

**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**RONNIE SANDERS**, Appellant,

vs.

**DENVER PARKS AND RECREATION**, and the City and County of Denver, a municipal corporation, Agency.

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**I. INTRODUCTION**

The Appellant, Ronnie Sanders, appeals his layoff from the Denver Department of Parks and Recreation, (Agency), on September 19, 2009. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on February 17, 2010, and May 5, 2010. Mr. Sanders was represented by Jennifer Robinson, Esq., while the Agency was represented by Franklin Nachman, Assistant City Attorney. In addition to testifying on his own behalf, the following witnesses testified for the Appellant: Manager of the Agency Kevin Patterson; Career Service Authority (CSA) Director of Organizational Development Dani Brown; CSA Personnel Director Jeff Dolan; Director of Finance and Administration Fred Weiss. The following witnesses testified for the Agency: CSA Safety and Industrial Hygiene Administrator David Stewart; CSA Director of HR services Nyle Houston-Boyd; and Kevin Patterson as part of the Agency's case-in-chief.

**II. ISSUES**

The following issues were presented for appeal:

- A. whether the Appellant's layoff was arbitrary, capricious, and contrary to rule or law;
- B. whether retaliation was a substantial or motivating factor in the Agency's layoff of the Appellant.

### III. FINDINGS

#### A. Layoff.

Sanders was the Agency's Safety and Industrial Hygiene Supervisor from 1993 until his layoff. Previously, as the City of Denver's Safety Coordinator, he administered a citywide safety program. [Exhibit 11-2; Appellant testimony]. At the time of his layoff, the Agency's Manager was Kevin Patterson.

Sanders supervised three employees from 2003-2008. By April 2009, however, he had no one to supervise, as he was the only safety employee remaining in the Agency.

During 2009, Denver was facing a financial crisis with a projected \$160 million deficit. On April 27, 2009, as part of the budget cuts required of all agencies, the Budget Management Office (BMO) directed the Department of Parks and Recreation to cut \$3.8 million from its budget. [Exhibit 30]. Agency Manager Patterson met BMO's directives, in part, by eliminating 12 positions, including that of Sanders. [Weiss testimony].

Concomitant with Patterson's budget reduction measures, he transferred in-house safety and payroll functions to the Career Service Authority (CSA), with the dual purpose of meeting the Agency's diminished budget and meeting the Mayor's directive to consolidate services common to all agencies.<sup>1</sup> A CSA assessment toward that end concluded in December 2008 that consolidation of functions could save the Agency \$800,000 by reassigning payroll and safety functions to the CSA, and eliminating the 12 Agency positions which served those functions. [Brown testimony; Exhibit 20].

CSA agreed to assume both payroll and security functions, [Exhibit 27] and, pertinent to this case, created a new Safety Administrator position in the CSA. The CSA opened applications for the new position on July 27, 2009, to those both inside and outside the City. Sanders applied, and was one of six finalists interviewed for the CSA position, but the position was awarded to Dave Stewart, a candidate from outside the Career Service. Stewart had the top score in his CSA-administered test, and each of the interview panelists ranked him the top candidate.

Patterson submitted the Agency's layoff plan to the CSA on August 17, 2009. Sanders was the only person in his layoff unit, as the other security positions were vacant. [Exhibit 4]. The plan was approved the following day, and the Agency notified Sanders the same day, August 18, 2009, that he was to be laid off. [Exhibit F]. Sanders was laid off one month later, on September 19, 2009. [Exhibit 3; Exhibit F].

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<sup>1</sup> The Mayor targeted 5 areas for consolidation into a shared services model, one of which was safety functions. [Dolan cross-exam].

During the last few months of Sanders' employment, his supervisor, Ann King, was separated from employment. When CSA agreed to assume the Agency's security functions pursuant to a memorandum of understanding, [Exhibit 27], Sanders was assigned to CSA supervisor Suzanne Iverson during July 2009 until his layoff in September, although his appointing authority remained Agency Manager Kevin Patterson and his duties remained unchanged.

There are differences and similarities between the newly created CSA Administrator position and the former Agency Supervisor position occupied by Sanders. The similarities of the positions are summed up under the "distinguishing characteristics" of each position. "[A] Safety and Industrial Hygiene Administrator and a Safety and Industrial Hygiene Supervisor perform many of the same professional and administrative duties..." [Exhibits C, D]. The four most important differences between the positions are: (1) supervision. The Supervisor's position contemplates the supervision of employees, while the Administrative position has no employees to supervise; (2) pay grade. The Supervisor position is a higher classification than the Administrative position (A 811 versus A 810) [Exhibit 3; Exhibit B]; (3) scope. The Supervisor position focuses on implementation of security strategies within the Agency, while the Administrator's position focuses on City-wide short and long-term security strategic planning policy; (4) permanence. Finally, the Supervisor's position is a permanent position, while the Administrative position was created as a limited position, meaning it had a fixed termination date (August 2010). [Patterson testimony; Exhibits C, D; compare Exhibits B, C, and 27-3].

## **B. Retaliation.**

In January 2008, Ann King became Sanders' supervisor. While his previous supervisor rated Sanders' work reviews from 2005-2008 as "successful" or "exceeds expectations," King rated Sanders' work for 2008-2009 as "needs improvement." [Exhibit 24-6; Appellant testimony].

Sanders filed a grievance of his "needs improvement" rating, pursuant to Career Service Rule (CSR) 18 C., on February 20, 2009. Patterson initially upheld the rating. When Sanders appealed pursuant to CSR 19-10 A.2.c,<sup>2</sup> Patterson determined King's basis for the rating was not sustainable at hearing, [Patterson testimony]. The parties settled the matter prior to hearing with Sanders' 2008-09 performance upgraded to "successful." [Exhibit 26].

By the time Sanders filed his February 20 grievance, the Agency had already been discussing budget-saving measures, including the elimination of some positions including that of Sanders. [Patterson testimony; Exhibit 35]. On February 11, 2009, nine days before Sanders filed his grievance, the Agency

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<sup>2</sup> At the time of Sanders' grievance, a Career Service employee's overall annual performance was rated as one of three categories: exceptional, successful and needs improvement, [see CSR 13-30 C. page issuance date 1/1/08]. A subsequent change to the rating system resulted in the present five categories: outstanding, exceeds expectations, successful, below expectations and failing [CSR 13-30 C. (effective date 1/1/10)].

circulated a document titled "human Resources and Safety Reorganization" which identified the position occupied by Sanders as one of the positions to be eliminated.

The agency formally notified Sanders of his impending layoff on August 18, 2009 and one month later, September 18, the layoff was imposed. [Exhibit 2]. This appeal followed.

#### **IV. ANALYSIS**

##### **A. Jurisdiction and Review**

As an employee of the Denver Department of Parks and Recreation at the time of his appeal, Sanders was a member of the Career Service personnel system, and therefore may appeal his layoff discipline under the Career Service Rules. Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR § 19-10 A.1.a.

Subject matter jurisdiction is proper under CSR §19-10 A.1.e., as the direct appeal of a layoff. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

##### **B. Burden and Standard of Proof**

In a layoff action, the employee retains the burden of persuasion, throughout the case, to prove the Agency's acts were arbitrary, capricious or contrary to rule or law. Dept. of Institutions v. Kinchen, 886 P.2d 700, 712 (Colo. 1994). The standard by which the Appellant must prove his claims is by a preponderance of the evidence.

Sanders also bears the burden to prove his retaliation claim by a preponderance of the evidence. See e.g. Hall v. Edward J. DeBartolo, Corp., 1999 U.S. App. LEXIS 22237 (6th Cir., 1999).

##### **C. Analysis of Sanders' layoff claims**

Sanders contends his layoff was arbitrary and capricious for the following reasons: substantially the same position from which he was laid off was unlawfully re-created in a different agency; he became the *de facto* CSA Safety Administrator because he was transferred into that position; he was the best-qualified candidate for the CSA Administrator position; the Agency's abolishment of Sanders' position violated an executive order which requires each agency to maintain a safety representative; the Career Service Rules entitled Sanders to "bump" to the new position; and Sanders' layoff by the Agency was arbitrary and capricious under Lawley v. Department of Higher Education. I analyze each claim in turn.

1. Substantially similar positions. Sanders is correct in his assessment that an agency may not abolish an employee's position and lay him off under the guise of reorganization while transferring his functions to a different agency if the qualifications for and duties of the positions are substantially similar. In re Hamilton, CSA 100-09, 107-09, p.19 (9/17/10), *citing Bardsley v. Colorado Dept. of Public Safety*, 870 P.2d 641 (Colo. App. 1994)(add'l cites omitted). Some key elements in determining whether the positions are substantially similar are whether there was a fundamental change to the Agency's structure, positions or functions. The Agency's wholesale elimination of payroll and safety functions, along with the 12 positions that comprised those departments, were undeniably substantial, since the Agency's structure, positions and functions were all significantly affected.

In addition to the evidence pointing to significant change in the Agency's structure, there is ample evidence that the positions of Safety Supervisor and Safety Administrator are substantially different. The Administrator position is entirely administrative, entailing no supervision, while the Supervisor position was supervisory;<sup>3</sup> the Administrator focuses on city-wide safety planning, while the realm of Sanders' position was limited to safety matters within one agency only; the Administrator is a limited position with a fixed end-date, while Sanders' position was full-time; the Administrator conducts accident review committee meetings, something Sanders did not undertake as a Supervisor at the Agency [Sanders' cross-exam]; strategic planning, a core function of the Administrator position, was not part of Sanders' duties; and finally, the positions occupied different pay grades. [Compare ## C&D, Appellant cross-exam; Patterson cross-exam. Together, these differences are substantial.<sup>4</sup>

When given an opportunity to rebut the Agency's evidence, Sanders replied only in conclusory fashion that the positions are "virtually identical." [Appellant's written Closing Argument, filed June 7, 2010]. Sanders cited In re Hurdelbrink, CSA 109-04, 119-04 (1/5/05) as precedent to reverse the Agency's layoff here. In Hurdelbrink, I said, in dicta

*...the rules appear to allow an agency to circumvent its obligation to terminate employees for cause, Charter sec. 9.1.1B, simply by abolishing the position in the appropriation account occupied by the employee, and creating the equivalent position in another appropriation account. In that fashion, the hiring authority may terminate any employee without due process as is required under the Career Service Rules. Accordingly, an*

<sup>3</sup> While Sanders had no one to supervise during the last year of his employment, that is a separate matter from the duties of the position. Given the lack of supervisory duties, the position was ripe for reallocation pursuant to CSR 7-33. However, since the Agency was already in transition at that point, reallocation would have been impractical in light of the impending abolishment of Sanders' position.

<sup>4</sup> Contrast In re Hamilton, CSA 100-09, 107-09 (9/17/10), where the parties agreed the duties and level of responsibility of the abolished and newly-created positions were identical. In contrast, in the present case, the Agency proved there were substantial differences between the Agency and CSA safety positions. In particular, the CSA Administrator manages the functions of the position, while at least 50% of the responsibility of the Agency's Supervisor position was to supervise performance of other employees. [Brown testimony, citing Exhibits D, C.; Patterson testimony]. Thus, in Hamilton, the positions in question were substantially similar while, here, the positions are substantially dissimilar.

*appeal in which an Appellant claimed wrongful termination by use of the layoff process, as opposed to a claim of failing to follow the layoff rules, would be closely examined.*

Hurdelbrink, p.12.

My concern in Hurdelbrink was the Career Service Rules might justify the abolishment of a position in one appropriation account, while allowing substantially the same position to be re-created in another appropriation account. At first blush, this word of caution seems applicable to present case. A position was abolished in one appropriation account, the only incumbent was laid off and another, similar position was created in another appropriation account and filled with a different employee. What distinguishes this case is the Supervisor and Administrator positions are substantially different from each other, whereas, the cautionary note in Hurdelbrink was intended to apply to the re-creation of an identical or nearly-identical position compared with the abolished position. Thus, Hurdelbrink is reconcilable with the current case, and does not mandate a finding of arbitrariness or capriciousness here.

2. De facto transfer. Sanders also argued, apparently in the alternative, that he became the *de facto* CSA Safety Administrator. He bases this claim on the transfer of his supervision to a CSA employee, Suzanne Iverson, during the last few months of his employment. First, Sanders provided no rule, law or precedent for his claim. Second, even though the Agency acknowledged Sanders was supervised by CSA employee Iverson at the end of his tenure, the transfer of supervision was simply a temporary accommodation for which the Agency reimbursed the CSA. [Exhibit 27]. Third, the accommodation was temporary only because the Agency's HR department, designated to supervise the functions of the Agency's Safety department, was abolished, leaving no one to supervise Sanders. Fourth, and most compellingly, Sanders remained on the Agency's payroll, not that of the CSA, and Patterson remained his appointing authority. [Patterson testimony]. Finally, Sanders conceded his duties remained the same and did not convert to those of an administrator. [Sanders' cross-exam]. For these reasons, Sanders never transferred to the CSA.

3. Best qualified. Next, Sanders claimed he was better qualified for the Administrator position because he had some prior administrative experience with the City. I agree with the Agency that, even if Sanders had the experience and qualifications to perform the duties of the Administrator position, his experience and qualifications do not automatically make him the best qualified candidate. If the CSA had chosen Stewart over Sanders based entirely on some subjective determination, serious questions would arise about whether the Agency's selection was, if not arbitrary, at least capricious. See, e.g. Hamilton, *supra*. However, Stewart scored much higher than any other candidate in a blind-scored exam and his qualifications were especially well suited to the needs of the CSA Administrator position. For example, he had performed administrative functions for the City for 13 years in his previous employment, and he had significant OSHA compliance experience, both qualities sought by the CSA for the Administrator position. These objective factors lend significant weight to the

fairness of the process, and Sanders did not question the validity of the exam or Stewart's qualifications.

4. Safety representative required. Sanders' next claim was the Agency failed to comply with Executive Order 65 (E.O. 65), section 5.4, which states "each department and agency shall have a Safety Professional or Safety Representative." Sanders' claimed a City-wide Administrator cannot fulfill the "each department and agency" requirement. The Agency replied that Stewart's position fulfills the E.O. 65 requirement because an Agency may designate an employee or alternate in accordance with section 5.4, which it did by designating Stewart. Sanders' provided no legal justification for his interpretation that E.O. 65 requires an agency's safety representative to be on the Agency's payroll.

5. Bumping rights. In addition to the forgoing claims, Sanders alleged he was entitled to bump down to the position occupied by Stewart. The layoff rules make it evident that bumping rights apply only within the portion of the agency targeted for layoff. CSR 14-45 B.1. In Sanders' case, he was the only employee within his layoff unit, so there was no position into which he could bump. I decline Sanders' invitation to expand the scope of CSR 14-45 to include bumping across agencies, since such an interpretation runs counter to the express language of the rule.<sup>5</sup>

6. Lawley v. Department of Higher Education. Sanders cited this case for the proposition that the Agency's layoff of Sanders must not be arbitrary, capricious, or contrary to rule or law. The Court in Lawley stated this standard is met by proof the agency (1) failed to use reasonable diligence to determine facts necessary to its decision, (2) failed to give proper consideration to facts relevant to the decision, or (3) bases its action on conclusions that reasonable persons considering the facts would not reach (also known as an abuse of discretion). Lawley v. Department of Higher Education, 36 P. 3 1239, 1252 (Colo. 2001).

a. Reasonable diligence. Given the Agency's compelling economic and structural problems, which Sanders acknowledged were legitimate concerns, the Agency used reasonable diligence in determining the necessity of abolishing not only Sanders' position but 11 others as well. For example, rather than undertaking only an internal analysis of cost-saving measures, it commissioned a study by the CSA to assist in determining alternatives and efficiencies. That the Agency decided to abolish non-core functions was a reasonable solution, given the options available.

b. Relevant facts. The Agency was obligated to reduce its 2010 budget by \$1.8 million. It received objective information on the cost savings of eliminating 12 positions including that occupied by Sanders. Those 12 positions were non-core functions of the Agency. At the same time, the CSA agreed to subsume

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<sup>5</sup> See CSR definitions of lay-off unit and appropriation, CSR 1.

the Agency's safety functions into a limited position, the principal purpose of which was to make recommendations for City-wide safety needs, [Patterson testimony; Stewart testimony], a function outside the duties of Sanders' position.

c. Abuse of discretion. The Agency's consideration of the relevant facts, above, and its decision to eliminate non-core functions both for structural and economic reasons was reasonable, and therefore not an abuse of discretion. CSA's decision to hire a candidate based upon objective criteria, including his test score, education, and experience, were also not an abuse of discretion. Any doubt remaining in the Agency's motives, absent an abuse of discretion, must be resolved in favor of the Agency. Lawley.

#### **D. Analysis of Sanders' retaliation claim**

In the context of this case, a retaliation claim is established by showing the layoff might well have dissuaded a reasonable worker from filing a grievance of his PEPR rating. See Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405 (U.S. 2006). The Supreme Court referred to this objective standard as one of "material adversity." *Id.*

The material adversity test necessarily infers causation, which, here, means the Agency engaged in some retaliatory act in response to the protected (grievance) act. [See 45A Am. Jur. 2d Job Discrimination § 240 2010); Chapin v. Fort-Rohr Motors, Inc., Nos. 09-1347, 09-2177 (7th Cir. Sept. 03, 2010). To find otherwise would defeat finding an "adverse treatment that is based on a retaliatory motive..." Burlington Northern p. 2413.<sup>6</sup> Thus, Sanders must show the Agency knew Sanders had filed, or was about to file, his grievance, when it laid him off.

As noted in the findings, above, the Agency's assessment of its safety and HR functions concluded at the end of 2008, and the Agency began discussing layoff plans with the CSA by early 2009. the Agency presented its layoff plan to its employees, including the Appellant, at latest, on February 11, 2009, [Exhibit E], but Sanders did not file his grievance until February 20, 2009. Sanders' failure to show the Agency's layoff decision followed his grievance constitutes a failure to establish material adversity. Consequently, Sanders failed his burden to establish retaliation was a substantial or motivating factor in the Agency's layoff.

Other evidence also signified an absence of retaliatory motive. First, Patterson agreed Appellant's "needs improvement" rating by his previous supervisor was unsustainable, and ordered it changed, albeit after Sanders filed an appeal. Nonetheless, Patterson's willingness to correct Sanders' PEPR is

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<sup>6</sup> The Agency's layoff of Sanders would certainly qualify for designation as an "adverse employment action" under the prior retaliation test. Thus, while not an issue in the present case, it is worth noting the Court's expansion of the kinds of actions taken by an agency described as "materially adverse" are no longer limited to those agency actions which negatively affect the employee's pay, benefits or employment status, but now include any agency act which would cause a hypothetical reasonably employee to pause before engaging in the action which gave rise to the agency's response, whether or not the agency response took place within the scope of employment. Burlington Northern, *supra*.

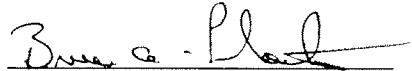
incompatible with retaliatory intent. Also, Patterson could have initiated Sanders' layoff 30 days after the Agency's initial layoff notice to its employees in February, but Patterson delayed Sanders' layoff for several months in order to follow up on Sanders' concerns and to give Sanders an opportunity to seek other training and employment. [Patterson cross-exam].

For reasons stated above, Sanders failed to establish, by a preponderance of the evidence, that his layoff was arbitrary, capricious, and contrary to rule or law, or that his layoff was motivated by retaliatory intent. He also failed to prove entitlement to the CSA Safety Administrator position. Consequently the Agency's layoff, and the CSA's selection for the Administrator position, must be sustained.

#### **IV. ORDER**

The Agency's decision to lay off Appellant Sanders on September 19, 2009, is **AFFIRMED.**

DONE September 24, 2010.



Bruce A. Plotkin  
Career Service Hearing Officer