

COLORADO CAREER SERVICE BOARD,
CITY AND COUNTY OF DENVER, STATE OF COLORADO
Appeal No. 47-10 A.

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

GAIL S. BLEHM,

Appellant-Petitioner,

vs.

DENVER AUDITOR'S OFFICE, and the City and County of Denver, a municipal corporation,

Agency-Respondent.

This matter is before the Career Service Board on Appellant's petition for review of the Hearing Officer's Decision, dated October 29, 2010. The Board has reviewed and considered the full record before it, and **REMANDS** this matter for further proceedings, on the grounds outlined below.

I. FINDINGS

The only issue Appellant raises on appeal is whether the Agency's actions in eliminating her position and laying her off were arbitrary, capricious or contrary to rule or law. Appellant, therefore, has waived her right to appeal the Hearing Officer's findings with regard to retaliation under the City's whistleblower ordinance and retaliation for taking FMLA leave.

The hearing was held on September 21 and 30, 2010. On October 25, 2010, the Agency posted a job opening for a management analyst position with a salary range of \$45,874 - \$60,000. (Exhibit C, attached to Appellant's Opening Brief.) We agree with Appellant that this posting is new and material evidence that was unavailable at the time the hearing was held.

In an appeal of a lay-off decision, one of the issues to be examined is whether the agency's stated reasons for the lay-off are in fact the true reasons for its actions. *In re Foley*, CSA 19-06 (11/13/06). Relying primarily on the testimony of Ms. Sulley and Ms. Phillips, the Hearing Officer found that Appellant's position was eliminated and

Appellant was laid off because: 1) the Agency needed to reduce its budget due to a decrease in city revenue; 2) the amount of time needed to complete Appellant's duties was approximately 35-40 days per year, or 15% of a full-time position, and 3) Appellant's job duties were easily absorbed by other Agency employees: Ms. Phillips would assume Appellant's HR duties, Ms. Giron would take on Appellant's employee recognition tasks, and Mr. Berckefeldt would perform Appellant's website duties. Decision, pp. 6-7. The Hearing Officer's finding that the lay-off was not arbitrary or capricious was based in large part on the testimony that other Agency employees could assume Appellant's duties without any interference with their ability to execute the other duties of their positions. Decision, pp. 7-8.

Appellant contends that the job described in the October 25th posting is a newly created position which contains, in part, the human resources duties that she performed prior to her lay-off, and which the Agency claimed were being reassigned to other employees. Appellant argues that the posting is relevant and material to assessing the credibility of the Agency's stated reasons for the lay-off. On the other hand, the Agency contends that the job described in the posting was an existing human resources position which became vacant when Ms. Moreno resigned, and to which Ms. Phillips reassigned some of Appellant's human resources duties. Affidavit of Tammy Phillips.

Clearly, the parties disagree as to the nature and significance of the October 25th job posting. The position described in the posting as Management Analyst II does appear to contain the duties that Appellant performed as an Associate Human Resources Professional. Moreover, although Ms. Phillips states in her affidavit that the position posted was an existing human resources position, that explanation does not appear to be consistent with the description in the posting: "This position is with the Auditor's Office and will perform analytical work researching and analyzing a variety of operational and/or administrative issues or problems related to information technology." Exhibit C, emphasis added).

Thus, it is not clear from the record whether the job posted on October 25th was a newly-created position, an existing position, or something in between, and Ms. Phillips provides no explanation in her affidavit for why she reassigned Appellant's duties to this position a few weeks after testifying that Appellant's duties were reassigned to other current employees. Although Appellant asks us to reverse the Hearing Officer's findings based on the October 25th posting, the Career Service Board cannot resolve factual disputes or determine the credibility of evidence. Therefore, this matter is remanded to the Hearing Officer for further findings and conclusions regarding the October 25, 2010 job posting and its relationship, if any, to Appellant's lay-off.

Finally, we note that the Auditor's Office is currently conducting a performance audit of the Career Service Hearings Office. We recognize that a new hearing on the October 25th job posting while the Agency is auditing the Hearing Officer's performance would create an appearance of impropriety and a potential conflict of interest. We therefore instruct the Hearing Officer to delay the setting of a hearing date until after the

performance audit is completed. While we are very mindful that such a delay may work a hardship on Appellant, nevertheless, we see no other option that would assure the Hearing Officer's ability to use her independent judgment in making those findings and conclusions required by this remand.

II. ORDER

IT IS THEREFORE ORDERED that this matter is **REMANDED** to the Career Service Hearings Office for further proceedings consistent with the findings herein. It is further ordered that a hearing on remand shall not be set until after the Auditor's Office has completed its performance audit of the Hearings Office.

SO ORDERED by the Board on February 17, 2011, and documented this
3rd day of March, 2011.

BY THE BOARD:


Co-Chair

Board Members Concurring:

Patti Klinge
Colleen M. Rea
Nita Henry
Tom Bonner