

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

Appeal No. 106-04

DECISION

IN THE MATTER OF THE APPEAL OF:

DIANE RODRIGUEZ, Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES, Agency
and
the City and County of Denver, a municipal corporation.

I. INTRODUCTION

Ms. Diane Rodriguez (the Appellant), appeals the level of her pay set by the Denver Department of Human Services (Agency) following her demotion in lieu of lay-off. A hearing concerning this appeal was held on December 21, 2004, before Hearings Officer Bruce A. Plotkin. The Appellant was present and was represented by Barry Roseman, Esq. The Agency was represented by Niels Loechell, Esq. Although the Appellant had claimed unlawful retaliation, discrimination, and improper manipulation of the Career Service Rules in her appeal, she waived those challenges prior to hearing. The parties agreed to the essential facts of the case, and therefore stipulated as follows.

In February 2001, the Appellant was promoted from Supervisor of Administrative Support I to Supervisor of Administrative Support II. On June 15, 2004, the Agency notified the Appellant that she was to be laid off effective July 15, 2004. Concomitantly, the Agency offered her a demotion, in lieu of lay-off, back to her prior classification as Supervisor of Administrative Support I. She accepted the demotion on June 18, 2004, and currently serves in that position. The Appellant filed her appeal on June 25, 2004.

The Appellant is an exempt employee as defined in Career Service Rule (CSR)1. Before her promotion to Supervisor of Administrative Support II in February 2001, the Appellant was paid \$4155 per month¹. After her promotion, her pay increased to \$4756,

¹ This and subsequent references to pay derive from the *Special Edition: 2003 Pay Survey* of the City and County in the Denver 47 SPOTLIGHT 3. When reading this Decision, the reader will find it indispensable to refer to the charts found in that periodical at page 2. The *Special Edition: 2003 Pay Survey* may be found at <http://www.denvergov.org/admin/template3/forms/2003%20Spotlight%20Pay%20Survey.pdf> (last visited 3/2/05).

which remained her pay up to the time of her demotion. Pay for the Appellant's current demotion position is \$3891 per month.

The parties also stipulated that the Agency's interpretation of these rules is based upon Mr. Peter Garritt's interpretation of CSR 9-63 c), although the Agency did not state what authority Garritt may have to interpret Career Service Board Rules (CSR). Both parties referenced page 2 of the *Special Edition: 2003 Pay Survey* in support of the pay information underlying their stipulation. The Hearings Officer deems that document part of the record.

Agency Exhibits 1-18 were proffered prior to hearing, and contain the information underlying the parties' stipulations. Therefore, even though Exhibits 1-18 were neither offered nor formally admitted at hearing, the Hearings Officer deems them part of the record.

II. ISSUES

A. Whether, at the time the Appellant accepted demotion, the Agency's method of setting the Appellant's pay was clearly erroneous, arbitrary, or contrary to Career Service Rules (CSR) or law.

B. If the Agency improperly set the Appellant's pay, whether she is entitled to an increase in her pay grade, and back pay.

III. ANALYSIS

The Appellant argues the Agency should have set her pay after her demotion according to CSR 9-63 c) 1) or, alternatively, CSR 9-63 c) 3). The Appellant's pay would change significantly, depending on which of those rules applies. A demoted employee is paid according to CSR 9-63 c) 1) if she meets the criteria for voluntary demotion. She is paid according to CSR 9-63 c) 3) if she meets the criteria for involuntary demotion. Each of these rules must consequently be analyzed as it pertains to the Appellant's pay.

The Appellant argues first that her pay after demotion should be set in accordance with 9-63 c) 1). That conclusion depends on whether the Appellant's demotion was voluntary. CSR 14-45 f) contains the requirements for whether a demotion is voluntary.

A. CSR 14-45 Actions in Lieu of Lay-off

- f) Voluntary action in lieu of lay-off: Employees who demote to a position other than the one described in 14-45 b) or who resign during a period of agency lay-offs, and these actions occur prior to the actual lay-off date...

- 3) Such actions in lieu of lay-off shall be considered to be voluntary actions and pay shall be set in accordance with CS Rule 9-63 c) 1)....

The term “such actions,” at subparagraph 3), refers to the actions of employees “who demote to a position other than the one described in 14-45 b) or who resign during a period of agency lay-offs....”² The Appellant did not resign, but chose the Agency’s demotion offer. [Exhibit 2, p.2]. Therefore, the Appellant argues, she is an employee “who demot[ed] to a position other than the one described in 14-45 b)” and as such, her demotion was voluntary pursuant to 14-45 f) 3). Accordingly, she concludes, her pay should be set at \$4155 per month³

This entire construct rests upon the Appellant’s assumption that her demotion was “to a position other than the one described in CSR 14-45 b),” something she failed to establish. On the contrary, the Appellant meets all the conditions set forth in CSR 14-45 b) 1).

C. CSR 14-45 Actions in Lieu of Lay-off

b). Demotional Appointment

- 1) General: An employee selected to be laid off shall be entitled to a demotional appointment to an existing position in the same layoff unit in a class below the employee’s present class which is the highest ranking class meeting each of the following conditions.

(a) the employee possesses the knowledge, skills, ability, and expertise to perform the essential duties of the position;

(b) The class is in the same class series as the employee’s present class, or the employee previously held a position in such class; and

(c) The employee’s total length of service as defined in Subsection 14-43 Length of Service must be greater than...the incumbent....

An employee selected to be laid off is entitled to a demotion appointment as long as she meets certain conditions. At the moment the Appellant was selected to be laid off, she became entitled to a demotional appointment under CSR 14-45 b) 1) if she met the conditions for the new position contained within the rule. Those conditions are that the new position is (1) an existing position; (2) within the same layoff unit; (3) in a class

² CSR 14-45 f)

³ Pursuant to CSR 9-63 c) 1), the Appellant’s pay grade would reduce to 805-C, step 22, as if she had not been promoted.

below the employee's present class; (4) meeting certain additional conditions, including (a) the ability to perform the duties of the demotional position, (b) that the demotional position is in the same class as the Appellant's class or she previously held such position, and (c) that the Appellant has served longer than the incumbent of the demotional position. For the following reasons, the Appellant meets all these conditions.

1. "An existing position". The Appellant demoted to an existing position, Supervisor of Administrative Support I, in keeping with the first condition [Exhibit 18, p.18].

2. "Within the same layoff unit". Both the Appellant's positions, before and after her demotion, are within the same layoff unit, id, fulfilling the second condition. [Exhibit 18, p.18].

3. "In a class below the employee's present class". "Class" means positions in the same pay grade, CSR 1, so "a class below the employee's present class" means a pay grade below the Appellant's present pay grade, 807-C. The Appellant demoted to pay-grade 805-C, which is a class below her former class, pay-grade 807-C. She therefore meets the third requirement.

4. Meeting certain additional conditions including

(a) The ability to perform the duties of the demotional position. Presumably, the Appellant is able to perform the essential duties of her demotional position because she previously held the position to which she demoted, Supervisor of Administrative Support I, and the stipulated facts do not indicate she has been unable to perform in that position.

(b) That the demotional position is in the same class as the Appellant's class or she previously held such position. As previously stated, the Appellant demoted to a position she previously held, in keeping with this criterion.

(c) That the Appellant has served longer than the incumbent of the demotional position. At the time she accepted a demotion, the Appellant's length of service was greater than the incumbent in the demotional position. [Exhibit 18, p.18].

The Appellant meets each criterion of CSR 14-45 b) 1), therefore her pay must be set pursuant to CSR 9-63 c) 3). See footnotes 4 and 5, *infra*. Because the Appellant meets each criterion of CSR 14-45 b) 1), she is precluded from meeting the requirements for voluntary demotion under CSR 14-45 f) ("[e]mployees who demote to a position other than the one described in 14-45 b)"). The Hearings Officer therefore

concludes the Appellant's demotion was involuntary under CSR 14-45 b) 1)⁴, thus pay should be set according to CSR 9-63 c) 3).

B. CSR 9-63 Demotion

c) Setting Pay

- 3) Demotion in lieu of layoff: When an employee demotes in lieu of layoff, pay shall be maintained at the level received before the demotion, or at the top of the growth sector in a pay range in the exempt schedule (the "18" step) or [at] the top of the grade in any other schedule, whichever is lower. If the level received before the demotion does not correspond to a step in the new pay grade, the closest higher step shall be paid. (Revised 3/19/04. 247B).

CSR 9-63 c) 3) determines how pay is set for an employee who demotes involuntarily⁵ in lieu of lay-off. This rule requires an employee's pay after demotion to be set at the lowest of three options: (1) at the level received before the demotion; (2) at the top of the growth sector in a pay range in the exempt-employee schedule (step 18); or (3) at the top of the grade in any other schedule. The third option does not apply since the Appellant is an exempt employee under the second option. Of the remaining options, the second produces the lower pay, thus that option must prevail. Both parties agree Step 18 is the top step of the growth sector⁶.

The disagreement here is over whether step 18 applies to the Appellant's pre-demotion pay grade, 807-C, or her post-demotion pay grade, 805-C. Underlying the disagreement is the interpretation of "a pay range" in 9-63 c) 3). The Agency contends "a pay range" applies to the Appellant's post-demotion (805-C) pay grade while the Appellant believes it applies to her pre-demotion (807-C) pay grade.

According to the Appellant's reading of "a pay range" in CSR 9-63 c) 3), the Agency should have assessed a reduction in pay from \$4756 to \$4449 per month⁷, where "a pay range" means her pay grade before demotion. The Agency responds "a pay range" refers to the Appellant's post-demotion pay, thus she is due a reduction from

⁴ CSR 14-45 b) 1) does not state that a demotion under the conditions therein define an involuntary demotion; however, as a matter of deduction, if the Appellant did not meet the conditions which define her demotion as voluntary under 14-45 f), the only remaining possibility is that her demotion is involuntary.

⁵ As concluded in the previous footnote, this rule does not state with specificity that it sets pay for involuntary demotions; however, since CSR 14-45 f) and CSR 9-63 c) 1) define the conditions for voluntary demotion and pay respectively, then the only remaining possibility is that 14-45 b) 1) and CSR 9-63 c) 3) define the conditions for involuntary demotions and pay respectively.

⁶ as defined in CSR 9-35 b) (9/26/03, revision memo #242B) (subsequently renumbered 11/30/04, revision memo #254B).

⁷ that is, from pay grade 807-C step 21, to 807-C step 18.

\$4756 to \$3891 per month.⁸ The difference in pay between those two positions represents the Appellant's stake in this case, \$558.00 per month.

The Appellant argues that under the Agency's interpretation, employees paid at steps 1-12 would retain their pay after demotion, while those in progressively higher steps above step 12 would suffer progressively higher pay reductions following a demotion. For example, an employee at a pre-demotion pay grade 807C, step 12, paying \$3891, would retain that same pay in a post-demotion grade 805C, step 18; but an employee one step higher, pay grade 807-C, step 13, paying \$3979 per month before demotion, would receive a post-demotion pay of \$3891, pay grade 805C, step 18, due to the "top of the growth sector" ceiling. Thus, according to the Appellant, the most senior employees, and those who have shown the most outstanding work performance, would be penalized the most since, presumably, the senior and outstanding workers receive the highest pay in the class, while someone at step 12 or lower would retain her pre-demotion pay. The Appellant concludes this result is contrary to the intent of CSR 9-63 c) 3). "The clear intent of [CRS] 9-63 c) 3) is, as much as possible, to maintain employees' pay level when they accept a demotional appointment," according to the Appellant.

The Appellant's argument, that the intent of CSR 9-63 c) 3) is to maintain employees' pay after a demotion, is at odds with the Agency's need to save money in a budget crisis. The Appellant's position was one of over sixty positions throughout the Agency to be abolished in response to a budget shortfall. Decreasing employee pay as much as possible, rather than as little as possible, seems consistent with the Agency's goal to meet its projected budget shortfall.

The Appellant's claim, that under the Agency's interpretation, the most senior and productive employees would be the most penalized, is countered by the Agency's response that the most senior employees enjoy senior bumping rights compared with their counterparts. In other words, even though senior employees who are demoted are subject to the highest reduction in pay, they retain employment, while less senior employees lose jobs.

IV. CONCLUSION

The Appellant's first claim, that CSR 9-63 c) 1) should apply in setting the Appellant's pay, is inapplicable. The Appellant's second claim, that the Appellant's pay, under CSR 9-63 c) 3), should be set at her pre-demotion pay grade, would impermissibly require demotion appointees' pay to be set at a level which is higher than the pay limit imposed on CSR 9-63 c) 3) by CSR 14-45 b) 1). Each of the Career Service Rules should be interpreted so as to give consistent, harmonious, and sensible

⁸ from 807-C, step 21, to 805-C, step 18.

effect to all its parts. See City & County of Denver v. Indus. Claim Appeals Office, 2004 Colo. App. LEXIS 1502, 4-5 (Colo. Ct. App., 2004).

In addition, the Agency reading of the Career Service Rules is due substantial deference, unless its interpretation is clearly erroneous, arbitrary, or otherwise not in accordance with the law. See *id.* For these reasons, the Hearings Officer concludes the Agency's interpretation of the Career Service Rules in setting the Appellant's post-demotion pay, was not clearly erroneous, arbitrary, or otherwise not in accordance with other Career Service Rules or law.

V. ORDER

The Agency's method of setting the Appellant's pay, following her June 18, 2004 demotion, is AFFIRMED.

DONE this 2nd day of March, 2005.

Bruce A. Plotkin
Hearing 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 March, 2005, addressed to:

Barry D. Roseman, Esq.
Attorney at Law
1120 Lincoln St. Suite 1607
Denver, CO 80401

Ms. Diane Rodriguez
9936 Harrison St.
Thornton, CO 80229

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

Niels Loechell, Esq.
Assistant City Attorney
Litigation Section
