she known that fact. Appellant was given adequate notice of her prioritized job duties in the new PEP. The Agency's decision to use only those duties performed by all AITs that could be objectively measured was reasonable given the nature of the Agency's work. The layoff plan was approved as proper by CSA, which is some evidence, unrebutted by Appellants, that the methodology was neutral and appropriate to measure proficiency. The Career Service Rules do not require an agency to give prior notice to employees in the layoff group of the tasks to be measured, nor prohibit an agency from using data gathered before the layoff decision was made. Section 14-44 requires only that “the appointing authority may choose to rank employees on their knowledge, skills, abilities, expertise and/or documented performance ('proficiency')” if the criteria and procedures used to

determine proficiency are reviewed and approved by the CSA, as they were here. Finally, Appellant's supervisor instructed Ms. Pettway to do scanning only after her assigned deeds were processed.

The evidence shows that the performance tasks rated for layoff were three out of four of the highest priority assignments listed in the PEP. The excluded task was assisting customers by phone or at the front desk. The Agency's conclusion that success in that task was not sufficiently measurable on an objective basis was reasonable given the nature of the Agency's mission. I find that the tasks selected to establish proficiency conformed to the layoff rule because the three measured tasks were highly relevant to the important work of the layoff group, they fairly compared the knowledge, skills, abilities and expertise of the AITs, performance was tracked for a sufficient amount of time, and the employees were on notice via Time Tracker and supervisor instructions that their productivity was being measured by those tasks. Each employee was given an equal opportunity to perform each of the measured tasks, and all were instructed to complete the highest-weighted task, deeds, before any other work was begun.

Appellant Owens-Manis argues that her performance of public information work at the front desk should have been counted as part of her proficiency. As stated above, the Agency did not use customer service because its results could not be objectively measured by mere time spent on the phone or at the front desk, and therefore a speed ranking could not be developed, unlike the other rated tasks. The Agency's selection of these tasks to measure proficiency was reasonable from a business perspective. The alternatives suggested by Appellants are not more reasonable. Finally, even if public information work was substituted for either of the two lower priority tasks, and Ms. Owen-Manis was ranked as number one for that task, Appellant would still have ranked in the lower half of the layoff group¹⁴, and would have been selected for layoff.

Both Appellants testified that they believed they were targeted for removal based on factors other than proficiency. Ms. Cantrall recalled that Ms. Pettway had filed several grievances against her. Although employee names were apparent during management's scoring of the Time Tracker data, there is no evidence that the numbers entered by each employee in Time Tracker were altered or manipulated by the Agency. The copying and calculation errors noted above were evenly spread among all of the employees in the layoff group, and show no pattern of favoring the employees retained or negatively affecting those selected for layoff.

What remains is the question of whether the Agency implemented the layoff plan in accordance with the Career Service Rules by procuring and considering the appropriate evidence to support its selections, and basing its conclusions on a reasonable interpretation of that evidence. The relevant data in this case is the productivity numbers entered by each employee into Time Tracker over a five-month

¹⁴ Appellant Owens-Manis' rankings were 18, 11 and 12. Thus, her lowest possible score under the above circumstances would have been 30 (18, 11 and 1), which still would have placed her No. 5 on the proficiency scale, and subject to layoff.

period for the three measured tasks. Mr. Jacobs explained that all but three employees in the job classification of Assessment Information Technician were to be eliminated by layoff. As determined above, the eight-factor proficiency test was appropriately tailored to retain the three most proficient employees based solely on the scores and rankings derived from the eight-factor proficiency test, in keeping with the purpose of CSR § 14-44. Thus, the layoff decision was intended to be the direct result of accurate calculations from the proficiency test. De novo review of that action requires an analysis of whether the Agency implemented that intention by careful consideration of appropriate evidence, and reasonable conclusions flowing from that evidence.

The Agency made a total of ten copying and calculation errors in transferring the data from the original Time Tracker documents to its own summaries, which were then incorporated into its ratings and rankings of the employees in the layoff group. These inadvertent mistakes then served as the factual basis for the layoff list. The only evidence supporting the layoff decision are the inaccurate numbers reflected in the Agency summary, which are convincingly rebutted by the time and production numbers in the source document, the Time Tracker. The accurate production numbers demonstrate that the three most proficient employees were Bridget Martinez, Linda Martinez, and Angelica Pettway.

The Agency did not offer an explanation for how it calculated the figures in the "Rate" column on Exhibit 48. Since the Agency described the rate as the average work product per hour, it may reasonably be discerned that the numbers are the product of each employee's total production divided by total time in each work task. However, the Agency's rate figures could not be mathematically reproduced using either the accurate or erroneous production and time numbers. In the absence of any supporting evidence, I cannot supply a reasoned basis for the action that the agency itself did not give, and so I must disregard these figures as the evidentiary facts used to uphold the action. SEC v. Chenery Corp., 332 U.S. 194, 196, (1947).

The Agency's failure to carefully calculate the performance numbers and derive accurate rankings from those numbers constituted a failure to use reasonable diligence to procure and consider the most appropriate evidence to support its determination of proficiency as to Appellant Pettway under the layoff rules. The factual finding that Appellant Pettway was not one of the three most proficient employees lacks competent evidence to support it. The Agency action was thus based on conclusions from the evidence which reasonable persons fairly and honestly considering the evidence could not reach. The action was therefore arbitrary and capricious, and must be reversed.

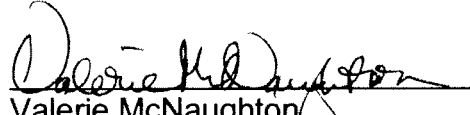
The errors did not affect the ranking of Appellant Owens-Manis, whose new ranking of 5 still renders Ms. Owens-Manis a proper subject of layoff under the approved layoff plan.

Order

Based on the foregoing findings of fact and conclusions of law, it is ordered as follows:

- 1) The Agency layoff action as to Appellant Angelica Pettway is REVERSED.
- 2) The layoff action as to Appellant Clara Owens-Manis is AFFIRMED.

Dated this 11th day of March, 2010.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org

AND

Opposing parties or their representatives, if any.

I certify that on March 11, 2010, I delivered a correct copy of this Decision and Order to the following in the manner indicated:

| | |
|--|-----------------|
| Clara Owens-Manis, 3275 Krameria St., Denver, CO 80207 | (via U.S. mail) |
| Angelica Pettway, 11308 Newark, Henderson, CO 80640 | (via U.S. mail) |
| Michael O'Malley, Esq., Michaelomalleylaw@hotmail.com | (via email) |
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