

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 83-09

ORDER GRANTING MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

KENNETH SHERBENOU, Appellant,

vs.

DEPARTMENT OF PARKS AND RECREATION,
and the City and County of Denver, a municipal corporation, Agency.

The Agency filed its motion to dismiss on October 26, 2009. Appellant responded in opposition on November 3, 2009. After considering the pleadings, file, and applicable law, I find and orders as follows.

The Appellant is appealing his layoff, and presents two claims in support thereof: the Career Service Personnel Director's failure to apply the rule on special qualifications to retain him was arbitrary and capricious; and his layoff was based upon unlawful age discrimination. [Appeal attachment 9/29/09].

In deciding a motion to dismiss, the factual allegations in an appeal must be taken as true. In re Steward, CSA 18-08 (4/11/08), *citing Norton v. Leadville Corp.*, 610 P.2d 1348 (1979). The motion must be denied unless it appears beyond doubt that the appellant cannot prove that the facts as he alleges them would entitle her to relief. In re Boden, CSA 86-06 (Order 11/22/06).

The Agency asserts the relief requested by the Appellant may not be granted because (1) the Hearing Office lacks jurisdiction to overrule a purely discretionary decision, and (2) the Appellant failed to meet a basic requirement of an age discrimination claim.

A. Appellant's arbitrary and capricious claim

The material facts are not in dispute. The Agency is entitled to initiate a layoff plan pursuant to CSR 14-40 *et seq.* The general rule for the order of layoffs is that employees will be laid off in order of their seniority. [CSR 14-44]. The Appellant had the least seniority of the affected employees. [Agency's motion to dismiss, attachment 2-1]. The Agency followed the requirements of that rule in laying off the Appellant.

There are several mandatory exceptions to the general rule, none of which apply here, and two permissive exceptions. An agency head may, but is not required, to consider an employee's proficiency when ranking employees for layoff. CSR 14-44 c) 2). The Appellant acknowledges the appointing authority (agency head) ranked employees for layoff based on seniority under the general rule, and did not invoke this exception.

The Career Service Rules also impart discretion to the Career Service Personnel Director to retain an employee who would otherwise be laid off under the general rule, when the employee possesses unique skills to perform duties essential to his position. CSR 14-42 f). The Personnel Director did not invoke this exception.

The Appellant responds (1) the intent of CSR 14-42 (f) is to provide for situations such as his where he maintained superior credentials and performance compared with his peers, (2) the Personnel Director's failure to invoke CSR 14-42 (f) is detrimental to government, and (3) the application of CSR 14-42 (f) was "arbitrary, wrongly applied and contrary to the intent of the Rules." [Appellant's Response and Appellant's Pre-hearing Statement].

First, even if it is the Appellant's statement about the purpose of the special qualifications rule is correct, the Personnel Director retains the discretion whether to invoke it. Next, even if the failure to invoke 14-42 (f) is detrimental to good governance, it is within the purview of the Personnel Director's discretion to make "detrimental" choices. Finally, the Appellant's conclusory statement, that the Personnel Director's decision not to invoke the special qualifications rule in his case, was arbitrary¹ was not supported by the scantest indication his failure to do so for the Appellant was based on any inference of actionable impropriety. The mere fact he invoked the rule previously and not in this case is insufficient to infer a cause of action.

The special qualifications rule does not permit the Personnel Director unfettered discretion when to employ it; nor may a hiring authority rank employees for layoff at his or her sole discretion. First the terms of the rules do not permit an arbitrary re-ranking of incumbents in a layoff group. The terms of the special qualifications rule require the Personnel Director to undertake a "thorough review and investigation" before granting an exemption to retain someone. The Career Service Authority must approve the criteria employed by a hiring authority who re-ranks incumbents for layoff from a seniority-based ranking to a proficiency-based ranking. CSR 14-44 c) 2). Second, neither the Personnel Director nor the hiring authority may use those respective rules to engage in unlawful discrimination, harassment, retaliation, or other any other unlawful act.

¹ A decision is arbitrary and capricious maker if the decision maker fails to use reasonable diligence to determine facts necessary to his decision, fails to give proper consideration to facts relevant to the decision, or basis his action on conclusions that reasonable persons considering the facts would not reach. In re Foley, CSA 19-06, 8 (11/10/06), *citing Lawley v. Dept. of Higher Education*, 6 P.3d 1239, 1252 (Colo. 2001).

The Appellant failed to raise in inference of any wrongdoing under either rule stated above or under any other basis for which relief might be granted. It is not the role of the Hearing Officer to weigh the relative qualifications of employees in retention decisions. Without suggesting an improper motive or irrational basis, the Hearing Officer is without jurisdiction to second guess an otherwise discretionary action.

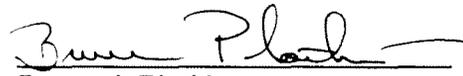
B. Appellant' s Age Discrimination claim

The Agency asserts, and Appellant does not dispute, the Appellant is thirty years old. To establish a prima facie case of age discrimination, Appellant must show membership in a protected age group, i.e., that he is at least 40 years old. CSR § 19-10 A.2.a; In re Hernandez, CSA 03-06, 9-10 (5/3/06); CRS 24-34-301(1); 29 U.S.C. 631(a). Therefore, the appeal does not assert a claim of age discrimination sufficient for hearing.

ORDER

Based on the foregoing, the Agency's motion to dismiss is GRANTED. The Appellant's appeal is DISMISED WITH PREJUDICE.

DONE November 6, 2009.


Bruce A Plotkin
Career Service Hearing Officer