

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

Appeal No. 89-04

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**DON L. ROMBERGER**, Appellant,

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

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The hearing in this appeal was held on October 13, 2004 before Hearing Officer Valerie McNaughton. Appellant Don L. Romberger was present and represented by David Fine, Esq. The Agency was represented by Assistant City Attorney Niels Loechell. 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**

I. NATURE OF APPEAL

Appellant Don L. Romberger appeals his demotional appointment from Program Administrator to Social Caseworker on June 11, 2004 as a result of a manager's exercise of bumping rights under Career Service Rule (CSR) § 14-45 b) 1) during a layoff at the Denver Department of Human Services (Agency). Appellant filed a timely appeal of the action on June 21, 2004 pursuant to the jurisdiction provided in CSR §§ 14-49 and 19-10 b).

The parties stipulated to the admissibility of Agency Exhibits 1 – 4, 14, 15, 17, 18 and 30, and Appellant's Exhibits A and D – J.

II. ISSUES

Appellant raises the following issues with regard to this appeal:

1. Did the Agency act in an arbitrary and capricious manner or act contrary to rule or law in granting a Program Manager a demotional appointment to the Program Administrator position then held by Appellant under CSR § 14-45 b) 1) (a), and

2. Did the Agency act arbitrarily in failing to except Appellant from the effects of the layoff based upon his possession of special qualifications under CSR § 14-42 f)?

### III. EVIDENCE

The underlying facts in this appeal are not in dispute. Prior to Appellant's demotion, Appellant was a Program Administrator who managed three different programs under the supervision of two different managers in two divisions according to function. Social Work Supervisor Carol Moore of the Adult Services Division supervised Appellant's social work duties, and Program Manager Karen Miller in Family Employment Resources supervised his administrative functions. Appellant's job was to administer the adult protection program for the homeless, a medical respite care program, and a homeless housing program.

As a result of state budget cuts effective July 1, 2004, the Agency implemented a layoff of approximately sixty employees. Program Manager Karen Miller was one of the employees selected for layoff. Based on her seniority, Ms. Miller was offered a demotional appointment to the position of Program Administrator then held by Appellant. As a result, Appellant was in turn offered a demotional appointment from his position into the job of Social Caseworker on June 11, 2004. He was given until June 15, 2004 to accept that demotion. [Exh. 2.] Appellant accepted the demotion, and this appeal followed.

Deputy Manager Valerie Brooks testified that the Agency's original layoff plan was to have Ms. Miller assume the administrative half of Appellant's duties, but not the social work duties. The parties have stipulated that the difference in pay between that of Program Administrator and Social Caseworker is \$1,400 per month, and that Appellant's retirement benefits will be reduced by \$500 per month as a result of the demotion.

Appellant testified that on June 11, 2004, he and his supervisors Carol Moore and Program Manager Karen Miller met with Doris Puga, the Acting Administrator of the Adult Services Division, in order to discuss his expected layoff. Ms. Puga confirmed that Appellant would be bumped from his position by Ms. Miller, but that he would be "doing the same thing he always did, only for a lot less money." Since Ms. Miller is not trained in social work, Appellant informed Deputy Director Valerie Brooks that his position involved the practice of social work. At Ms. Brooks' request, Appellant e-mailed Senior Agency Personnel Analyst Julie Maerz to discuss "the skill levels requisite for a social work position . . . for an individual bumping into my position." Ms. Maerz and Ms. Brooks replied on June 14<sup>th</sup>, requesting more information about the part social work plays in the position. Appellant informed them that his social work duties were 100% of his job, and consisted of 50% adult protective services and 50% medical respite stabilization cases. He requested a meeting to explain further. In response, Ms. Brooks questioned why the position was classified as that of a Program Administrator when it "sounds like a Senior Social Caseworker position", and requested a copy of the reclassification reviews. Appellant replied by summarizing the history of the reclassification process due to the "numerous one of a kind aspects to the position," and offered to provide copies of the "copious material" produced during the "multiple year

appeal” of the reclassification process under the Merit System as well as at Career Service. He again requested a meeting. Ms. Brooks attempted to set up a 30-minute meeting to discuss the issue, as Appellant’s deadline for selecting a demotional appointment was expiring. At 5:07 on June 14<sup>th</sup>, Ms. Brooks advised Appellant that “[y]ou will need to go ahead and complete your lay-off paperwork as planned. This will be treated more like an appeal to the process, as it may take some time to figure all this out.” [Exh. 7, pp. 1 - 9.]

In the weeks following Appellant’s acceptance of the layoff, Appellant met with Ms. Miller and her supervisor, Community Liaison Nan Morehead, to discuss the effect of the layoff on the programs run by Appellant. Ms. Morehead agreed that the duties of the position would remain with Appellant, since it was acknowledged that Ms. Miller was unable to perform the social work involved in these programs. At a later meeting that also included his supervisor Ms. Moore, all present agreed that Appellant must continue to perform his adult protective service intake duties. On July 12<sup>th</sup>, the same parties met with Juanita Sanchez, the administrator for the newly created Family and Adult Services Division, who also agreed that the medical respite program should remain with Appellant. The next day, Ms. Morehead left a voicemail message for Appellant that communicated Agency Manager Roxanne White’s agreement to allow Appellant to continue to run the medical respite program. At Ms. White’s request, Appellant prepared a summary of the history and operation of the program. [Exh. J.]

Thereafter, and up to the date of the hearing, Appellant continued to perform the same duties he had performed prior to the layoff. [Testimony of Appellant, Ms. Morehead.] The Agency representative has stated that the Agency intends to pay Appellant as a Program Administrator up to the date of the hearing based upon his performance of higher level duties from the date of layoff until the hearing. [Agency opening and closing statements.]

On Sept. 9, 2004, Ms. Brooks notified Appellant by letter that he must cease to perform Program Administrator functions, and transfer them to Nan Morehead for reassignment to other staff. The memo stated that such functions included but were not limited to the following language initially used in the job analysis questionnaire dated Jan. 10, 2003 which described Appellant’s essential duties:

- Assessing unmet needs in the community; developing new programs or resources to meet those identified needs; developing policies, procedures and program guidelines; determining the fiscal implications; administratively managing newly developed program resources and evaluating program outcomes. Previously, 35% of your position involved these duties.
- Serving as a consultative resource person and primary agency contact for community organizations or networking skills and technical assistance to city and county as well as state government staff, provider groups, agency administration employees and collateral persons in matters involving homeless

and homelessness. Previously, 15% of your time was involved in these activities.

[Exh. G.]

Appellant testified that, as a result of the memo, he sought out Ms. Moore to determine her reaction. Ms. Moore asked Ms. Brooks to clarify what duties Appellant was being instructed not to perform. Ms. Brooks informed her that she was to find out what duties he was not supposed to do and instruct Appellant to stop performing them. Additional meetings between Ms. Puga, Ms. Morehead and Ms. Moore resulted only in a renewed conclusion that the administrative and social work components of the medical respite program were indivisible. Appellant was never thereafter instructed to stop performing any duties, including administrative ones, which Appellant and his supervisors estimated at 20 - 25% of the Program Administrator job. [Testimony of Appellant, Carol Moore, Nan Morehead; Exh. 30, p. 18.] Appellant's second-level supervisor Nan Morehead testified that Appellant was not being insubordinate by continuing to perform his former duties as a part of administering the medical respite and homeless housing programs, since "someone needs to be doing this."

Appellant testified that the person running the medical respite program would need to perform the functions listed in the Sept. 9<sup>th</sup> memo, and that a social work background was necessary for their performance. Ms. Brooks testified that some part of the medical respite program was social casework.

Ms. Brooks testified that she believed half of Appellant's job was administrative because it was classified as administrative, and because of the description of essential job duties in the job analysis questionnaire, from which she borrowed the above language. [Exh. 30, p. 5.] Ms. Brooks stated that she believed that the other half of Appellant's job was social work, consisting of his adult protective caseload and the medical respite program. In contrast, Appellant's testimony indicated that his adult protective caseload was a full half of his duties, and that medical respite consumed another 30 - 40% of his duties. On cross-examination, Ms. Brooks admitted that she did not know the details of Appellant's duties. Ms. Brooks testified that she recently learned that her order of Sept. 9<sup>th</sup> had not been carried out. She stated disciplinary action may be taken against Appellant and his supervisors for their failure to comply with that order.

CSA analyst Peter Garritt testified that the Agency determines an employee's eligibility for a demotional appointment, since the Agency is more familiar with the specific job duties assigned to each position than is the Career Service Authority, whose expertise is the classification of jobs for the purpose of allocation into the classification and pay plan. Mr. Garritt also stated that subsection (a) was added to the rule on demotional appointments out of "concerns about whether someone can perform the duties of the position, and it allows them to request that we test. Ordinarily, we assume that someone that meets the other criteria [subsections (b) and (c)] is going to meet this criteria." Julie Maerz testified that she based her determination that Ms. Miller qualified

to demote into Appellant's position on the fact that Ms. Miller supervised Appellant, had a masters degree in social science, and that her position was within the same class series as Appellant's. Usually, she stated, that is sufficient to establish qualification to bump into a position. Ms. Maerz did not identify the essential functions of Appellant's position under subsection (a) as a part of that determination. She did not learn that Appellant had two separate supervisors for the two aspects of his job until after she had determined that Ms. Miller qualified for the demotional appointment.

In 1991, the position at issue was classified as Social Caseworker. Appellant as the incumbent in that position provided adult protection outreach services to homeless individuals, including emergency lodging, food, and general assistance fund money. Upon conversion from the merit system to career service in January 1999, the job was classified as Senior Social Caseworker, but Appellant testified that the duties remained the same.

In 2003, the position was granted reclassification to Program Administrator based on its gradual assumption of oversight for homeless services and the 1995 creation of a medical respite program coordinated with three other community programs. [Exh. A, p. 5.] The position was supervised by two supervisors: Carol Moore, Social Casework Supervisor, who oversaw Appellant's social work functions, and Program Manager Karen Miller, who supervised Appellant's administrative responsibilities. [Exh. A, p.2.] The job specification for Program Administrator indicates that "this class implements, administers, and develops program activities and functions. This class is distinguished from the Program Manager which provides leadership, direction, and planning for a program, supervises program staff, and is responsible for budgetary and resource decisions." [Exh. 17, p. 1.] "Some positions may require experience in a specific program area." [Exh. 17, p. 5.] The reclassification of the job to Program Administrator listed as "required" a bachelor's or master's degree in social work with an emphasis on administrative management. [Exh. 30, pp. 17 - 18.] .

#### IV. ANALYSIS

The Hearing Officer has jurisdiction over this appeal pursuant to CSR § 19-10 b). A career status employee is entitled to layoff protection in accordance with Rule 14. CSR § 5-62 (5). An appointing authority may grant a demotional appointment in accordance with 14-43 and 14-45 b). CSR § 5-74 a) 1). Appellant has the burden to prove the action in lieu of layoff was arbitrary, capricious, or contrary to rule or law. Velasquez v. Dept. of Higher Education, 93 P.2d 540 (Colo. App. 2003.); Lawley v. Dept. of Higher Education, 36 P.3d 1239 (Colo. 2001.)

Appellant contends that Ms. Miller did not possess "the knowledge, skills, ability, and expertise to perform the essential duties of the position", as required by CSR § 14-45 b) 1) (a). In the alternative, Appellant argues that the Personnel Director should have designated the possession of social work skills as a special qualification for the demotional appointment under CSR § 14-45 c).

In order to be entitled to a demotional appointment, an employee selected for layoff must possess “the knowledge, skills, ability, and expertise to perform the essential duties of the position.” CSR § 14-45 b) 1) (a). Career Service Authority (CSA) Personnel Analyst Peter Garritt testified that “knowledge, skills, ability and expertise” are the characteristics or qualifications that allow an employee to succeed in performing a job’s essential duties. A position is “the aggregate of duties and responsibilities performed by one person.” CSR Rule 1. The essential duties of a position are those used by the CSA to allocate each job to a classification and pay plan under CSR § 7-12. A job specification describes the duties and qualifications of a classification in general terms, while a position description or reclassification of a position describes “the aggregate of duties and responsibilities performed by one person.” [Exhs. 17, 30.]

Here, the job specification for the broad classification of Program Administrator presents a wide range of educational and experience requirements, adding that “some positions may require experience in a specific program area.” [Exh. 17.] Appellant’s former position specifically requires a degree in the area of social work. [Exh. 30, p. 18.]

It must be determined whether social work is an essential duty of the position of Program Administrator formerly held by Appellant. A duty is considered essential if it consumes a majority of the work time for that position. The CSA evaluates “permanent changes to essential duties that comprise a majority of work time and are most important to the position.” CSR § 7-13. CSA has interpreted this provision to mean that a position is eligible for reclassification if 50% of its duties have changed. [Testimony of Peter Garritt.] Thus, in the layoff context, an employee who has the needed skills to perform 50% of the duties of a position meets the condition for a demotional appointment under CSR § 14-45 b) 1) (a).

The evidence reveals no dispute that the essential duties of Appellant’s former job of Program Administrator arise from the operation of three different programs: 1) Adult Protective Services, which assists at-risk adults in finding a safe home or other residential setting and supporting services, 2) Medical Respite Care, which provides a limited number of beds and social casework services in a secure facility to homeless persons recuperating from serious medical or mental health conditions, and 3) the development of housing programs for the homeless. [Exh. 30, p. 6; testimony of Appellant.]

Deputy Manager Valerie Brooks testified that she believes social case work is 50% of the job of Program Administrator, consisting of the adult protective services and the medical respite program, and that the remaining 50% are administrative duties. In making this determination, Ms. Brooks relied upon the job’s administrative classification, as well as her assessment that two categories of duties in the job analysis questionnaire which add up to 50% are administrative in nature. [Exh. 30, p. 5.] Ms. Brooks stated that she is not familiar with the details of Appellant’s job.

Appellant asserts that social work is either 80% or 100% of the duties of the position, depending on how broadly one defines the term. Appellant testified that half his time is spent performing adult protective services, the medical respite program consumes another 30 - 40%, and that half of that time was spent providing social casework services to individuals admitted to the medical respite program. The development of homeless housing programs accounts for the remainder of the work time. Appellant stated that social work is a required skill for all of adult protective services and homeless housing, and that one-half of medical respite is social work. Thus, about 80% of the duties of his former position call for the practice of social work, and Appellant believes that even the administrative duties require the application of social work principles and knowledge, and thus should be included as social work.

Social Casework Supervisor Carol Moore, who directly supervised Appellant's social work functions, testified that the Medical Respite Program is one-half social work. The remaining administrative functions of coordination with other agencies and data interpretation are inextricably tied to the social work component, rendering it difficult to separate the two functions without compromising the integrity and quality of the program. She testified that Appellant's social work duties comprise about 80% of the job of Program Administrator.

Community Liaison Nan Morehead, who was Ms. Miller's supervisor, testified that half of the Program Administrator job is adult protective services, all of which is social work, and another 25% is the medical respite program. The third program, homeless housing, also requires the provision of some social work. Ms. Morehead considers between 75 - 80% of the job "very intensive social casework", and "maybe 20%" of the job administrative. On Sept. 9, 2004, Ms. Brooks gave Ms. Morehead the task of reassigning Appellant's administrative duties to another staff member. Ms. Morehead testified that no plan to do so has yet been developed because of her increased workload, and the challenges of separating the administrative from the social work functions within the programs administered by Appellant.

At the hearing, social work team leader Janna Youmans of Denver Health defined social work as "looking at people in their environments", with an emphasis on their strengths rather than mental health issues. She testified that social work includes advocacy for people, the use of collaborative organizations, private and governmental funding sources, and the administration of social work programs. Ms. Youmans testified that she considered the Medical Respite program to be based on clinical social work and social casework principles.

The most convincing evidence of the nature of Appellant's duties was presented by Appellant himself and his first and second level supervisors who were knowledgeable about his responsibilities in the field of social work. Those employees concluded that about 80% of Appellant's job duties were social work, and that the associated administrative duties could not be easily isolated and reassigned to anyone.

In contrast, the Agency's witness readily admitted that she did not know the details of the Program Administrator's duties. Significantly, Ms. Brooks relied upon Ms. Morehead's more detailed knowledge of the position to attempt to reassign the administrative duties to another employee. [Exh. G.] Ms. Brooks expressed her belief that the medical respite program and adult protective services together consumed only half of Appellant's job. In fact, the weight of the evidence on that issue indicates that those two programs are about 80% of the job of Program Administrator, and are largely social work in nature. Both Ms. Moore and Ms. Morehead also stated that, despite a number of meetings held to determine how to separate the social work and administrative functions that comprise Appellant's former position, there is still no plan for accomplishing that task. Therefore, it is concluded that social work is an essential duty of the position of Program Administrator.

The 2003 reclassification of the job from Senior Social Caseworker to Program Administrator listed as "required" a bachelor's or master's degree in social work with an emphasis on administrative management. [Exh. 30, pp. 17 - 18.] Appellant, Ms. Moore, Ms. Morehead, and Janet Youmans all testified that knowledge of social work is necessary in order to perform the reclassified job. Thus, it is concluded that a social work degree is part of the knowledge, skills, ability and expertise needed to perform the essential duties of the position within the meaning of CSR § 14-45 b) 1) (a).

The Agency is mandated to provide adult protective service pursuant to C.R.S. 26-3.1-103 and 104. [Exh. 22.] The Agency concedes that Ms. Miller cannot perform those functions, which constitute 50% of the job of Program Administrator. Ms. Miller's ability to perform the administrative duties required by the position is not disputed. Since social work is an essential duty of the position of Program Administrator, Ms. Miller does not possess the knowledge, skills, ability and expertise to perform that essential duty, as required by CSR § 14-45 b) 1) (a).

In its closing argument, the Agency asserts that it did not act arbitrarily when it granted the demotional appointment to Ms. Miller and assigned the Program Administrator's duties to Appellant's new position of Social Caseworker, since it may change the essential functions of a position in order to get the work of the Agency done after a layoff, or indeed at any time. Thus, it argues, an agency may allow a demotional appointment even if the demoted employee lacks the qualifications to perform the job at the time of the demotion, and may thereafter change the qualifications and essential duties of the position.

Appellant counters that Ms. Brooks granted the demotional appointment to Appellant's job without knowing that Appellant's duties consisted mainly of social work, and despite Ms. Miller's inability to perform the essential duties of the position, in violation of CSR § 14-45 b) 1) (a). Thus, Appellant views the demotional appointment itself as improper. Moreover, Appellant notes that the Agency presented no testimony as to what duties Ms. Miller is now performing, including whether she has assumed any of the duties of Appellant's former position. Appellant urges a finding that her testimony would support Appellant's testimony.

The Career Service Rules provide that an “appointing authority . . . has the responsibility to assign duties. Duty assignments may be temporary or regular, incidental or essential, and may include changes in location of work and changes in equipment and tools.” CSR § 7-15. “A gradual change in the level of essential duties and responsibilities” may lead to reallocation into a different classification. CSR § 7-14 A). When an appointing authority has made “significant changes to the essential duties of an employee’s position”, a request for an individual audit must be submitted to the CSA within six months of assignment of the duties, “absent extenuating circumstances.” CSR § 7-22. There is no evidence that the Agency has requested reclassification based upon the results of the layoff, or that reclassification of the position to conform it to the duties being performed by Ms. Miller is otherwise in process.

On its face, CSR § 14-45 b) 1) (a) requires as a condition of demotion that an employee be able to perform the most important duties of the position as they exist at the time of the demotion. The Agency’s suggested interpretation of that rule would allow an agency to waive its explicit condition that an employee must possess the skills to perform the essential duties of the job. The absence of any exception within the rule indicates that the Career Service Authority considers the possession of actual ability to perform a majority of the job duties a prerequisite to the granting of a demotional appointment. While the Career Service Rules governing classification give an appointing authority the power to assign and change the duties of a classified position, they also specify that it is the Personnel Director who has the responsibility to classify positions for the Board’s approval when there has been a change in the “essential duties that comprise a majority of work time.” CSR §§ 7-13, 7-15, and 2-84. If an agency changed all of the essential duties of a position without submitting the change for eventual reclassification, that change would violate the classification and pay plan developed and maintained by the Career Service Authority under Rule 7. The layoff rules do not support an exception to Rule 7 for demotional layoffs. Likewise, a supervisor’s undeniable power to assign duties does not include the power to waive the minimum qualifications established by the CSA. See In re: Bourgeron, CSA ## 92-03, 102-03 113-03 (3/8/04), upheld in Bourgeron v. City and County of Denver, 03 CV 4712 (order dated 2/4/05); City Charter Section C5.25 (“[a]ppointments shall be made solely upon merit and fitness to perform work.”)

Agency Personnel Analyst Julie Maerz testified that in a typical demotion scenario, it is assumed that an employee is qualified for a demotion if that employee supervised the position into which he or she demotes. Here, however, Ms. Maerz was not aware the position was overseen by two different supervisors because Ms. Miller lacked the background to supervise Appellant’s social work functions.

The evidence is silent as to what duties are now being performed by Ms. Miller after her demotional appointment, except that she is not performing any of the duties formerly assigned to that position during Appellant’s incumbency. The Agency does not dispute that Appellant is still performing all of the duties assigned to the position of Program Administrator, including the administrative duties. The fact that the duties

have not yet been assigned to Ms. Miller despite substantial efforts and pressure to do so is convincing proof that the demoted employee did not meet the condition for a demotional appointment set forth in CSR § 14-45 b) 1) (a). Further evidence that the Agency intended no change to Appellant's duties was presented by Appellant's unrebutted testimony that Doris Puga, acting administrator of Family and Adult Services, told both his supervisors, Ms. Moore and Ms. Miller, that Appellant would be "doing the same thing, only for a lot less money."

In its opening statement, the Agency conceded that Ms. Miller was not qualified to perform the social work duties of the Program Administrator position. The original plan had been to transfer only the administrative duties performed by that job to Ms. Miller. That plan did not go into effect because the Agency could not determine an effective manner of separating the administrative and social work duties of the position. By Sept. 9, 2004, the Agency recognized that the administrative duties would have to be transferred to "other staff," which appears to acknowledge that their transfer to Ms. Miller was not anticipated.

The Agency representative stated that Appellant is entitled to be paid as a Program Administrator from the effective date of the layoff to the date of the hearing, in acknowledgement of his continuing performance of the higher level duties. However, the Agency's answers to interrogatories indicate that CSR Rule 14 does not provide for "maintenance of pay" in a job abolishment. [Exh. H, p. 3.] The offer of informal back pay for a limited period is then an admission that the Agency assigned the performance of the higher level duties to Appellant, and that the Agency benefited from their performance.

It must be determined whether the Agency exercised its discretion in an arbitrary and capricious manner in granting a demotional appointment to Ms. Miller. Lawley v. Dept. of Higher Education, 36 P.3d 1239, at 1252 (Colo. 2001.)

The evidence indicates that the Agency's action occurred in the following order: the Agency determined that the position of Program Manager, among others, would be eliminated during its layoff. CSA Analyst Peter Garritt reviewed the layoff plan for conformity with CSA rules, recommended several changes, and sent back a rank order list with the names of the employees whose positions were affected by the layoff. Agency Analyst Maerz then determined that Ms. Miller was qualified to demote into Appellant's position. Deputy Manager Valerie Brooks decided to allow the demotion as an action in lieu of layoff, and to allow Appellant to demote into a Social Caseworker position.

When those decisions were announced to Appellant and his supervisors, the latter met several times to determine how the three programs would be run after the layoff, given Ms. Miller's inability to perform the social work duties. They concluded that Appellant would need to continue performing his old duties. On June 13, 2004, Agency Director Roxanne White communicated her approval of that plan through Ms. Morehead. There was no evidence that this plan was ever communicated to Ms.

Brooks. Even after Sept. 9<sup>th</sup>, by which time Ms. Brooks had received notice that none of Appellant's former duties had been transferred to Ms. Miller, the Agency took no action to reconsider whether Ms. Miller was qualified to perform the essential duties of the position. Between the June layoff and the October hearing, the Agency had no further discussions about the nature of the skills and duties necessary to perform the job. Its only efforts were directed toward an attempt to separate the administrative and social work duties, and those efforts did not succeed.

The evidence indicates that the Agency arbitrarily and capriciously failed to consider whether Ms. Miller possessed the knowledge, skills, ability and expertise to perform the essential social work duties of the position, as required by CSR § 14-45 b) 1) (a), and ignored facts of which it had notice that indicated Ms. Miller did not possess those skills needed for the position. On June 11<sup>th</sup>, Appellant informed Ms. Brooks that the position required the practice of social work. Appellant's supervisors, including Ms. Miller herself, agreed. The closest thing to a position description in the record indicates that the position required a social work degree, which the Agency admits Ms. Miller did not possess. [Exh. 30, p. 18.] Despite numerous additional meetings and pressure from management, the Agency has not been able to reassign Appellant's duties to any other employee, including Ms. Miller. Appellant's June 15<sup>th</sup> deadline for accepting the demotion was treated as the last date by which the issue of Ms. Miller's demotion qualifications could be considered, although the evidence does not demonstrate any need to adhere to that deadline, and the matter was still not resolved five months its passage. [Exh. F, p. 9.]

The Agency's failure to resolve the issue created the necessity to pay Appellant at a higher level pay for several months, and caused Ms. Miller to assume none of the duties of the position. The Agency's statutory responsibility to provide services to the homeless requires the reassignment of those duties to some employee, and the nature of those duties require their reassignment to a qualified social worker. As a result of the Agency's failure to comply with CSR § 14-45 b) 1) (a), Appellant was deprived of the pay plan set for the work he performed, and Ms. Miller was unable to perform any of the duties of the position to which she demoted.

The Agency based its decision to offer the demotion to Ms. Miller on two factors: (1) the job of Program Administrator was classified as administrative, and (2) the "essential duties" section of the job analysis questionnaire used to reclassify the position listed a number of duties considered administrative as consuming 50% of the work time for that position. Its reliance on the title of the classification oversimplified a complex position that evolved to administer three programs delivering social work services to the homeless, and overlooked the information presented to it that contradicted that oversimplification. In relying on one page of the job analysis questionnaire, the Agency failed to consider the requirement that the incumbent in this position hold a degree in social work, as specified therein, or that the position was supervised in part by a Social Casework Supervisor, despite Appellant's statements before the layoff that the duties of the position were social work in nature. [Exh. 30, p. 18; Exh. A, p. 2.] After considering the evidence as a whole and the language used to describe those duties within the job

analysis questionnaire, it must be concluded that the Agency gave undue weight to its own interpretation of that language instead of the more objective educational requirements listed on that same document, as well as the supervisors' unanimous assessment that the job required social work. [Exh. 30, p. 5.] The Agency thus neglected "to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising [its] discretion", and exercised its discretion "based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions." Lawley v. Dept. of Higher Education, 6 P.3d 1239, 1252 (Colo. 2001). Therefore, the Agency's action was an arbitrary and capricious exercise of its discretion.

Since I find that the demotional appointment violates the above personnel rule, the issue of whether Appellant possessed a special qualification under CSR § 14-45 f) is not necessary to the determination of this appeal.

### **ORDER**

The Agency's action in lieu of layoff dated June 11, 2004 is hereby REVERSED.

Dated this 2<sup>nd</sup> day of  
March, 2005.

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Valerie McNaughton  
Hearing Officer  
Career Service Board

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**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 3<sup>rd</sup> day of March, 2005, addressed to:

David K. Fine, Esq.  
Kelly, Haglund, Garnsey & Kahn  
1441 – 18<sup>th</sup> St., Suite 300  
Denver, CO 80202

Don L. Romberger  
11864 E. Yale Way  
Aurora CO 80014

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail, this 3<sup>rd</sup> day of March, 2005, addressed to:

Niels Loechell  
Assistant City Attorney  
Denver Department of Human Services

Julie Maerz  
Denver Department of Human Services

City Attorney  
Litigation Section

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