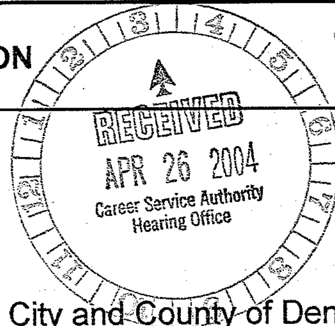
HEARING OFFICER, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 97-03

DECISION



2004 APR 26 P 12:42
CAREER SERVICE AUTHORITY

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 June 26, 2003, appealing a June 17, 2003 Notice of Layoff. The reason for the appeal states as follows:

> Appellant contends the Agency's actions were arbitrary, capricious and contrary to rule or law.
>
> The Appellant contends that the termination was a discriminatory act based on her use of worker's compensation and her return to work with restrictions. The Appellant contends her termination was based on race and not related to a legitimate basis for layoffs.
>
> The Appellant contends this is the continuation of a pattern of harassment by the Agency towards her which includes an attempted disciplinary action, refusal to provide accommodations and refusal to grant FMLA.

The Appeal form also alleges discrimination based on race and disability. The remedy sought is reinstatement to her position and an award of back pay.

2. The Appeal alleges violations of CSR §14-40, §5-84, and Charter §9.1.5. Appellant's Prehearing Statement alleges violations of CSR §14-40, §14-45, §14-46, §14-49, and City Charter §9.1.5. Additional remedies sought are reassignment or transfer appointment in a pay grade with the same job rate, and damages to make Appellant whole.

3. The appeal herein was heard on March 31, 2004, at the Career Service Authority. Assistant City Attorney Robert D. Nespor represented the Career Service Authority, herein the Agency, and the City and County of Denver, herein the City, and jointly as the Agency. Appellant represented herself. Stacey Schalk was Advisory Witness for the Agency. Ms. Schalk and Acting Personnel Division Director Steve Adkison were called to testify by the Agency. Appellant testified in her own behalf. Agency Exhibits 1 through 13 were admitted without objection. Appellant Exhibits A (three pages), B (nine pages), C (three pages), D (one page), E (seven pages), and F (six pages), although not listed prior to hearing, were admitted over the objections of the Agency.

4. At the opening of the hearing herein Appellant offered Exhibits A through F, as noted above, to which offer the Agency objected both generally and specifically. Notwithstanding the valid objections, the Exhibits were received. Exhibit A consists of three Return to Work Passes for Appellant, issued December 16 and 30, 2002, and January 21, 2003, by the Occupation Health and Safety Clinic of Denver Health. Exhibit B is an Office Ergonomic Worksite Evaluation dated January 29, 2003. Exhibit C is a Health Care Provider Certification (FMLA of 1993). Exhibit D is a Notice of Unemployment Insurance Appeal Hearing for Appellant mailed July 17, 2003. Exhibit E is a letter dated April 2, 2003, from Career Service Authority to Appellant, informing her of a pre-disciplinary meeting rescheduled for April 10, 2003. Exhibit F consists of two documents: 1) a claim of discrimination submitted by Appellant on June 18, 2003, addressed to Stacey Schalk, Acting Director Employee Relations, and requesting an

"independent (outside) investigation..."; and 2) an Incident Witness Statement based on an interview of Appellant on July 25, 2003, executed by Appellant on August 8, 2003.

5. Appellant testified in her own behalf. She did not present any other witnesses in her behalf, but cross-examined the Agency witnesses regarding their testimony. In her opening statement Appellant restated her position that her layoff was wrongfully deserved, and was discriminatory based upon her race, disability and age. The issue of age discrimination was not listed or set forth in her June 26, 2003 appeal herein.

6. Appellant testified regarding Ex. A which she stated shows that she was allowed to return to work by workman's compensation doctors. No evidence or testimony was presented regarding the nature of any injury that resulted in her disability. Notations on Ex. A state that Appellant was to "alternate repetitive activities & non-repetitive activities every 30 minutes"; a temporary restriction of lifting items weighing less than five pounds; a limitation of writing to 15 minutes/hour; and a limitation of keyboarding/mousing to 15 minutes/hour. There are similar notations on each of the three pages in Ex. A. Appellant argues that the fact that she was permitted to return to work as shown by Ex. A supports her contention that she was harassed by the Agency when she was required to take Family and Medical Leave Act (FMLA) leave when she attempted to return to work.

7. Appellant testified that Ex. B, the ergonomic evaluation, sets forth the adjustments which the Agency was required to make to accommodate her disabilities. After her return to work she testified that she was placed on light duty, and when this

work was completed, she was sent home on FMLA, thus showing that the Agency was failing to fulfill the requirements of the ergonomic evaluation.

8. Ex. C, the certification form for FMLA, reveals that Appellant was suffering from work related overuse of her arms, and that pain limited her function. The onset occurred December 13, 2002, and was estimated to continue for a period of three months. The form states that Appellant will be able to work only intermittently, or to work on a less than full schedule for the three month period. Physical therapy is recommended, as well as a limitation on excessive typing or writing. Appellant stated she refused to sign this form because she did not agree with it. She contends she was required to have a medical specialist sign the form before she was permitted to return to work. She states that when she reported for work she was told there was no light duty work available, and she contends that this demonstrates a pattern to get her out of her job for whatever reason.

9. Ex. D is a notice of an unemployment compensation (UC) hearing. Appellant testified that she applied for UC because she was running out of leave and had not been permitted to return to work with accommodations to her disabilities, but was forced to take FMLA leave.

10. Ex. E is an April 2, 2003 letter notice of a pre-disciplinary meeting. Appellant testified that in November of 2002 she was given a rating of "exceeds expectations" on her annual review. She contends that Ex. E is evidence of further attempts to go after her.

11. Ex. F is a two-page handwritten harassment and discrimination grievance filed by Appellant addressed to Stacey Schalk, Acting Director Employee Relations,

dated June 18, 2003. Attached is a four-page Incident Witness Statement of Appellant taken by Jennifer E. Fairweather/Angela Ewing-Davis. The Agency submitted Ex. 13, a Memorandum dated September 3, 2003, from Jennifer E. Fairweather, Agency Human Resources Director, Denver Fire Department, addressed to Appellant, in which Ms. Fairweather advises Appellant regarding her investigation of Ex. F that there is no evidence of harassment, discrimination or retaliation based upon any protected status.

12. Appellant admitted that at some undetermined point the City did admit liability for her workman's compensation injury. She further admitted that ergonomic studies of her work site were made, and that she was provided with various ergonomic aids for her worksite.

13. The Agency presented Stacey Schalk, Acting Supervisor of Employee Relations, to testify regarding the Agency's layoff rules and processes. She testified that she has presented seminars on this topic to other agencies. At the time of Appellant's layoff the City had a layoff system based on seniority. An agency would first determine what class of employees was to be abolished, and would then rank the employees within that class. The agency could, but was not required to, consider proficiency within the group, but could lay off based strictly on seniority. Employees who are impacted by the layoff and who meet minimum qualifications may bump other employees with less seniority, and are requested to provide updated resumes to assist in establishing bumping rights. Ms. Schalk's office audited the Agency layoff in the summer of 2003 and found it to be proper. Her office was not involved in the decisions as to which positions were to be abolished.

14. The Agency presented Steve Adkison, Acting Personnel Division Director, to testify regarding the layoff decisions in the summer of 2003. At that time he was Acting Co-Director of the Agency, with Jim Nimmer, a position he held from the end of May to the end of July 2003.

15. Mr. Adkison testified that prior to being appointed Acting Co-Director he had been working with Personnel Director Jim Yearby addressing budget shortfall concerns in the 2004 budget, which had been presented to the Agency by the City Budget & Management Office. They had been able to cut $200,000 in non-personnel spending, but still needed to find an additional $350,000 in savings, necessarily from personnel cuts, to meet the demands of the City Budget & Management Office. Personnel Director Yearby had requested reports from senior staff members on positions within their departments as to the least disruptive cuts that could be made while maintaining the work of the Agency.

16. Based on the recommendations of the senior staff, and discussions with other managers and supervisors following their appointment as Co-Directors, Mr. Adkison and Mr. Nimmer made the decisions on which positions were to be abolished, beginning with the layoffs in the 800 series pay grades, before deciding to abolish the position of Agency Support Technician, a 600 series pay grade. The decision to abolish the latter position was based in part on changes in the duties of that position at the first of the year, when the education refund duties were removed from that position. Ex. 9 reflects the report to the Acting Co-Directors regarding bumping rights. Mr. Adkison denied that decisions on which positions to abolish were in any way related to the race

or disability of employees in those positions. The Appellant did not examine Mr. Adkison regarding his testimony.

17. Ex. 9 reflects that following her layoff the highest position for which Appellant met the minimum qualifications was the position of Administrative Assistant. Exs. 5 and 6 reflect that the latter position had a broader wage range than Appellant's position as an Agency Support Technician, which could have resulted in a higher rate of pay for Appellant. Ex. 10 lists other positions for which Appellant qualified. Ex. 7 reflects that Appellant was only informed that she qualified for the Administrative Assistant position.

18. In her opening statement Appellant spoke generally about her initial attempt to return to work following her December 2002 on-the-job injury. She said that she was sent home and was required to obtain a doctor's release before returning to work. After obtaining the release she was placed on light duty, working in the hearing's office and in employee relations. During this time Appellant was given the April 2, 2003 notice of pre-disciplinary meeting, Ex. E, which was in relation to her work as Education Refund Coordinator prior to her on-the-job injury. Appellant admitted that she was never disciplined based on this notice. Appellant also said that Mr. Adkison and Mr. Nimmer knew her hands were bad, that they knew if she were laid off she would be put into the administrative position, and that they intentionally selected her to set her up for failure.

CONCLUSIONS

19. I find that Appellant has failed to present sufficient evidence to show that her layoff was arbitrary, capricious, or contrary to rule or law, nor was it discriminatory.

20. I credit the testimony of Ms. Schalk and Mr. Adkison that provides evidence that the actions taken in planning for, and carrying out, the layoff necessitated by the demands of the Budget & Management Office were neither arbitrary nor capricious. Appellant presented no evidence to refute this testimony. Further, I find that the layoff action followed the applicable rules of the Agency, specifically CSR 14-45b)1).

21. Appellant failed to explain how the layoff action of the Agency violated CSR §14-40, §14-45, §14-46, §14-49, and City Charter §9.1.5. §14.40 is merely a listing of "Types of Separation Other Than Dismissal." Appellant has not shown that the June 17, 2003 action of the Agency, Ex. 2, was anything other than a layoff. §14-45b)1) sets forth the requirements for a "Demotional Appointment", which I find was given to Appellant here. §14-46 sets forth the requirements for a "Notice of Layoff", including planning, audit and approval of the plan, and at least a ten-day notice of the layoff, all of which I find were followed here. §14-49 Appeal states that an employee may appeal a layoff or demotion action pursuant to CSR 19, which Appellant has done herein. Former City Charter §9.1.5 Content of personnel rules adopted by board sets forth what the personnel rules shall cover, and what they shall provide. Appellant failed to state how the Agency had failed to follow the requirement of this former Charter provision.

22. Appellant presented no evidence that her layoff was based on her use of worker's compensation and her return to work with restrictions. The evidence presented by Appellant noted in paragraphs 6 through 11 above reflects only that Appellant filed a worker's compensation claim for injuries caused by the repetitive nature of her work. There is no evidence in the record that Mr. Adkison and Mr. Nimmer selected Appellant for layoff. Rather, the testimony of Mr. Adkison was that the position

of Administrative Support Technician was abolished because, in conjunction with the other positions previously determined to be appropriate to be abolished, it would meet the goal of saving $350,000 in personnel cuts in the 2004 budget for the Agency.

23. CSR §5-84 Reasonable Accommodations for Individuals with Disabilities Policy is a seven-page rule. Appellant alleged her disabilities as one of the reasons for her layoff. As noted above in paragraphs 6, 7 and 8, Appellant testified regarding her on-the-job injury, the resulting workman's compensation claim, and her return to work. Absent from her testimony is any explanation of how the layoff decision by the Agency or the demotion appointment given Appellant constituted Disability Discrimination. While the record herein is not clear on the sequence of events regarding Appellant's on-the-job injury, it appears that a separate agency, the Office of Workman's Compensation, initially contested the Appellant's claim. As noted above, Appellant admitted that at some undetermined point the City did admit liability for her workman's compensation injury, that ergonomic studies of her work site were made, and that she was provided with various ergonomic aids for her worksite. Based on the foregoing I find that Appellant has failed to show that the decision to abolish the position of Agency Support Technician, which resulted in her layoff and demotion appointment, was based on her disabilities.

24. In her closing argument Appellant expressed her belief that her position was one of the first to be abolished by the Agency because of her disability and prior grievance filing. The uncontradicted testimony by Mr. Adkison at paragraphs 14, 15 and 16 above, regarding the decisions on positions to be abolished, is contrary to Appellant's belief. There is no evidence of prior grievances being filed by Appellant.

Possibly Appellant relates this to her Workman's Compensation claim. Appellant also believes that her position was not abolished. This belief is based on her understanding that some of the duties that she previously performed are now being performed by others. In any case of budget cutting, layoff or reorganization, it is generally the case that the work which existed prior to the layoff continues to exist, and must now be performed by the remaining employees along with the work which those employees had been performing. Appellant did not provide evidence to support her belief that her position had not been abolished, other than hearsay testimony about others performing work which she had performed as Education Refund Coordinator.

25. Further, Appellant accepted (see Ex. 8) the offer of a demotion appointment in lieu of layoff to the position of Administrative Assistant, a position for which she was deemed to meet the minimum qualifications, and for which she had greater seniority than the incumbent.

26. Appellant claims discrimination on the basis of her race. Appellant's only evidence in support of the claim of race discrimination was that Appellant is African-American and coworkers are Hispanic. These facts alone are insufficient to show race discrimination. Similarly, Appellant's hearsay statements about comments made to her by other employees are insufficient to prove race discrimination.

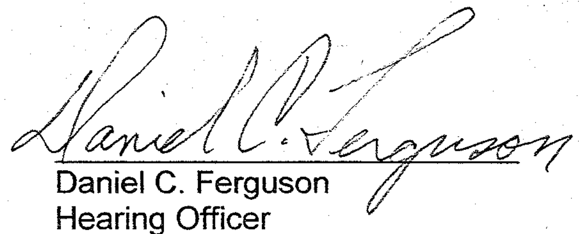
27. From her opening statement, her testimony, and her closing argument I understand Appellant to argue that she was wrongfully selected for layoff, that her selection was made knowing that she would fail when placed in the Administrative Assistant position, and that the intent was to get rid of her for discriminatory reasons based on race and disabilities. I have found that Appellant presented no direct

evidence of her selection for layoff being based on discriminatory reasons. I further find that no presumption can be made on the basis of the record before me that Appellant's selection for layoff was made for any reasons other than those stated by Mr. Adkison. Having previously heard and decided a grievance filed by Appellant alleging discrimination based on a written reprimand given her regarding the performance of her duties as Administrative Assistant, the undersigned Hearing Officer is aware of facts which were not a part of the hearing herein. Given the interrelated nature of the grievances and appeals filed by Appellant, consolidation would have provided a more comprehensive consideration of her claims. Since there was no consolidation I base my findings on the evidence presented herein.

ORDER

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

Dated this 23rd 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 27th 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 27th 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 Jean Brough
Personnel Director
Career Service Authority

Charlotte A Smith