

DECISION REVERSING THE AGENCY LAY-OFF OF APPELLANT

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MICHELLE LEE TENORIO, Appellant,

v.

OFFICE OF ECONOMIC DEVELOPMENT,  
and the City and County of Denver, a municipal corporation, Agency.

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I. INTRODUCTION

This case is before the Career Service Hearing Office (Office) pursuant to the Career Service Board's (Board) remand "for further proceedings to develop the record concerning the issues raised herein and for the Hearing Officer to make further findings in light of the augmented record." The issues raised by the Board included whether: (1) Appellant Michelle Lee Tenorio (Appellant) was required to apply for any newly created Manager position; (2) an analysis of the comparability of the old and new Manager positions was necessary and proper under CSRs 14-45 and 14-47; (3) Appellant should have been given a transfer appointment to any vacancy for which she was qualified within the layoff unit, pursuant to CSR 14-45A; (4) the old position from which Appellant was laid off and the newly created Manager positions resided within the same layoff unit as defined by Rule 14-42A; and (5) Appellant is entitled either to a Reinstatement Appointment, pursuant to CSR 5-[11]B, or a Re-employment Appointment, pursuant to CSR 5-[11]C.

On March 31, 2018, Hearing Officer Daniel C. Ferguson held a hearing on the issues remanded to the Office by the Board. Sean Olson, Esq. appeared on behalf of Appellant. Ashley Kelliher, Esq. and Kristen Merrick, Esq. appeared on behalf of the Office of Economic Development (Agency) and the City and County of Denver (City). Appellant's new exhibits Q, R, S, and T and the Agency's new exhibits 10 and 13 were received into evidence. After the hearing, Appellant's Exhibit A of her May 21, 2018 Response, the Agency's Exhibit 11 of its July 31, 2018 Response to Appellant's Additional Exhibit, and the Affidavits of Mariea Singleton (Exhibit U) and Appellant (Exhibit V) of her August 3, 2018 Reply were received into evidence.

II. ISSUES

These issues regard Appellant's claim that her layoff was arbitrary, capricious, or in violation of rule or law, as remanded by the Board in In re Tenorio, CSB 34-16A, 2-4 (12/21/17).

III. ADDITIONAL FINDINGS

Initially, the Hearing Officer incorporates herein by reference the findings of In re Tenorio & Delgado, CSA 34-16 & 36-16 (3/31/17). The Hearing Officer repeats the most pertinent findings and, after a review of the additional record, supplements them as described below.

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<sup>1</sup> Hearing Officer Federico C. Alvarez received the July and August 2018 additional exhibits.

Through June 30, 2016, the Agency had managed its operations consistent with the terms of the Workforce Investment Act of 1998 (WIA) and received federal funds with which it financed them. Effective July 1, 2015, the Workforce Innovation and Opportunity Act (WIOA), superseded WIA. [Exh. 3]. The regulations implementing WIOA, effective October 18, 2016, now required of it a competitive process to determine who would deliver job-seeker services to its clients, and a separation of its oversight and policy from its administration and provision of services. [Exh. 4]. Due to these regulatory changes, the Agency opted to reorganize its operations. It would maintain the oversight and policy functions for its operations in-house but outsource to the private sector the administration and provision of services, effective July 1, 2016. It then began to reorganize internally to accommodate the outsourcing of these functions, most significantly to lay-off its employees who had performed them, effective June 30, 2016. The Agency's goal remained the same, to match job seekers with private employers and it continued to receive federal funding therefor.

For its reorganization, the Agency abolished about 150 positions, including all the positions in Appellant's unit, the Wagner-Peyser Unit. It notified its employees 11 months before June 30, 2016 to expect lay-offs as it was abolishing their positions. [Agency Chief Operating Officer (COO) Amy M. Edinger testimony]. On May 17, 2016, COO Edinger notified Appellant by letter that her lay-off was effective June 30, 2016. COO Edinger did not offer Appellant any position to transfer or demote into in lieu of lay-off on the premise that all the positions in her lay-off unit had been abolished. Appellant had then been a City Career Service employee for 21 years, the last 11 years as an Agency Manager. Appellant was the most senior Manager in her unit and therefore first in line to be transferred or re-instated if the Agency had any available vacancies. The majority of employees had found other jobs in advance of their lay-offs, so the Agency ultimately laid off about 36 employees.

Through June 30, 2016, the Agency had managed its provision of services through four lay-off units, which it had created well in the past. To manage its reorganized operations, the Agency designated a new lay-off unit, WIOA. All the witnesses testified that the Agency had created this new unit and some of them testified that it had created new codes for it.

The Agency created two new Workforce Development Manager positions that were to reside in the newly-designated WIOA lay-off unit, the Managers of Operations and Systems and of Business Services, which were in the same classification as Appellant's former Manager position. The Agency required any interested employees, including Appellant, to apply competitively for them. Appellant applied only for the Operations position<sup>2</sup> and the Agency interviewed her for it. However, the Agency hired Anita Davis as its Operations Manager, effective April 2016. She had also been one its Managers before the reorganization but had less seniority than Appellant.

Appellant did not find another Manager position with the City. However, the Agency offered Appellant a one-year, limited, contract position as a Contract Administrator, which she accepted. She thereby lost her status as a Career Service unlimited employee. On June 7, 2016, Appellant began working in her contract position and after the one-year period, became unemployed with the City. On June 1, 2016, Appellant filed her timely appeal.

## IV. ANALYSIS

### A. Jurisdiction and Review

The Office has jurisdiction of this direct appeal of a layoff pursuant to CSR 19-20 A.1.e. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no

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<sup>2</sup> Appellant also applied for the Manager of Small Business Opportunity Team position, outside of the Workforce Development Unit and in a separate lay-off unit, hence it is inapplicable to this appeal.

previous action had been taken. Turner v. Rossmiller, 532 P.2d 751, 754-5 (Colo.App. 1975); see also Dept. of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

## B. Burden and Standard of Proof

In a lay-off, Appellants retains the burden of persuasion, by a preponderance of the evidence, to prove their lay-offs were arbitrary, capricious or in violation of the CSRs. In re Sanders, CSA 62-09 (9/24/2010); see also Dept. of Institutions v. Kinchen, 886 P.2d at 710, (distinguishing Renteria v. Colorado State Dept. of Personnel, 811 P.2d 797 (Colo. 1991)).

Arbitrary and capricious has been defined as:

(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 [b]efore 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 [b]efore it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Department of Higher Educ., 36 P.3d 1239, 1252 (Colo. 2001), *citing* Van DeVegt v. Board of County Commissioners of Larimer County, 55 P.2d 703 (1936).

## C. CSR Alleged Violations

### 1. Authorities

CSR 1 Definitions,<sup>3</sup> states in relevant part: ...

Appropriation: An authorization by the City Council to a specified agency to expend a specified sum of money from a specified fund during a specified period for a specified purpose. ...

Lay-off: the involuntary separation of a career status unlimited employee resulting from the abolishment of a filled position. ...

Transfer Appointment: An appointment of an employee from a position in one classification to a different position in the same classification or a classification with the same range minimum for which the employee meets the minimum qualifications.

CSR 3-41 Re-instatement List, [Exh. 13] states in relevant part:

A. Employees or former employees shall be placed on the re-instatement list for the classification from which they have:

1. Been laid off; ...

B. The names of eligible employees or former employees shall be added to this list as soon as administratively feasible, with the effective date being the effective date of the lay-off or action in lieu of lay-off.

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<sup>3</sup> The CSRs cited were effective at the times relevant to Appellant's notice of and lay-off.

- C. Eligible employees or former employees will be listed for one year unless removed for cause. ...
- E. Re-instatement lists shall only be used within the Lay-off Unit (as defined in Rule 14 **SEPARATION OTHER THAN DISMISSAL**) that the employee or former employee was in when the lay-off took place.

CSR 5-11 Appointments of Applicants Who Are Not in the Career Service, [Exh. 10] states in relevant part: ...

- B. Re-instatement appointment: An appointment of a former employee who had been laid off or who resigned in lieu of a lay-off, which is made as a result of referral from a re-instatement list in accordance with Rule 3 **RECRUITMENT**.
- C. Re-employment appointment: An appointment of a former employee to a position in the classification in which the employee was previously employed within the preceding five (5) years, or to a successor classification; or to any classification for which the employee is qualified, with the same or lower range minimum than the former classification, subject to the following conditions: ...
  - 2. An appointment that is a re-instatement is not a re-employment appointment;
  - 3. In order to determine eligibility for re-employment into a successor classification, the OHR Executive Director may, on a case-by case basis, review the duties previously performed as well as classification and pay; ...

CSR 14-42 Order of Lay-off, states in relevant part:

- A. Lay-off unit: Lay-offs shall be determined by lay-off unit. Lay-off units are appropriation accounts, appropriation sub-accounts, combinations of appropriation sub-accounts, or combinations of appropriation accounts which have been consolidated or de-consolidated in accordance with paragraph 14-41 B. Consolidation of appropriation accounts (Revised March 19, 2004; Rule Revision Memo 247B).
- B. Consolidation of appropriation accounts:
  - 1. The Career Service Board may consolidate appropriation accounts ...

CSR 14-45 Actions In Lieu of Lay-off

- A. Reassignment or transfer appointment: An employee selected to be laid off shall be given a transfer appointment to any vacancy for which qualified within the layoff unit, subject to paragraphs 14-45 C, D and E (Revised March 19, 2004; Rule Revision Memo 247B). (C - authorizes the Executive Director to designate a special skill as a qualification, D - requires the Agency to offer the employee a choice of among certain types of positions, E - requires the Agency to offer the employee a limited position in lieu of lay-off, including displacing another employee therefrom.)

CSR 14-47 Re-instatement, states in relevant part:  
(Revised May 7, 2012; Rule Revision Memo 62C)

- A. Re-instatement appointments: The right of a former employee who was laid off, to be re-instated is set forth in Rule 3 **SELECTION**.

## 2. Discussion

The resolution of the issues that the Career Service Board remanded depends on whether the Agency actually created a new lay-off unit in which it intended to locate its two new Manager positions. If it did, Appellant cannot prove that she is entitled to relief regarding these positions.<sup>4</sup> If it did not, Appellant is entitled to relief based on a straight-forward application of some of the CSRs cited by the Board. Therefore, the Hearing Officer first addresses the fourth issue remanded by the Board: whether the old position from which Appellant was laid off and the newly created Manager positions resided within the same lay-off unit as defined by CSR 14-42A.

Pursuant to the CSR 14-42A, an Agency creates a new lay-off unit through the creation of a new appropriation, or new appropriation parameters, for a unit. The March 31, 2018 testimony about whether the Agency created a new lay-off unit is inconclusive. All the witnesses testified in a conclusory fashion that the Agency had created the new WIOA lay-off unit, with most of them also testifying that the Agency had created new codes for it. However, Denise Bryant, Agency Director, testified that the Agency reorganization occurred due to the change in the funding stream resulting from WIOA replacing WIA. Yet she did not explain why the Agency layoffs, allegedly caused by WIOA, came one year after its July 1, 2015<sup>5</sup> effective date. Ranae Taylor testified that, to her knowledge, the Agency's funding before and after June 30, 2016 was the same, but she also testified that it had created a new fund-org, describing either a lay-off unit or a program.

No witness, including Director Bryant, directly addressed the creation of a new lay-off unit through any new appropriation account, sub-account, or combination thereof, or through any new authorizations by the City Council. No witness addressed the creation of a new lay-off unit through any consolidation, or the reversal of any consolidation, of appropriation accounts by the Board pursuant to CSR 14-42B. And no witness identified the new codes for the new lay-off unit. The witnesses either were ignorant of any Agency appropriation account changes, or the lack thereof, or they simply avoided testifying about whether or not any changes had actually occurred.

After the hearing, Appellant filed an Exhibit A with her May 21, 2018 Response to the May 8, 2018 Order that allowed additional evidence and/or guidance. Exhibit A is a file containing a chart, dated July 28, 2016, in the Excel software format, entitled "Listing of Current Fund-Org Projects.xls." Appellant argues that Exhibit A, with funding codes for program activity from 2015 through 2017, proves that the Agency's appropriations remained the same after June 30, 2016, hence that it did not create a new lay-off unit as it claims to have done for its reorganization.

Chiquita McGowin, Financial Director for the Agency at the times relevant to this appeal, responded in an affidavit, Exhibit 1, to Appellant's Exhibit A. She initially purported to cast doubt on Exhibit A's authenticity, claiming it to be a document that was removed without authorization from the Agency's Accounting Codes book. However, the Hearing Officer had previously accepted Exhibit A into evidence and thereby deemed its authentic.

Next, Director McGowin explains that Exhibit A is "used for accounting purposes only and does not identify layoff units, or appropriation accounts for WIOA in the Workforce Development Unit of OED." She also explains that the codes specify that the City has received restricted grant funds from outside sources. Some of the codes she references correspond to program activity from 2015 to 2017. She appears to rebut witnesses who testified that the Agency had created new codes for its WIOA unit. And taken literally, her comment can be consistent with Appellant's claim

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<sup>4</sup> The Hearing Officer found that Appellant's former position and these two positions are not substantially similar, a requisite for relief under this scenario. In re Tenorio & Delgado, CSA 34-16 & 36-16, 6-8 (3/31/17).

<sup>5</sup> Common sense suggests that the WIOA funding correlated to its effective date of July 1, 2015 when appropriations changes, if any, would have been implemented.

that the Agency created no new appropriation accounts after June 30, 2016, and hence did not create a new WIOA lay-off unit.

In response to Director McGowin's affidavit, Appellant submitted an affidavit from Mariea Singleton, a former City Contract Administrator, who attests that documents like Exhibit A were routinely distributed to Contract Administrators, who would then have accurate information with which to develop contracts. Appellant also submits an affidavit attesting that she received Exhibit A when she was a Contract Administrator. Both attest that they are unaware of any Agency Accounting Codes book that was the sole depository for these charts.

In fact, Exhibit A suggests a continuity of the Agency's appropriations rather than any changes to them. As significant as Director McGowin's criticism of Exhibit A is what she omits. She does not dispute that it contains financial information for the Agency's pre- and post-June 30, 2016 operations. More relevant, she does not rebut Appellant's claim that the Agency appropriations remained constant by providing appropriations details that would show the creation of a WIOA lay-off unit. So, her challenge to Exhibit A does little to rebut Appellant's claim of its implications.

Pursuant to People v. Ortiz, 381 P.3d 410, 415 (Colo. 2016), the Hearing Officer concludes based on a consideration of all of the evidence, that Appellant has proven by a preponderance of the evidence, i.e., that it is more probable than not, that the Agency failed to create a new lay-off unit to manage its reorganized operations. Clearly it intended to create a new lay-off unit. The Agency advised and convinced its employees that it had created a WIOA lay-off unit, but it then failed to obtain the appropriations changes necessary to have actually created it.

Having so decided, the Hearing Officer addresses the other issues remanded by the Board, the third and first issues together, as the first is a subset of the third. The third issue: whether Appellant should have been given a transfer appointment to any vacancy for which she was qualified within the lay-off unit, pursuant to CSR 14-45A; which the Hearing Officer concludes she should have been given. The first issue: whether Appellant was required to apply for any newly created Manager position; which the Hearing Officer concludes she was not so required.

CSR 14-45A requires that "[a]n employee selected to be laid off shall be given a transfer appointment to any vacancy for which [she] qualified within the layoff unit..."<sup>6</sup> CSR 14-45A, by its terms, is self-executing. Both Parties provided evidence that the Agency notified Appellant that she had been selected to be laid off and that she qualified for the new positions because they were in the same classification as her former position. In fact, the Agency interviewed her for the position for which she applied because she qualified for it. Director Bryant<sup>7</sup> incorrectly alleged that Appellant was not qualified for this position, by describing her as not the most qualified (Appellant does not dispute this fact) but disregarding the fact that its classification was the same as Appellant's former one. Only upon cross examination did Director Bryant admit that Appellant met the minimum qualifications for this position. Accordingly, Appellant was entitled to a transfer appointment to the new Manager positions and did not have to apply for them.

The Agency argued that Appellant was not entitled to re-instatement because she was not laid off since she accepted a contract position before her effective lay-off date. It ignores that the Board had already concluded that, "[Appellant] was laid off from her position with the Agency as a Manager"<sup>8</sup> and that it did not remand this issue for further consideration. Furthermore, CSR 14-

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<sup>6</sup> As the Agency did not create a new lay-off unit, there could have been a question of which of its four initial lay-off units housed its two new positions, but the Agency did not raise this issue as a defense.

<sup>7</sup> Director Bryant's limited knowledge renders her testimony unhelpful. She also claimed ignorance of a re-instatement list, seemed unaware that transfer lists do not exist in the CSRs, and claimed that a re-instatement list was not created, although Suzanne Iversen explained that her office had created one.

<sup>8</sup> Were this issue in dispute, CSR 1 suggests that the Agency laid off Appellant by ordering her subsequent

45A renders the Agency's argument immaterial because it vests employees "selected to be laid off" with the right of a transfer appointment. The Parties do not dispute that Appellant was so selected or that the vacancies became available before her lay-off date. Appellant also qualified pursuant to CSR 1's definition of "Transfer Appointment," applicable to positions "for which the employee meets the minimum qualifications." Hence, the Agency's novel defense<sup>9</sup> lacks merit.

The next issue: whether an analysis of the comparability of the old and new Manager positions was necessary and proper under CSRs 14-45 and 14-47; and the Hearing Officer concludes that such analysis was unnecessary. CSRs 14-45 and 14-47 are self-executing so Appellant was entitled to their benefit due to her status. Since the new positions were in the same classification as Appellant's former position, whether the positions are substantially different is irrelevant.

The last issue is whether Appellant is entitled either to a Re-instatement Appointment pursuant to CSR 5-11B, or a Re-employment Appointment, pursuant to CSR 5-11C. As described above, Appellant was entitled to a transfer appointment to the Agency's two new Manager positions litigated in this appeal. Appellant would not have had to rely on CSR 5-11, which addresses appointments of former Career Service employees.

CSRs 14-47, in conjunction with CSR 3, and 5-11B could provide relief to Appellant, were the Agency to lay her off appropriately and were it to create any new positions within one year from her lay-off. Appellant could be entitled to CSR 11C's limited relief, were the Agency to lay her off appropriately and were it to create any new positions within five years therefrom, in the same classification as her former Manager position, or in a successor classification; or in any classification for which she is qualified, with the same or a lower range minimum than her former classification. While inapplicable to this time, the evidence did not show any basis on which CSR 11B or C's limited relief to Appellant became eliminated.

Based on the discussion above, the Hearing Officer concludes that Appellant has proven by a preponderance of the evidence that the Agency lay-off of her was arbitrary, capricious and in violation of the CSRs. First, the Agency failed to use reasonable diligence and care to procure the procedure necessary to create a new lay-off unit. Next, it failed to give candid and honest consideration to the evidence of whether it had in fact created a new lay-off unit. Further, it violated Appellant's right to a transfer appointment when it failed to offer her the Manager positions while it lacked confirmation that it had created a new lay-off unit, such that people fairly and honestly considering this lack of evidence must reach contrary conclusions. And, the Agency violated CSR 14-45A through these actions.

## V. ORDER

The Agency's lay-off of Appellant, effective June 6, 2016, is REVERSED. Appellant is to be reinstated as a Manager, with appropriate backpay and benefits.

DONE August 8, 2018.



Federico C. Alvarez  
Career Service Board Hearing Officer

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involuntary separation from her abolished Career Service unlimited position. It merely expedited her separation by hiring her as a contractor without vacating its order or restoring her Career Service status.  
<sup>9</sup> Taken to its logical conclusion, the Agency argues that Appellant lost her Career Service right of appeal by leaving her Manager position for the contract job, with which the Hearing Officer disagrees.