

HEARING OFFICER, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 143-03

DECISION

IN THE MATTER OF THE APPEAL OF:

KIM STEWART, Appellant,

Agency: Career Service Authority, and the City and County of Denver, a municipal corporation.

1. The Appeal herein was filed on September 15, 2003, appealing a September 3, 2003 Response to Grievance, which Grievance had been filed on August 28, 2003. These actions followed a written reprimand dated August 21, 2003. The reason for the appeal states as follows:

Written reprimand for frivolous reasons has been placed in my file for lack of performance when I was never properly trained in the position of Administrative Assistant.

The Appeal form also alleges discrimination based on race, color, disability and age.

The remedy sought is removal of the written reprimand.

2. The written reprimand is for violation of CSR §16-51(2), (6) and (10). Three areas are cited: 1) procedures and processes being followed; 2) calendar and schedule; and 3) preparing minutes of Board meetings.

3. Appellant filed a written response, dated August 27, 2003, which she attached to her Grievance. This response states that Appellant was never given a copy of her predecessor's job description of responsibilities, a laid out performance plan for the specific duties for her position, or documentation of what qualified her for the position. The response further alleges Appellant was set up for failure, referring to her medical

restrictions and possible racial discrimination. Appellant also responded to the points raised in the letter of reprimand.

4. The appeal herein was heard on March 23, 2004, at the Career Service Authority. Assistant City Attorney Robert D. Nespor represented the Agency. Appellant represented herself. Interim Personnel Director Kelly Brough was the only witness called to testify by the Agency. Appellant testified in her own behalf. Agency Exhibits 1 through 4 were admitted by stipulation. Appellant Exhibits A (sixteen pages), B (two pages), C (five pages), D (three pages), and E (three pages), although not listed prior to hearing, were admitted over the objections of the Agency.

5. Ms. Brough testified that she was appointed Interim Director at the end of July 2003. She attended the Career Service Board (CSB) meeting on the Thursday prior to her assuming her duties the following Monday. The Appellant had been employed as an Agency Support Technician by the Agency, and had over fifteen years of service. By letter dated June 17, 2003 she was informed that she would be laid off effective July 1, 2003. A second letter dated June 23, 2003 informed Appellant of her entitlement to a demotion appointment to the position of Administrative Assistant to the Personnel Director. Appellant accepted the appointment on the same date.

6. Appellant's duties as Administrative Assistant were to prepare the agenda for, and take minutes of CSB meetings; maintain the calendar for the Personnel Director; post notices regarding classification changes, and do correspondence and filing.

7. Ms. Brough stated that she had a counseling session with Appellant soon after assuming her duties. She did not consider this formal discipline, but rather as constructive feedback to assist Appellant. Some time after August 7, 2003, she gave

Appellant a verbal reprimand regarding the preparation of Board minutes, a fact noted in the August 21st written reprimand.

8. Ms. Brough was questioned specifically about Ex. 2, the Written Reprimand, and testified regarding each of the areas considered by her to be ongoing failures of Appellant to perform duties critical to the Administrative Assistant position. She further stated that she considered a range of disciplinary options, and that she decided on a written reprimand in the hope that a written document would aid Appellant in learning the duties of Appellant's position. Ms. Brough denied that her written reprimand had anything to do with Appellant's race, color, age or alleged disability.

9. The parties agreed that Appellant had made clear that she was new to the position of Administrative Assistant, and that she had not had an opportunity to perform the duties of the position prior to Ms. Brough's appointment. Appellant also informed Ms. Brough of her lack of familiarity with using an electronic calendar. However, while Appellant asked whether Ms. Brough had brought anyone in to provide training for her, Ms. Brough responded that Appellant had stated she was confident, that she did not need additional training, and that she was doing fine. Ms. Brough also stated in response to Appellant's cross-examination that she could not say exactly how long it should take to learn a position in the City since there were too many factors involved, nor could she weigh how long an employee is given to learn a position before being reprimanded.

10. Ms. Brough admitted that Appellant was not given a Performance Enhancement Program Report (PEPR), but stated that she told Appellant about the plan for Appellant's predecessor and discussed that plan and her expectations with

Appellant. In reply to a question about whether an employee should be given a PEPR she said that the employee should be given expectations, and that while written expectations were preferable, here she thought verbal expectations were better so that Appellant could become familiar with her duties. Initially Ms. Brough assigned the preparation of Board minutes to Appellant, and preparation of Board packets to Joelle Prado.

11. Appellant testified that from the time she accepted the demotion appointment to the Administrative Assistant position she found herself in a hostile work environment; and that she believed she was never given a chance to perform the duties of the position because she was never formally trained. She accepted the demotion appointment believing that she could learn the position, but found that things she was attempting to do were being sabotaged. As an example she stated that while typing a list Ms. Brough came to her desk and spoke to her. Appellant closed the list, which she had been typing, and when she reopened the file found that the names she had typed had been deleted. A coworker, Joelle Prado, who allegedly had spoken to Ms. Brough about the list Appellant was typing, denied deleting the list.

12. Appellant testified regarding another incident where she had prepared an order for signature by the CSB at its regular meeting. The day prior to the meeting a man informed her that his address had changed. Appellant corrected the document to reflect the correct address and took the corrected copies to the meeting. At the meeting there apparently was a complaint about duplicate copies of documents in the Board Member's packets. Appellant contended the duplicate copies were the result of actions by the Coworker. The same Coworker would allegedly send e-mails to the Personnel

Director regarding Appellant's mistakes. Finally, Appellant testified that she was at work on time, while her Coworker would be late, but that the Personnel Director picked on Appellant while ignoring the Coworker's conduct.

13. Appellant also testified that she is an Afro-American woman, over forty years of age, with permanent partial disability as evidenced by an ergonomic study of her work location, and that the City by its own rules was required to accommodate her disability.

14. On cross-examination by Agency Counsel Appellant stated that she did inform Ms. Brough that she could not work with Ms. Prado, that she believed Ms. Prado wanted the position of Administrative Assistant, and that Ms. Prado was not giving Appellant the information she needed to enable her to do her job.

15. Appellant admitted that in their first meeting Ms. Brough had said she wanted Appellant to do the minutes of the CSB meetings and for Ms. Prado to do the Board Member's packets. Board minutes done by another employee were provided as examples for Appellant in the completion of this task. Appellant also admitted to making typing errors, but said that she believed she was trying to get the minutes corrected. She denied incorrectly listing Board votes, or misidentifying speakers in Board meetings, as well as double booking Ms. Brough's calendar of meetings. Initially Appellant created a calendar by using a table in a Word document. She later was instructed to use the calendar feature of Microsoft Outlook, with which she was not familiar.

16. At the conclusion of the presentation of her own testimony, Appellant offered Exhibits A through E, as noted above, to which offer the Agency objected both generally

and specifically. Notwithstanding the valid objections, the Exhibits were received. Exhibit A pages 1-3 refer to Classification Notices, and contain handwritten notations, presumably by Appellant. Exhibit A-4 is a flow chart showing the steps to be followed for all city ordinance changes. Exhibit A pages 5 –16 are copies of e-mails within the Career Service Authority in which Appellant is either a sender or recipient. Many of these appear to be incomplete. They all generally involve Classification information and the posting of hearing notices. Exhibit B is an e-mail notification of an e-mail that was not deliverable to Kristin Rozansky. Exhibit C is a printout of an Outlook calendar, along with e-mails indicating scheduling problems. Exhibit D, entitled "Timelines to Remember", is a three-page listing of duties for the position of Administrative Assistant. Exhibit E consists of three documents relating to Appellant's disabilities.

17. Regarding her disabilities, Appellant testified that she suffered from repetitive stress injuries from work, including carpal tunnel syndrome and problems with her back and legs. These disabilities limited her walking, and she is required to take pain medication. Appellant requested ergonomic items for her disabilities, which she obtained after Ms. Brough assumed her position as Personnel Director.

18. Appellant submitted a Prehearing Statement dated February 20, 2004, in preparation for the hearing herein. This document repeats the allegations made in the grievance herein, but also raises additional issues post-dating the written reprimand. The only Rule violations alleged are §19-10(c)(2), regarding discrimination concerning disabilities, and §19-10(f), regarding a hostile work environment.

CONCLUSIONS

19. The record herein does not reflect whether there is a standard for an employee accepting a demotion appointment. Career Service Rules do provide for probationary periods in promotion situations. Here, because Appellant had held a high clerical position in the Career Service Authority, she was assumed to be capable of performing the duties of the position of Administrative Assistant.

20. CSR §14-45b) provides:

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 both of these conditions:

- a) the employee must meet the qualification requirement for such class as stated in the class specification and be certified as having met all qualification requirements by the Personnel Director; and
- b) the employees total length of service as defined in Sub-section 14-43 Length of Service must be greater than that of at least one (1) of the incumbents in the class; or there must be a vacancy in the class.

21. CSR §5-74 Demotion Appointments provides for demotion appointments in lieu of layoff, requires notice to the employee, and provides for approval by the CSA if it finds that the employee meets the minimum qualifications for the new class.

22. While not submitted as exhibits in the hearing herein, the undersigned Hearing Officer is aware that Appellant was offered, and agreed to accept, a demotion appointment to the position of Administrative Assistant in the Career Service Authority, pursuant to the provisions of Career Service Rules.

23. CSR 13 PERFORMANCE ENHANCEMENT PROGRAM RATING, Section 13-10 Purpose, provides in part that:

In no event shall an employees [sic] performance rating be a substitute for disciplinary action under Rule 16 DISCIPLINE. It may be used, however, to establish attempted non-disciplinary corrective action in support of subsequent

disciplinary action under Rule 16 DISCIPLINE for unsatisfactory work performance...

24. CSR RULE 16 DISCIPLINE, Section 16-20 Progressive Discipline, does not require that an employee be provided with a Performance Enhancement Program Report prior to disciplining an employee.

25. I find that Appellant has failed to present sufficient evidence to show that the August 21, 2003 Written Reprimand was given to her for frivolous reasons. The testimony given by Ms. Brough regarding the shortcomings of Appellant's performance of her duties was not rebutted in any way.

26. Appellant's contention in support of her appeal is that she was not properly trained. The record before me indicates that the training provided to Appellant was at best minimal. Ms. Brough testified only to a counseling session, which she considered constructive feedback, and a verbal reprimand on August 7, 2003. She admitted that Appellant was never given a PEPR. She did testify that Appellant was given the PEPR for Audrey Renke, Appellant's predecessor as Administrative Assistant. Ms. Brough also testified that she offered training, but that her offers were rejected by Appellant, whose response was to say that she was fine. While I find that Appellant was not given training, I also find that Career Service Rules anticipated that Appellant was qualified for the demotion appointment to the Administrative Assistant position. I also find that under CSR 16 DISCIPLINE, a Written Reprimand was a permissible method of notifying an employee of the need to correct the performance of their duties.

27. Appellant claims that her work was sabotaged. Her testimony was in regard to the actions of her co-worker, Joelle Prado. The evidence of sabotage is insufficient to prove this contention. Appellant's testimony regarding the deletion of a file on which

she was working did not establish any connection to Ms. Prado. Similarly the testimony regarding duplicate copies of documents in Board packets does not establish an act of sabotage.

28. Appellant claims discrimination on the basis of her race and color. Appellant's only evidence in support of the claims of race and color discrimination was that Appellant is African-American and her Coworker was Hispanic. These facts alone are insufficient to show race and/or color discrimination.

29. Appellant claims discrimination on the basis of her disabilities. No medical records were provided at the hearing to establish disability. Rather, Appellant testified about being on medical leave, and stated that she had carpal tunnel syndrome and suffered back and leg pain. Appellant did offer as Exhibit E-1 the first page of a letter from the Risk Management Workers' Compensation Unit to Dr. Allison Fall. The letter seeks clarification of work restrictions for Appellant, "...so that they [Agency] can assure they will adequately accommodate Ms. Stewart." Appellant also submitted as Exhibit E-2 an e-mail indicating work to be done on Appellant's cubicle. In light of the foregoing I find there is insufficient evidence that the Agency discriminated against Appellant based on her disabilities.

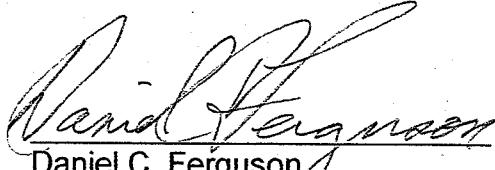
30. Appellant claims discrimination on the basis of her age. At the time of these events, Appellant was forty years of age. It is unclear the ages of any other persons mentioned in the hearing herein. Appellant's speculation, that possibly because of her age it took her a longer time to learn the procedures for the Administrative Assistant position, is insufficient to prove discrimination on the basis of age. I therefore reject the claim of age discrimination in this appeal.

31. I find that Appellant has failed to present evidence to support her claims of violations of Rule 19-10, set forth in her Prehearing Statement. As noted, I find no evidence to support the claim of discrimination based on disabilities. I further find no evidence to support the claim of coercing employees against one another and allowing room for workplace harassment, thereby creating a hostile work environment. As noted, Appellant's June 17, 2003 layoff from her position as an Agency Support Technician resulted in her demotion appointment to the Administrative Assistant position, bumping an incumbent with less agency seniority. I assume that Appellant's appointment was not well received. However, of itself this does not prove a hostile work environment.

ORDER

For the reasons set forth above I hereby deny the Appeal herein in its entirety.

Dated this 12th day of
April, 2004


Daniel C. Ferguson
Hearing Officer

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 13th day of April, 2004, addressed to:

Kim Stewart
3320 Josephine St.
Denver, CO 80205

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail, this 13th day of April, 2004, addressed to:

Robert D. Nespor
Assistant City Attorney
Employment Law Section
201 West Colfax Ave. Dept 1108
Denver, CO 80202

Kelly Brough
Career Service Authority

Charlotte A. Smith