

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

Appeal No. 101-04

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

ELIZABETH ABEYTA, Appellant,

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

This matter comes on for decision on the Agency's Motion for Leave to File a Second Motion to Dismiss and its tendered Second Motion to Dismiss. Appellant has not filed a response to either motion. Upon full consideration of the motions, exhibits, the affidavit and attachments supporting the Second Motion to Dismiss, and the pleadings and discovery filed herein, it is found and ordered as follows:

NATURE OF APPEAL

This is an appeal by Appellant Elizabeth Abeyta based upon her June 11, 2004 demotion from the position of Education Program Assistant into an Administrative Support Assistant (ASA) III position for the Department of Human Services. Appellant's position was eliminated as a result of a departmental lay-off during which thirty-one positions were abolished in her division. Appellant was offered and accepted a demotional appointment to the ASA III position pursuant to Career Service Rule (CSR) § 14-45. This timely appeal followed.

JURISDICTION

The Career Service Rules provide that an employee may appeal "any action of an appointing authority resulting in . . . layoff . . . which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules." C.S.R. § 19-10(b); see also C.S.R. § 14-49.

The Agency moves for dismissal based upon the Appellant's asserted failure to state an actionable basis for appeal. The Agency supports that argument by the affidavit of Tamara Tyler, the Agency's Senior Agency Personnel Analyst for the Human Resources Division. The affidavit states that Appellant's job title of Merit System Eligibility Clerk was changed to ASA III when she was transferred from the Merit System into the Career Service Authority (CSA). Ms. Tyler attached to her affidavit a Job Data printout showing Appellant's job title under the Merit System, and a list of job title equivalencies at the time of the department's transfer into the CSA. [Second Motion to

Dismiss, affidavit of Tamara Tyler, and Attachments I and II.] The latter is contemporaneous evidence that Appellant remained in the same occupational group, "C", but that her job title changed to ASA III. [Attachment II.]

The Agency mailed Appellant a copy of the Second Motion to Dismiss on November 17, 2004. Appellant was granted until November 29th to file a response to the motion. [Order dated Nov. 17, 2004.] On Nov. 29th, Appellant submitted a letter which completed her responses to the Agency's discovery requests pursuant to the same order. [Appellant's supplemental discovery response dated Nov. 29, 2004.] Appellant did not file a response to the Second Motion to Dismiss.

In her discovery response filed on November 29, 2004, Appellant claimed that under the first clause of subparagraph (b) she is entitled to a position of similar status to the one she held before lay-off, such as program case manager or ASA IV. [Appellant's supplemental discovery response, ¶ 14.] Appellant also argues that she should have been offered a position as an ASA IV because she had previously performed the job of Eligibility Clerk, also known as Eligibility Technician IV, under the Merit System. Thus, she argues, both clauses of subparagraph (b) require that she be granted a higher level demotional appointment. C.S.R. § 14-45(b)(1)(b); Appellant's supplemental discovery response, ¶ 11.

ANALYSIS

The Agency's Motion to Dismiss has submitted matters beyond the pleadings. The motion will therefore be treated as one for summary judgment under C.R.C.P. 56. C.R.C.P. 12(c). I have reviewed the entire record in order to determine whether, when viewed in the light most favorable to the Appellant, there exists a genuine issue of material fact for hearing. C.R.C.P. 56.

The record reveals that Appellant's challenge to her demotion arises solely under CSR § 14-45(b)(1)(b) governing the conditions for a demotional appointment. That provision states as follows:

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

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

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

(c) The employee's total length of service as defined in Subsection 14-43 Length of service must be greater than that of at least one (1) of the incumbents in the class; or there must be a vacancy in the class.

The Appellant first claims she should have been appointed to a position "in a similar status to the one I held (614A), such as program case manager, which is in the same series (administrative vs. clerical)," or to an ASA IV position. [Appellant's supplemental discovery response, ¶ 14.]

The first clause of C.S.R. § 14-45(b)(1)(b) provides for a demotional appointment to a position below the present class of job in the same class series as the currently-held position. "Class series" is defined in the Career Service Rules as "[t]he arrangement in sequence of classes that are alike in the kind but not in level." CSR Rule 1. Exhibit 3 lists the job titles affected by the layoff by class series from A to K. The exhibit shows that Appellant's pre-layoff position, Education Program Assistant, was in class series C immediately before the layoff. It also indicates that Program Case Manager was in class series D, and was identical in pay to Appellant's pre-layoff job. The other position requested by Appellant, ASA IV, was also in class series D. Appellant has not presented any contrary evidence. Therefore, it is concluded that Appellant was not entitled to a demotional appointment to either position in class series D under the first clause of subparagraph (b).

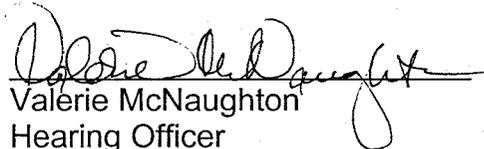
Appellant next asserts that she is entitled to a demotional appointment to an ASA IV under the second clause of subparagraph (b), since she previously held the equivalent position under the Merit System as an Eligibility Technician IV. [Appellant's supplemental discovery response, ¶ 14.] However, the Agency's contemporaneous records indicate that Appellant's job title was changed from Eligibility Clerk to ASA III. [Agency's Second Motion to Dismiss, affidavit of Tamara Tyler, Attachment II.] After her layoff, Appellant received a demotional appointment to an ASA III position on the basis that she had previously held that position. Appellant has not submitted any information disputing the accuracy of the affidavit or its attachments. It is concluded that there is no genuine issue of material fact as to this issue. Thus, Appellant is not entitled to a demotional appointment to the position of ASA IV under the second clause of CSR § 14-45(b)(1)(b). Since all three conditions listed under CSR § 14-45(b)(1) must be met, Appellant's failure to meet either of the criteria set forth in subparagraph (b) defeats her claim for such an appointment.

Viewed in the light most favorable to Appellant, it is clear that the undisputed facts do not support a finding that the lay-off violated the Career Service Personnel Rules, City Charter or Ordinances. Thus, appeal jurisdiction under C.S.R. § 19-10(b) is absent, and the Agency is entitled to a judgment of dismissal as a matter of law.

ORDER

The Motion for Leave to File a Second Motion to Dismiss is GRANTED for good cause shown, including the delay in Appellant's complete responses to discovery. The Motion to Dismiss is GRANTED.

Dated this 14th day of
December, 2004.


Valerie McNaughton
Hearing Officer
Career Service Board

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a true and correct copy of the foregoing **ORDER** by regular mail on this 14th day of December, 2004, addressed to:

Elizabeth Abeyta
4755 W. Stanford Ave.
Denver CO 80236

Niels Loechell
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1200 Federal Blvd.
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