

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

Appeal No. 170-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MERIDETH ANN BOSSERT, Appellant,

Agency: DENVER DEPARTMENT OF HUMAN SERVICES, and
THE CITY AND COUNTY OF DENVER, a municipal corporation.

A hearing in this matter was held on February 12, 2004 by Hearing Officer Joanna Lee Kaye in the Career Service Hearings Office. Assistant City Attorney Niels Loechell represented the Denver Department of Human Services (Agency). Merideth Ann Bossert (Appellant) was present and represented herself. At the close of the proceedings, the parties agreed to file written Closing Statements by March 2, 2004. Both parties filed written Closing Statements on that date.

MATTER APPEALED

Appellant alleges that the Agency changed the intended date of her retirement, rendering it involuntary and negatively impacting her pay and benefits as provided under the City's Deferred Retirement Option Plan (DROP).

For the reasons set forth below, the Agency's action is **REVERSED** and **REMANDED**.

PRELIMINARY MATTERS

1. The Agency's Motion to Dismiss is denied.

On January 6, 2004 the Agency filed a Motion to Dismiss. Appellant filed a written response to the Agency's Motion on January 16, 2004. Prior to the hearing on the merits on February 12, 2004 the Hearing Officer denied the Agency's Motion to Dismiss, and now memorializes that ruling as follows.

A judgment of dismissal for failure to state a claim must specifically find that no genuine material issue of fact remains unresolved. See, Shaw v. City of Colorado Springs, 683 P.2d 385 (Colo. App. 1984). For the following reasons, the Hearing Officer finds that Appellant raised genuine issues of material fact that remained in dispute prior to the commencement of the hearing:

a. Appellant alleged a CSR violation sufficiently to establish jurisdiction.

In its Motion to Dismiss, the Agency asserted that Appellant expressed the intent to "stop working on October 17, 2003" in her retirement letter (Exhibit A), and that this was therefore her voluntary date of retirement. The Agency posited that Appellant was paid accordingly, and that she therefore failed to allege a specific CSR violation.

Appellant responded that the Agency misconstrued her wishes as they were represented in the retirement letter. She asserted that her intent was to stop working on October 17, 2003 in order to utilize her accrued vacation time before actually retiring as her retirement letter (Exhibit A) indicated.

The Hearing Officer concluded a material issue remained in dispute as to whether the Agency misinterpreted Appellant's retirement letter. Appellant's allegations articulated a violation of CSR 19-10 b) sufficiently to establish jurisdiction. The Hearing Officer therefore concluded the Agency's argument that Appellant did not articulate a CSR violation must fail.

b. Appellant's retirement did not cause her to lose her appeal rights.

The Agency next argued in its Motion to Dismiss that by voluntarily retiring, Appellant waived her appeal rights. While typically this is true, it is not true when the retirement date itself is called to question as it was in this appeal. Upon learning of the Agency's decision to designate October 17, 2003 as her official retirement date, Appellant timely filed her appeal, alleging this date was involuntary in violation of CSR 19-10 b). Once appealed, such an action is not considered final until the Hearing Officer renders a decision on the ultimate issue. Thus, the Hearing Officer concluded the Agency's argument that it is entitled to a dismissal because Appellant waived her appeal rights by "voluntarily" retiring must also fail.

c. The Agency's argument that Appellant's requested remedies violate Executive Order 78 depends on a determination of the issue on appeal.

Executive Order 78 states in relevant part:

- I. The last day of employment shall be the date of the employee's voluntary retirement or resignation...
- II. Each employee separating from employment with the City and County of Denver for any reason shall be paid accrued benefits and salaries according to established Career Service Authority...rules...

CSR 11-39A in turn states in relevant part:

- B. While participating in the DROP and for any period of continuous City employment following the end of the DROP, the employee shall continue to accrue sick leave hours in the same manner as a regular employee. During the DROP period, any accumulated sick leave may be converted into vacation leave if used immediately upon conversion. The employee shall

begin the new accrual in the DROP program with a zero balance in the sick leave bank.

- C. Upon final separation from City employment due to retirement or death, the employee who is participating or has participated in DROP shall be paid for one-half of any accrued, but unused sick leave hours that accumulated after the employee's retirement without separation from employment...¹

Appellant was a participant of the DROP program at the time of her retirement. She asserted that the Agency prematurely designated her retirement date before allowing her to convert and use her sick leave. She argues that she had already worked several hours when she discovered the Agency had previously processed her retirement, and was then compelled to work additional hours under the Agency's threat of a poor recommendation, despite its refusal to compensate her because she was officially retired.

In its Motion to Dismiss, the Agency argued that since Appellant voluntarily retired and had been paid accordingly, she is barred by Executive Order 78 and the CSR rules from seeking any further remedy. Again, the Agency's argument rested on the ultimate question of whether or not Appellant's retirement was voluntary. The Hearing Officer observed since Appellant's appeal stayed the finality of her retirement, the applicability of Executive Order 78 remained yet to be determined.

For the above reasons, the Hearing Officer denied the Agency's Motion to Dismiss, and the case proceeded to a hearing on the merits.

2. Appellant bears the burden of proof in her challenge of a non-disciplinary, administrative action.

The processing of an employee's retirement letter is an administrative action not specific to an employee's conduct or performance. There is a presumption of "validity and regularity" in administrative actions. See, Velasquez v. Dept. of Higher Education, ___ P. 3d ___, WL 22097754 (Colo. App. 2003); Garner v. Colo. State Dept. of Personnel, 835 P.2d 527 (Colo. App. 1992). The "proponent of an order" is the person who brings the action in question. See, Velasquez, above. The proponent of a challenge to an administrative action (Appellant in this case) therefore bears the burden to prove the administrative action was *not* valid or regular. Garner, above; see also, Dept. of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The proponent must prove by a preponderance of the evidence that the Agency's action was arbitrary or capricious, and/or contrary to rule or law.² See, Renteria v. Colo. State Dept. of Personnel, 811 P.2d 797 (Colo. 1991.)

¹ "Retirement without separation from employment" refers to the period of employment after an employee enters the DROP program.

² A "preponderance of evidence" means that a party must demonstrate the assertions it makes in support of its claims are more likely true than not.

In Lawley v. Dept. of Higher Education, 36 P.3d 1239 (Colo. 2001), the Colorado Supreme Court specifically restated that the arbitrary or capricious exercise of discretion by an administrative agency can arise in only three ways:

"(a) By neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it. (b) By failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion. (c) By exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable [persons] fairly and honestly considering the evidence must reach contrary conclusions."

Lawley, above at 1252, quoting Van DeVeight v. Board of County Comm'rs, 98 Colo. 161, 55 P.2d 703 (1936).

The burden of proof is on Appellant to show by a preponderance of the evidence that the Agency's decision to process her retirement as effective on October 17, 2004 was arbitrary or capricious in one of the three ways set forth above in Lawley, or that it was contrary to rule or law.

ISSUES

1. Whether Appellant has shown the Agency's action in processing her retirement as effective on October 17, 2003 was arbitrary, capricious or contrary to rule or law.
2. If so, what if any remedies are available to Appellant.

FINDINGS OF FACT

Based on the evidence presented at the hearing, the Hearing Officer finds the following to be fact:

1. Appellant was a social worker for the Agency since 1970. She worked in a variety of programs in the general area of Child Welfare Services. Appellant was a half-time employee since 1976. She was eligible to accrue leave at half the rate of a full-time employee of her tenure. At the time of her retirement, Appellant accrued seven hours annual leave and four hours sick leave per month.
2. "Deferred Retirement Option Plan" (DROP) is an optional retirement plan available to City employees as an alternative to the standard retirement plan, Denver Employee Retirement Plan (DERP). Both plans are administered by the same agency, the Denver Retirement Board. Upon entry into the DROP program, the employee's maximum retirement benefit is deferred to a separate DROP account, to which subsequent retirement contributions are made. The employee is paid for unused annual and sick leave, and begins accruing annual and sick leave thereafter at the same rate as before entering the DROP program. The employee continues to work and receive the regular salary. Once under the DROP plan, an employee may

convert and use the full amount of accrued sick leave as vacation leave, if the employee uses it upon conversation while still employed. However, if the employee has not converted and used the sick leave as vacation time at the time of retirement, the employee is paid only half the value of unused sick leave hours and the other half is lost. (See, CSR 11-39A, above.)

3. Appellant opted out of the City's retirement system and entered the DROP program on October 1, 2002. She was paid for her sick and annual leave balances at that time. As a half-time employee, she again began accruing 7 hours annual leave and 4 hours sick leave per month.
4. Employees, including those under the DROP plan, are typically permitted to use all their accrued leave on an extended vacation prior to retiring. They are expected to work with their direct supervisors in arranging for pre-retirement leave use, and are ultimately expected to coordinate with the Agency's Human Resources Department to finalize their retirement arrangements.
5. In September of 2003, Appellant decided to retire sometime in December after using her accrued leave on an extended vacation. She notified the Denver Retirement Board of these plans.
6. As a social worker whose cases primarily involved special needs children, Appellant had many complex cases needing concise transfer summaries to familiarize newly assigned workers with the immediate needs of the children. Appellant had received cases with very poor transfer summaries in the past and was determined not to make the same mistake in transferring her own cases before retiring. She planned to complete thorough transfer summaries for each case before officially retiring.
7. As of September 29, 2003 Appellant knew she had accrued 48 hours of sick leave, but was uncertain whether she had 74 or 79 hours of annual leave due to a five-hour accounting discrepancy.
8. Appellant consulted with her supervisor, Twilla Stiggers (Stiggers) on September 29, 2003 concerning her plan to utilize her accrued leave time for an extended vacation, and then retire. Stiggers agreed with this plan. No specific retirement date was established because of the accounting error.
9. Based on their agreement, Appellant drafted and submitted a letter of retirement to Stiggers on September 29, 2003. The letter states as follows in relevant part:

I wish to retire from my employment with Denver Human Services. I would like to stop working on October 17, 2003. ***In order to maximize my DROP payments and my deferred compensation, I request permission to take an extended vacation of about 7 weeks from October 17 until approximately December 5, 2003.***

As a half-time worker, I am paid to work 20 hours per week. As of October 1, I have 74-79 hours of annual leave (there is a discrepancy that needs to

be resolved). As a member of DROP, I am entitled to convert sick leave to annual leave on a one-for-one basis and then use it immediately. Thus, in mid November I wish to convert my 48 hours of sick leave to annual leave and continue on vacation until that leave runs out in December. (Exhibit A; emphasis added.)

10. Upon receipt of Appellant's retirement letter (Exhibit A), Stiggers signed the bottom of the letter, stating: "Merideth, I accept your notice of retirement." By this signature, Stiggers intended to accept the entire plan she and Appellant had discussed, including Appellant's use of her vacation time prior to officially retiring in December of 2003. Both women understood at that time that Appellant would complete transfer summaries in all her cases before retiring.
11. Stiggers immediately gave a copy of Appellant's retirement letter (Exhibit A) to her supervisor, Ongoing Child Protection Manager Janice McIntosh (McIntosh), and Senior Agency Personnel Analyst Julie Maers (Maers) in Human Resources. Both women independently reviewed the letter.
12. McIntosh is not an expert in retirement matters. She made no technical distinction between the official date of termination and Appellant's last day of work when she read the letter.
13. Maers' understanding of the letter was that Appellant intended to retire on October 17, 2003, and that Stiggers accepted Appellant's retirement date as October 17, 2003 by signing the bottom of the letter. Maers proceeded to handle Appellant's retirement based on those assumptions. She forwarded Appellant's case to personnel technician Tracy Bueno (Bueno), and payroll technician Doreen Romero (Romero), for processing.
14. Romero recalls leaving a message on Appellant's phone machine sometime in early October stating that Appellant's request in her retirement letter as Romero understood it was not permitted under the CSR rules. Appellant never received this message or responded to it. Romero proceeded to process Appellant's retirement letter.
15. On October 2 and 3, 2003, Stiggers called Maers and left messages seeking guidance on what if any arrangements were necessary for Appellant's use of her accrued leave. As of Thursday, October 9, 2003 Maers had not called Stiggers back. Stiggers became concerned and contacted an employee Human Resources, who advised Stiggers to keep trying to contact Maers and discuss the matter with her.
16. On Friday, October 10, 2003 Stiggers ran into Maers in the hallway and told her she was concerned about Appellant's situation because the date of October 17, 2003 was approaching. Maers told Stiggers she needed to talk with Bueno, who was the individual responsible for arranging exit interviews.

17. Stiggers exchanged several phone messages with Bueno between October 10 and 17, 2003. Stiggers did not make contact with Bueno until the early morning of October 17, when they spoke on the phone. Stiggers asked Bueno about Appellant finishing her work. Bueno told Stiggers the Agency had already accepted October 17, 2003 as Appellant's retirement date, and that Bueno would conduct an exit interview with Appellant. Bueno asked Stiggers to have Appellant contact her and Maers as soon as possible to do the exit interview.
18. Appellant came to work on Friday, October 17 still under the impression that she would soon be on vacation. However, she had a large number of transfer summaries remaining and intended to finish the work before her eventual retirement.
19. Stiggers went to Appellant's office after her conversation with Bueno that morning and told Appellant to contact Bueno and Maers as soon as possible to arrange an exit interview. Stiggers has virtually no experience in processing retirement benefits and did not understand the significance of Bueno's comment about Appellant's retirement date. She did not tell Appellant about this comment on the morning of October 17, 2003.
20. Appellant called Bueno and Maers before 9:00 a.m. on October 17, 2003 and left messages stating she would be available on Monday, October 20, 2003 for an exit interview if they would call her back with a time.
21. At the end of the working day on October 17, 2003, Appellant still had a large amount of work remaining, and still had received no return calls from Bueno or Maers. She called them both back and left messages stating that since she had not heard from them, she was rescinding the offer to arrange an exit interview on Monday, October 20, 2003.
22. Before leaving work the night of October 17, 2003 Appellant also left a voicemail message with Stiggers, stating that she could come in and finish her remaining work as soon as Stiggers let her know what had been worked out with Human Resources concerning her vacation leave. Appellant then left leave requests on Stiggers' desk for four hours personal paid leave on October 20, 2003, and for annual leave from October 21 through 31, 2003. Appellant assumed she would have to come back in every two weeks and turn in new leave slips.
23. Appellant came to work on Saturday, October 18, and worked 6 hours that day. She still had transfer summaries to complete after working that day. She worked periodically from home during the following week, primarily contacting families to prepare them for the transfer of their cases.
24. Bueno recalls trying to reach Appellant several times unsuccessfully during the week of October 13, 2003, and then having a telephone conversation with Appellant on October 20 during which she explained that Appellant could not use vacation time after her official retirement date. Appellant has no recollection of this call.

25. Stiggers did not realize the Agency had accepted October 17, 2003 as Appellant's official date of termination until Tuesday October 22, 2003 when she received an e-mail from Human Resources. Prior to that, Stiggers thought the retirement letter (Exhibit A) clearly relayed Appellant's intent to use her vacation leave before officially retiring.
26. After Stiggers received the e-mail on October 22, 2003 she did not immediately tell Appellant. Instead, she went to McIntosh and informed her of the apparent problem. During this discussion, McIntosh understood the main concern to be that Appellant's work was not done and she needed to come in and finish it. McIntosh advised Stiggers that she and Appellant needed to consult with Human Resources because McIntosh was not sure what would be allowed or not allowed.
27. McIntosh contacted Human Resources and spoke to Maers about Appellant's unfinished work. Maers told McIntosh the Agency could have some flexibility in allowing Appellant to finish her work after the official retirement date if Stiggers agreed to help accommodate this request.
28. Appellant received a voice mail from Stiggers on October 22, relaying that Bueno told Stiggers to get Appellant to turn in her personal items. Stiggers did not mention the October 17, 2003 retirement date in this message. Appellant sent a return voicemail message stating she would do this as soon as possible, but she needed the items to do her work.
29. On October 23, 2003, Appellant had not heard back from Stiggers about arrangements to finish her work. Appellant left numerous voice mail messages for Stiggers asking what she had worked out with Human Resources.
30. Appellant and Stiggers spoke by telephone on the morning of October 24, 2003. Stiggers indicated a problem with Appellant's request to use her accrued leave, but declined to discuss the issue of leave use, directing Appellant to talk with McIntosh.
31. After speaking with Stiggers on the morning of October 24, 2003 Appellant called McIntosh and asked what the problem was with using her accrued leave. McIntosh did not know the answer to this question. She contacted Maers and they spoke. Maers told McIntosh that Appellant's retirement letter (Exhibit A) said the last day of work would be October 17, 2003, that the auditor's office had already processed that date as the official date of retirement, and that Appellant could not use leave after her official retirement date under the CSR rules.
32. McIntosh called Appellant back at 3:30 p.m. on October 24, 2003 and relayed the following things. Appellant's termination date was October 17, 2003. The letter was at the auditor's office and had already been processed. Appellant's termination date could not be changed. There is a CSR rule that prohibits use of sick and annual leave to extend a retirement date. Appellant would receive payment for all her vacation leave and half of her sick leave.

33. This information took Appellant completely by surprise. She asked McIntosh if she could exercise her right under the DROP plan to convert her sick leave to vacation leave on a one-for-one-hour basis. McIntosh told her she could not. Appellant observed that Stiggers' signature was not being considered as an acceptance of the entire retirement letter (Exhibit A), and McIntosh confirmed this was the case.
34. Appellant and McIntosh then discussed Appellant's unfinished work. McIntosh asked Appellant if she could finish her work prior to her exit interview. McIntosh recalls telling Appellant that typically professionals are expected to tie up loose ends before leaving, and the Agency would probably not give Appellant a positive recommendation in the future if there was unfinished work left behind. Appellant asked McIntosh whether she would be compensated for this time and McIntosh responded that Appellant would not be compensated since she had already retired. McIntosh then told Appellant her exit interview was scheduled for Monday, October 27, 2003 at 3:30 p.m. Appellant agreed to come in on October 27, finish her work, and do the exit interview.
35. Appellant did not know the Agency was using October 17, 2003 as her official retirement date until her conversation with McIntosh on October 24, 2003. She did not receive any guidance from her supervisors or Human Resources before that call. She immediately called the Denver Retirement Board to tell them October 17, 2003 had been determined to be her official retirement date, not December of 2003 as she originally told them. The individual she spoke with expressed alarm and told Appellant it was urgent to get all her paperwork processed by October 31, 2003.
36. Appellant arrived at 11:30 a.m. on October 27, 2003 and worked until 3:30. She then went to Human Resources for her exit interview. While she waited for her interview, Appellant visited Bueno to turn in her work items. Senior Agency Personnel Analyst Paul Sienkiewicz was in Bueno's office. Bueno told Appellant her retirement letter was "really confusing." Appellant explained her intent to use her vacation leave before retiring to Bueno and Sienkiewicz. They told Appellant that an employee must always work the last day of employment prior to officially retiring. Therefore, if the letter had said she wanted to *retire* on a certain date in December of 2003, and would like to be on annual leave from October 17 until the day before the retirement date, Appellant's request would have been accommodated.
37. Maers remained busy with another employee. At 4:20 p.m. Appellant submitted an exit letter to Sienkiewicz and returned to her office. The exit interview never occurred. Stiggers then asked Appellant to complete a report related to the transfer of Appellant's cases. Appellant agreed, and worked until 8:30 p.m. finishing the report. She then stayed until 10:30 p.m. to clean out her desk and retrieve her personal items.
38. Sienkiewicz holds a position of the same classification as Maers (Senior Agency Personnel Analyst). Sienkiewicz read Appellant's letter and found it ambiguous because Appellant stated she wished to stop working on October 17, 2003 but the letter was not clear in terms of what the retirement date was. If Sienkiewicz had been the analyst who received the letter, he felt it would have been incumbent upon

him to seek clarification of the employee's intent before forwarding it through the administrative channels responsible for processing retirements.

39. Appellant did not fully understand why the request in her retirement letter was not followed until the discussion with Bueno and Sienkiewicz on October 27, 2003. This was the first conversation Appellant had with either Bueno or Sienkiewicz concerning the effective date of her retirement.
40. Appellant timely filed this appeal on October 31, 2003, eight days after discovering the effective date of her retirement during her conversation with McIntosh on October 24, 2003.

DISCUSSION

1. **Appellant demonstrated that the retirement date of October 17, 2003 was involuntary, and therefore contrary to the CSR rules.**

- a. ***Appellant intended to retire in December of 2003 only after using her leave.***

The Agency argues that Appellant waived all her rights to change any of the conditions of her retirement on October 17, 2003 because it was voluntary. The Hearing Officer disagrees.

In order to be "voluntary," an employee has to *intend* to retire on the date the Agency asserts the retirement took place. However, Appellant established by a preponderance of the evidence that she intended to retire not on October 17, 2003, but in December of 2003, only after first exercising her DROP benefits by using her leave for an extended vacation. (See, Findings 8 and 9, *above*.)

Contrary to the implication of the Agency's argument, nowhere in Appellant's retirement letter (see, Exhibit A; Finding 9, *above*) does Appellant state that she intended to "retire on October 17, 2003." Appellant's statement that she wished to "stop working" on that date is clearly part of her subsequent detailed request to first use the full value of her sick and annual leave time for a vacation, as permitted under the DROP plan, which Appellant also specifically referenced in the letter (see, CSR 11-39A, Subsections B and C, *above*).

The Hearing Officer concludes that Appellant intended to retire in December, only after using her accrued leave on vacation.

- b. ***Appellant did not know the Agency had processed her retirement as effective on October 17, 2003 until October 24, 2003.***

The Agency's argument that Appellant intended to retire on October 17, 2003 presumes that Appellant knew she retired on that date. However, Appellant's own actions corroborate her claim that she was ignorant of the fact that she had "retired" on that date until seven days later on October 24, 2003. (See, Findings 8, 22, 23, 28, 29, and 31 through 36, *above*.) Only after a conversation with Bueno and Sienkiewicz on

October 27, 2003, ten days after her ostensible "voluntary" retirement date, did Appellant get some explanation for the reason her request to take her vacation prior to retiring, as the DROP plan permitted, was denied. (See, Finding 36, above.)

The Agency points to the testimony of payroll clerk Doreen Romero, who testified she called Appellant in early October of 2003 after receiving Appellant's retirement letter, and explained that Appellant could not use leave after her official retirement date. Therefore, the Agency argues, Appellant knew before October 17, 2003 that this would be the date she was retiring.

The Hearing Officer finds Romero's testimony unpersuasive and somewhat lacking in credibility. Whereas Romero first testified she "talked with" Appellant in early October, she later changed her testimony to assert that she actually only "left a message" presumably on Appellant's phone. Romero ultimately admitted during her testimony that she did not actually speak in person with Appellant until October 27, 2003, the day Appellant also spoke with Bueno and Sienkiewicz.

Furthermore, there is no indication that Appellant ever actually received this message. Appellant credibly testified that she has "wracked her brain" for some recollection of any such conversation/message, but is certain that Romero must be recollecting a conversation with someone else because she recalls no such communication. The credibility of Appellant's assertion is supported by all of her actions indicating she believed she was still an employee and did not know the Agency had processed her retirement as effective on October 17, 2003 until her telephone conversation with McIntosh on the afternoon of October 24, 2003.

In light of this evidence, it is clear that Appellant did not know she had retired until well after the date in question. Therefore, the Hearing Officer concludes her retirement on that date cannot be considered "voluntary."

c. Appellant did not ratify her retirement date by failing to rescind her retirement.

The Agency further argues that Appellant's failure to "rescind" her retirement indicates she has ratified the date of October 17, 2003. The Agency asserts this renders the date voluntary. The Hearing Officer disagrees.

Appellant has never indicated she "changed her mind" about her decision to retire. It is the *date* of retirement that she calls to issue, not the act of retiring itself. This issue was created by the Agency's selective interpretation of her retirement letter. Appellant correctly challenged the Agency's interpretation by filing this appeal. There was no need to rescind the letter itself. Furthermore, Appellant can hardly be seen to "ratify" the date of her retirement when this issue is at the center of her challenge on appeal.

The Hearing Officer concludes that Appellant's retirement on October 17, 2003 was involuntary in violation of CSR 19-10 b). Therefore, the Agency's action was contrary to rule or law. See, Renteria, above.

2. Appellant has demonstrated that the Agency's action was arbitrary and capricious.

a. Appellant attempted to follow the required procedures.

It is undisputed that City employees can and do use their accrued leave for extended vacations prior to officially retiring. It is undisputed that under the DROP plan an employee can convert his or her entire sick leave bank for use as vacation leave prior to retirement, rather than retire without using the sick leave and lose half its value.

The Agency argues that while an employee is expected to arrange leave use prior to retiring with the supervisor, the employee is ultimately expected to work directly with Human Resources concerning her retirement plan. The Agency asserts that Appellant failed to do this, and therefore any misunderstanding of the intent of her letter was her responsibility.

The Hearing Officer finds this argument unpersuasive. Appellant did begin by consulting with her immediate supervisor about her retirement and vacation plans. (See, Findings 8 and 9, *above*.) While Appellant was still in the process of working out her initial vacation plans with her supervisor, Human Resources hastily processed Appellant's retirement request based on an alleged ambiguity in her retirement letter before Appellant began consulting with them concerning her eventual retirement. (See, Findings 13 through 17, *above*.) By the time Appellant discovered she was not retiring sometime in December, it was too late.

The Hearing officer concludes that Appellant attempted to follow the required procedures.

b. Appellant's failure to work with Human Resources is the direct result of the Agency's premature processing of Appellant's retirement.

The Agency argues that its interpretation of Appellant's retirement letter, and therefore its actions in reliance on that interpretation, were reasonable. The Hearing Officer disagrees.

In her letter (Exhibit A; see also, Finding 9, *above*), Appellant specifically requested permission to use her leave under the DROP rules (see, CSR 11-39A, subsection B, *above*). She further referenced exercising that right in *November* of 2003, well after the date of October 17, 2003, and expressed her wishes to use her annual leave prior to that time. Furthermore, the letter referenced exhausting all this leave in *December*. It is apparent that the only reason Appellant did not specify the exact date in December she intended to retire was because of a five-day discrepancy in her annual leave accrual, which needed to be resolved before a specific retirement date could be determined.

Despite Appellant's lengthy, detailed explanation of her wishes to utilize her accrued leave, the responsible Agency officials chose to ignore this entire portion of the letter. Instead it focused exclusively on the first two sentences: "I wish to retire from my

employment with Denver Human Services. I would like to stop working on October 17, 2003." Human Resources then processed Appellant's retirement without responding to Stiggers' calls for guidance until after the letter was processed. (See, Findings 15 and 17, *above*.) Thereafter, Human Resources and upper management told Appellant and her supervisor that what Appellant requested was prohibited since she had already "retired" and that nothing could be done to change Appellant's retirement date. (See, Findings 17, 25, and 32 through 34, *above*.)

Sienkiewicz admitted that as a Senior Personnel Analyst, he found Appellant's letter ambiguous because Appellant was not clear about what her desired retirement date was. Sienkiewicz further admitted that if he had been the Analyst in receipt of the letter, it would have been incumbent upon him to seek clarification of Appellant's intent before proceeding. If the Agency had clarified Appellant's intentions before processing her retirement, or responded to Stiggers' requests for guidance before October 17, 2003 came and passed, it would have discovered that what Appellant had actually requested was acceptable but for the Agency's erroneous interpretation of Appellant's request. It did neither of these things.

Thus, the only reason Appellant allegedly did not approach Human Resources in time was because she reasonably thought she had approximately two months to sort out the leave discrepancies, determine her specific retirement date and process all the necessary paperwork with Human Resources. This was not true only because of the Agency's failure to act in a reasonable manner.

c. The Agency failed to use reasonable diligence, failed to candidly consider the evidence before it, and acted in such a manner as to compel a contrary conclusion.

The Agency argues that it proceeded with due diligence in its attempts to communicate the problem to Appellant. It asserts that Human Resources employees Romero and Bueno did try to contact Appellant before October 17, 2003. The Hearing Officer is unpersuaded by this assertion for several reasons.

Romero's testimony only establishes that Human Resources actually identified an alleged problem with Appellant's retirement letter up front. Yet they proceeded to process that letter after leaving messages of uncertain content and fate, without assuring someone in Human Resources actually spoke with Appellant about the problem.

The Agency further points to Bueno's testimony that she allegedly called Appellant on October 20, 2003 and told her she could not use vacation time after her official retirement date. Yet Appellant credibly denies having any conversation with Bueno until the afternoon of Monday, October 27, 2003. Once again, all of Appellant's actions clearly corroborate her own assertion of ignorance about the problem until speaking with McIntosh on October 24, 2003.

In addition, even if Bueno had discussed this issue with Appellant on October 20 as Bueno asserts, this would still have been after October 17, 2003 when the retirement

had already been processed as effective and, as the Agency argues, it was too late to change the date. By the Agency's own theory of the case this alleged conversation would have made no difference.

The Hearing Officer concludes that the Agency neglected to use reasonable diligence and care to procure the evidence it needed to process Appellant's retirement request. See, Lawley, above. At best, in the face of her specific request to exercise her DROP rights, any ambiguities created by Appellant's stated wish to "stop working on October 17, 2003" should have prompted the Agency to get clarification from Appellant and her supervisor about the intent of the letter before processing it, or at least responded to Stiggers' calls for help first.

At worst, the Agency actually manufactured the alleged ambiguity in Appellant's otherwise clear intent by ignoring every part of the retirement letter except for the date of October 17, 2003, which date was clearly when Appellant wished to begin a vacation to which she was legally entitled. To interpret the letter as the Agency did deprived Appellant of the right she requested to exercise in that same letter. The Agency therefore failed to give candid and honest consideration of evidence already before it. See, Lawley, above.

The Agency's insistence on using a date inconsistent with the entire text of the letter, and its failure to seek any clarification, are unreasonable to the point that the Hearing Officer is compelled to reach a contrary conclusion. See, Lawley, above. This result is underscored by the fact that the Agency implicitly threatened Appellant with a poor reference should she not complete unfinished work, despite its refusal to pay her because its own actions compelled her retirement before she was ready.

For these reasons, the Hearing Officer concludes that the Agency's imposition of the retirement date of October 17, 2003 was arbitrary and capricious.

3. Determination of a remedy.

The Agency argues that Appellant is not entitled to any remedies because she voluntarily retired on October 17, 2003 and has already been paid accordingly. The Agency argues that any further reimbursement would be in violation of Executive Order 78 (above). However, the Hearing Officer's conclusion that Appellant did not voluntarily retire on October 17, 2003 renders that ordinance inapplicable to the period between October 17, 2003 and the date Appellant intended to retire.

The Hearing Officer has the authority to affirm, modify or reverse the Agency's action. CSR 19-27. The Hearing Officer is responsible for determining the appropriate remedy as part of her modification authority. In this case, the appropriate remedy is the re-determination of Appellant's retirement date, and reimbursement of any pay and benefits due. The processing of a retirement request is an administrative function which must be completed by the Agency's Human Resources Department. Appellant's new retirement date shall be re-determined, and Appellant reimbursed accordingly, as ordered below.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to hear this case, render a decision and order a remedy.
2. The burden of proof is on Appellant to prove the Agency's administrative action in processing her retirement as effective on October 17, 2003 was arbitrary, capricious, or contrary to rule or law.
3. Appellant has shown that the Agency's action in processing her retirement as effective on October 17, 2003 was arbitrary, capricious, and contrary to rule or law.

ORDER

Based on the Findings and Conclusions set forth above, the Agency's action is REVERSED.

This case is REMANDED to the Agency, which is ordered to MODIFY Appellant's official date of retirement in all personnel and administrative files and databases ordinarily containing such data, and reimburse Appellant based on the new retirement date.

- 1) The new retirement date shall be re-determined to include the following:
 - a. The full value of sick leave hours accumulated prior to October 17, 2003 which Appellant would have been entitled convert and to use for vacation leave, assuming the Agency acted on her request to exhaust all her leave on vacation prior to officially retiring.
 - b. The full value of any additional sick and annual leave hours Appellant would have been entitled to accrue, convert and and use for vacation leave from October 17, 2003 to the new retirement date.
 - c. One additional day to represent Appellant's final working day.
- 2) The Agency is further ORDERED to calculate and restore any such appropriate pay and benefits to Appellant based on the newly calculated retirement date that have not already been paid. The calculation of the amount of this reimbursement is specifically to include:
 - a. Four hours personal paid leave taken on October 20, 2003.
 - b. Fourteen hours of work performed, including 6 hours on October 18, 2003 and 8 hours on October 27, 2003.
 - c. The full value all annual and sick leave hours not already paid, specifically to include the value of all sick leave lost because Appellant was paid for half its value, as well as the full value of any annual and sick leave hours that Appellant would have accrued from October 17, 2003 through the new retirement date.

- d. All additional contributions to Appellant's DROP account to which Appellant is entitled based on the new retirement date, but that have not yet been made.
- e. Any additional pay and benefits not specified here to which Appellant would be entitled based on the new retirement date, but that have not yet been paid.
- f. One day's salary shall be subtracted to represent Appellant's final working day.

Appellant's new retirement date must be re-determined, and Appellant reimbursed accordingly, within the period of time ordinarily accepted under established administrative rules, procedures and guidelines for processing retirement requests and benefits, but in no event shall the Agency's execution of the order above exceed ninety (90) days after the date of this Order.

Dated this 26th day of March, 2004.


Joanna Lee Kaye
Hearing Officer
Career Service Board