In the Matter of the Appeal of:

AMY BOURGERON, Appellant

Agency: CAREER SERVICE AUTHORITY, and
THE CITY AND COUNTY OF DENVER, a municipal corporation

I. FINDINGS OF FACT

1. Pursuant to Appellant's request for an independent Hearing Officer, and the Career Service Board's (herein CSB or the Board) appointment thereof, the undersigned was appointed to conduct a consolidated hearing in the above-captioned matters. Hearing was held on January 22, 23, 26, 30, and February 2 and 3, 2004 before the undersigned independent Hearing Officer. Appellant Amy Bourgeron, who was present throughout the hearing, was represented by Marc P. Mishkin, Esq. and Hugh S. Pixler, Esq., and the Agency by Karla J. Pierce, Esq. and Sybil R. Kiskjen, Esq. The Career Service Authority and the City and County of Denver are referred to herein jointly as the Agency.

2. Agency Exhibits introduced at hearings are designated by number, and Appellant Exhibits are designated by letter. When exhibits are referred to herein, they will be designated "Ex.", followed by an appropriate number or letter. The parties will be referred to as Appellant and Agency. Appellant Exhibits A, B, C, D, E, F, G, H, I, K, L, M, N, O, R (but excluding a June 11, 2003 letter Bates-
stamped 18009), S, U (as redacted), V, W, Y, Z, AA, DD, FF, GG, HH, II, LL, and MM; and Agency Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 24, 25, 26, 27, 28, 29, 30, 37, 38, 39, 40, 41, 42, and 43, were received in evidence. Appellant also offered Exhibits Q, NN and OO, to which there were objections, and those exhibits were excluded.

3. Appeal No. 92-03 was filed on June 20, 2003, based on a June 11, 2003 letter of the Career Service Board, (Ex. 17) which stated in part:

   "...revoking the waiver and subsequent promotion reflected on Personnel Action form 2-077370 currently in [Appellant's] Career Service Authority personnel file. This means that effective July 1, 2003, [Appellant] is to be returned to her position with the Department of Public Works as a Marketing, Public and Employee Relations Coordinator...".

The Career Service Authority file in this appeal does not contain a grievance form. The file in Appeal 102-03 does contain a grievance form, dated June 20, 2003, and a memorandum Response to Grievance dated June 24, 2003 from Bruce Baumgartner to Appellant, stating: "Upon review of your grievance filed on June 20, 2003, it has been determined that I do not have the authority to grant you the remedy you seek. Therefore your grievance is denied."

4. Appeal No. 102-03 was filed on July 1, 2003, alleging a failure to provide "...the remedy sought in grievance to agency head...". The Career Service file in this appeal contains a grievance filed on June 20, 2003, and a denial by memorandum dated June 24, 2003.

5. Pursuant to a grievance filed on July 9, 2003, and denied by memorandum dated July 11, 2003, Appeal No. 113-03 was filed on July 15, 2003.
6. The Appellant withdrew the allegations of sex and age discrimination contained in the grievances and appeals herein. These issues were not litigated at the hearing herein.

7. The Rules of the Career Service Authority speak in a number of places of specific authority in stated circumstances for the Personnel Director to Act. CSR §2-10(b) sets forth the duties and powers of the Career Service Board.

8. Ex. T, Appellant's Curriculum Vitae, reveals that Appellant began working for the City and County of Denver in 1980 as a contract employee. In 1984 she was hired as a Career Service employee as the Public Information Officer in the Public Works Department, with a staff of three employees. By 1998 Appellant had risen to the position of Marketing, Public and Employee Relations Coordinator in the Public Works Department.

9. Between 1992 and 1998 Appellant had received special assignments including Event Management Team-World Youth Day 1993; Denver International Airport Operational Management Readiness Team; Media Logistics and Public Relations Director-Oklahoma City Bombing Trials; and Public Relations Director-G8 Denver Summit of the Eight.

10. In May 1998 Bruce Baumgartner, with whom Appellant had worked in the Public Works Department, was appointed as the Manager of Aviation at Denver International Airport. Mr. Baumgartner chose Appellant to be Deputy Manager of Aviation for Marketing/Government Affairs. Because the position required a college degree as a prerequisite, which Appellant did not have, she was given a mayoral Appointment to the position.
11. The Curriculum Vitae of Appellant, (Ex. T; Bates-stamped page 20008), reveals that Appellant attended the Colorado Institute of Arts in 1978/79, achieving 4 semester credits studying Commercial Photography. Appellant’s Online Application for the Marketing/Government Affairs position shows that Appellant attended the Colorado Institute of Art starting 01/1997 and ending 10/1979; Degree Type is indicated as Associate; Time is indicated as Part Time; and Credit hr and Major hrs are blank. Kelly Brough testified that upon inquiry she was informed that in 1978/79 the Colorado Institute of Art did not offer an Associate degree. Appellant asserted no other education at the college level.

12. The Manager of Aviation is a Cabinet level appointment by the Mayor. There are some 1200 employees in this department. Reporting to the Manager of Aviation are four Deputy Managers of Aviation: for Marketing/Government Affairs; for Maintenance, Planning and Engineering; for Finance/Administration; and for Operations. The Deputy Managers for Planning and Engineering and for Maintenance were merged in April of 2000.

13. A Denver Mayor has authority to appoint up to fifty persons to positions in the City without regard to Career Service rules. Appellant was the only mayoral appointment to a deputy manager of aviation position.

14. Appellant stated that when first employed at DIA she had a staff of 20-25 employees, which grew to a staff of 50 FTE’s (full-time equivalent), comprised of 70 employees, plus 200 volunteers, with a budget in excess of $6 million dollars. She also stated that she supervised at least second level
supervisors, including Kristi Torrey and Sally Covington, and that Torrey also supervised two levels of employees.

15. The organizational chart for the Public Relations & Marketing Division at Denver International Airport, (Ex. 37), shows Amy Bourgeron as Deputy Manager of Aviation. Reporting to Ms. Bourgeron are three Assistant Deputy Managers: Kristi Torrey for Public Relations, Sally Covington for Marketing, and Chuck Cannon for Media Relations. A Program Administrator and a Section Supervisor, each of whom has supervisors reporting to them, report to Ms. Torrey. A Global Market Planner and an Assistant Marketing Director report to Ms. Covington. The Public Information Officer reports to both Mr. Cannon and Ms. Covington. Ms. Torrey testified to the supervisors reporting to her.

16. The record does show that Bruce Baumgartner wanted Appellant for the position of Deputy Manager of Aviation for Marketing and Government Affairs in 1998. They had worked together when Mr. Baumgartner was Manager of Public Works, where Appellant worked as Marketing, Public and Employee Relations Coordinator. Following his appointment as Manager of Aviation in 1998, Mr. Baumgartner needed someone to handle media relations at the Denver International Airport. He was successful in having Appellant appointed by the Mayor to the Deputy Manager of Aviation for Marketing and Government Affairs position, a necessity caused by the fact that as a Career Service position there was an absolute requirement of a baccalaureate degree (See Ex. 3), which Appellant did not possess. He continued to be very satisfied with Appellant's work thereafter, such that he sought a waiver of the educational requirement so
that Appellant could compete for the position following his decision in 2002 to fill
the position through a Career Service Authority posting.

17. The position description for the position of Deputy Manager of
Aviation for Marketing/Government Affairs, dated 9/16/95, (Ex. 3), reveals the
requirement of a baccalaureate degree for the position. It also states that this
person “Supervises two or more first level supervisors”.

18. Appellant admitted that she participated with the Manager of
Aviation and the three other Deputy Managers of Aviation in the annual
development and approval of the $190,000,000 operating budget, and the
$400,000,000 capital improvement budget for the Department of Aviation, which
included a $6,000,000 budget for her division. She also admitted that she set
goals, objectives, policies and procedures for her division, but she did not agree
that all Deputy Managers of Aviation were equal, being given different authority by
the Manager of Aviation, and being at different pay levels. Dept. of Aviation
Human Resources Manager Jim Thomas stated that based upon the levels of
supervision by Kristi Torrey, Appellant would be a third level supervisor.

19. In a memorandum regarding “Request for Minimum Qualification
Modification”, dated May 17, 2001, (Ex. 4), from Jim Yearby, Personnel Director
of the Career Service Authority, to Bruce Baumgartner, Yearby stated:

I have reviewed your memorandum requesting modification of the
...Deputy Manager of Aviation for Marketing/Governmental Affairs
classification specification equivalency statements to permit complete
substitution of experience for education. ...

After reviewing the duties and responsibilities performed by this deputy Mr.
Yearby further stated:
Regretfully, I cannot grant your request to permit complete substitution of experience for education for this class for the following reasons.

In summary, the minimum education requirement of a "Baccalaureate Degree in Public Relations, Marketing, Mass Communications or a related field is directly related to the duties and responsibilities assigned to the Deputy Manager of Aviation for Marketing/Governmental Affairs position. Consequently, I must reject your request for modification of the classification specification equivalency statements to permit complete substitution of experience for education.

20. Subsequently, effective 6/26/02, the Career Service Board (CSB), adopted an EDUCATION & EXPERIENCE REQUIREMENTS & EQUIVALENCIES POLICIES & GUIDELINES, (Ex. A and 2), following a public hearing held on 6/20/02, (Ex. B). This policy states in part:

**Education Requirements:** Typically, classes that require specialized competencies, knowledge, skills, certification or licensure in order to perform the essential duties and responsibilities of the class will contain minimum education requirements. A college degree will be established as an absolute requirement for some classes.

... High level executive classes (Typically at the third level of management) that require exposure to executive principles and concepts and the related knowledge(s), skills and competencies necessary to perform the essential duties and responsibilities of the job.

... Substitution of experience for education for management classes, other than high level executive classes, will be permitted on a two-for-one basis or in other words, two years of the appropriate type and level of experience will serve as an equivalency to one year of education. (For example, if a Baccalaureate Degree is required, eight years of relevant experience can be substituted.) ...

Testimony was presented regarding the meaning of the phrases containing the adjective “typically”.¹

¹ *Webster's New World Dictionary, Second College Edition, 1970,* defines the word “typical” as follows: Typical – 1. serving as a type; symbolic 2. having or showing the characteristics, qualities, etc. of a kind, class, or group so fully as to be a representative example 3. of or
21. By memo dated July 5, 2002, (Exs. 7 and G), from Bruce Baumgartner to Jim Yearby, regarding the Deputy Manager of Aviation for Marketing/Government Affairs position, Mr. Baumgartner stated:

... Under the recently adopted CSA Education and Experience Requirements & Equivalency Policy I understand that this position would typically have a minimum education requirement. However, I think that this particular position is not typical for the following reasons. ... Because of these unusual circumstances, I am requesting your approval to allow the Education and Experience Requirements & Equivalencies to be applied to the recruitment for Deputy Manager of Aviation for Marketing and Governmental Affairs.

22. The Career Service Authority staff prepared for Mr. Yearby's signature a memorandum, dated July 18, 2002, (Ex. 9) in response to Ex. G, but which was apparently neither signed nor sent, which stated:

... The Career Service Authority Policy and Guideline for Education and Experience Requirements and Equivalencies establishes that a college degree is an absolute requirement for “high level executive classes (typically at the third level of management) that require exposure to executive principles and concepts and the related knowledge(s), skills and competencies necessary to perform the essential duties and responsibilities of the job.” In a memorandum to you, dated May 17, 2001, I explained that this position is the highest level of Career Service positions within the Department of Aviation and is therefore considered to be a “high level executive class.” Therefore, I cannot grant your request to apply Education and Experience Requirements and Equivalencies to the position of Deputy Manager of Aviation for Marketing/Government Affairs.

23. Instead of the July 18th memorandum above, Mr. Yearby, by letter dated July 31, 2002, (Exs. 4 and H), responded to the July 5th memo, (Exs. 7 and G) and stated:

...Please note that current policy governing the substitution of experience for education does not include executive positions above the third level of management. ...
It is my position that to deny this employee the opportunity to compete with others for DIA's Deputy Manager position solely because she does not have a college degree is without sound basis. There, I am not waiving the educational requirement for this executive position, but I am waiving the requirement so that this employee may compete on a competitive basis to fill this position. ...

24. Human Resources Manager Jim Thomas testified that he believed Appellant should be permitted to compete for the Deputy Manager position because she had held the position as an appointee, but that he was uncomfortable with her being permitted to compete because of the waiver issue. He believed that as a Deputy Manager Appellant was a "high level executive", and that the requirement of a degree was appropriate for such a class.

25. Stacey Schalk, Acting Supervisor of Employee Relations for the Career Service Authority, was partially responsible for the preparation and presentation of Ex. 9 to Personnel Director Yearby. She believed Mr. Yearby's decision to disregard the staff recommendation regarding the substitution of experience for education was not consistent with Career Service Rules or the merit system, and that the Personnel Director did not have the authority to waive the requirement in Rule 3, including the Education & Experience Requirements.

26. Steve Adkison, CSB Acting Personnel Division Director, testified that he was informed that the Mgr. Of Aviation intended to fill the Deputy Manager of Aviation for Marketing/Government Affairs position through Career Service, and that when the waiver to compete was granted to Appellant by Mr. Yearby (Ex. 10), he informed Personnel Analyst Jim Boyersmith, who was drafting the recruitment announcement (Ex. D). He further testified that the
announcement was incorrect, and that he spoke to Mr. Boyersmith concerning
the error in permitting the substitution of experience for education, since Mr.
Yearby's July 31, 2002 letter (Ex. 10) stated: "I am not waiving the educational
requirement for this executive position,..."

27. The job announcement for the position of Deputy Manager of
Aviation for Marketing/Government Affairs (Ex. D) states in part:

...A degree in Public Relations, Marketing, Mass communications or
related fields plus three years of supervisory experience in a public
relations or a marketing environment. Additional appropriate experience
or education can be substituted for experience or education. ...

This announcement was generated at some point after Mr. Yearby granted the
waiver to Appellant allowing her to compete for this position. Human Resources
Manager Jim Thomas testified that he probably submitted qualifications for this
position, that the Manager of Aviation had input into identifying preferred skills,
but that the minimum qualifications were set by the Career Service Authority.

28. Thereafter, by memo dated August 13, 2002, from Bruce
Baumgartner to Jim Yearby, (Exs. 11and I), Mr. Baumgartner set forth his
understanding of a July 19th approval by Mr. Yearby, not in evidence, and the
July 31, 2002 letter, as well as of an August 5, 2002 conversation, regarding the
"Application of Education and Experience Requirements and Equivalencies to
Position of Deputy Manager of Aviation for Marketing/Government Affairs".

29. Appellant admitted that she was aware she had received a waiver
of the educational requirement for the Marketing/Government Affairs position
prior to submitting her On Line Application, and that she did not rely on the job
announcement language permitting the substitution of experience for education (Ex. D).


31. Exhibits T and U reflect that Appellant's application was processed, that she took and passed the written examination, and that she was ranked first among the applicants for the position of Deputy Manager of Aviation for Marketing/Government Affairs. She thereafter completed the interview process and was selected for the position, effective as of February 1, 2003, when her six-month probationary period commenced. (Ex. 26)

32. James Yearby was appointed Personnel Director by the Career Service Board in October 1997, serving in that position until his resignation in June of 2003.

33. Mr. Yearby testified that when he was hired the Career Service Board wanted to see new directions in the area of classifications of employees under Career Service Rules (CSR). RULE 7 CLASSIFICATION AND PAY PLAN CSR §7-21 states, "The Career Service Authority shall conduct position audits and studies to maintain the classification and pay plan." §7-62 refers to an employee whose position is reallocated, and states: "The Personnel Director may, under special circumstances, substitute experience or other factors for the minimum requirement of the position." (Ex. N)
34. Mr. Yearby testified that where an employee had taken on new duties and an audit was performed under Rule 7 showing that the employee qualified for a higher position, but the employee did not meet the increased educational requirements of the higher position, he wanted the flexibility under Rule 7-62 to waive the educational requirements where the employee had shown the ability to perform the work of the higher position.

35. Mr. Yearby stated that he worked on this problem beginning in 1999, culminating in the approval of the Education and Experience Guidelines (Ex. A) in June of 2002, a major policy change for which he pushed. His thinking on this question was expressed in an April of 2000 article in the Spotlight, a newsletter for Denver City employees. (Ex. DD)

36. Mr. Yearby also testified that Mr. Baumgartner, who served on a steering committee regarding changes to the classification system, philosophically agreed that experience could substitute for education, and that he had similar discussions with Jim Thomas, Human Resources Manager at DIA since 1995.

37. Kristin Rozansky, an Administrative Law Judge for the Colorado State Personnel Board, and a member of the Career Service Board and at various times its Co-chair, testified that beginning in 2002 there were a number of new appointments to the Career Service Board. While previous Boards had given Mr. Yearby favorable annual reviews, in the final quarter of 2002 the new Board did a performance evaluation of Mr. Yearby, including interviewing peers of Mr. Yearby in other agencies.
38. This review raised concerns among the Board members, who decided to have a performance management audit of the Personnel Director position performed by Mountain States Employer's Council. The audit report was given to the Board in late March or early April. Mr. Yearby was suspended by the Career Service Board on April 4, 2003, for reasons not related to the audit.

39. By letter dated May 22, 2003 (Ex. 14) addressed to Bruce Baumgartner, with a cc: to Appellant, the Career Service Board reversed the waiver that was provided to Appellant by the July 31, 2002 letter (Ex. 10), and requested Mr. Baumgartner to remove Appellant from her position during the probationary period “...since Ms. Bourgeron never should have been qualified, and hence been selected, for the position.”

40. By a second letter, dated June 11, 2003, (Ex. 17), the Career Service Board informed Mr. Baumgartner it was “…revoking the waiver and the subsequent promotion reflected on Personnel Action Form 2-077370...”.

41. Bruce Baumgartner, Manager of Aviation, executed Personnel Action Form 2-101577 (Exs. 27 and Y) on June 30, 2003 canceling the promotion of Appellant to the position of Deputy Manager of Aviation for Marketing and Government Affairs. Thereafter on July 9, 2003 Human Resources Director Jim Thomas re-executed the same document. By memorandum of July 11, 2003, attached to Appeal 113-03, Mr. Baumgartner denied Appellant’s July 9, 2003 grievance based on the instructions given to him in the June 11, 2003 letter to him from the Career Service Board (Ex 17).
42. Appellant testified that she had heard rumors concerning possible action by the Career Service Board regarding her position as Deputy Manager of Aviation for Marketing/Government Affairs, and that she obtained the services of an attorney, Marc Mishkin, to protect her interests.

43. Mr. Mishkin sent an e-mail to City Attorney Sybil Kiskin on May 14, 2003, (Ex. 13) objecting to any hearing or determination of Appellant's status in which Appellant was not given an opportunity to prepare and be heard.

44. Following the Career Service Board's letter of May 22, 2003, (Ex. 14) referred to above, Mr. Mishkin sent letters on June 2, 2003, (Ex. 15 and 16), addressed to the Career Service Board and Mr. Baumgartner, protesting the May 22nd letter of the Board.

45. Following the Career Service Board's letter of June 11, 2003, (Ex. 17), a second letter was sent on June 16, 2003, (Ex. 18) to Mr. Baumgartner, requesting that he not take the action stated in the June 11th letter.

46. As noted in paragraphs 3, 4 and 5 above, grievances and appeals were filed regarding the actions of the Career Service Board reflected in their letters of May 22 and June 11, 2003.

47. Appellant testified that while she was aware that the Board was intending to take some action regarding her position, she was never given any official notice, since the letters were not addressed to her.

48. By Personnel Action Form dated June 30, 2003, (Exs. 27 and Y), signed by Bruce Baumgartner, Appellant's promotion of February 1, 2003 was cancelled.
49. The actions taken by the Board in its letter of June 11, 2003, (Ex. 17) "...revoking the waiver and subsequent promotion..." of Appellant, and reflected in the Personnel Action Form, (Ex. 27) as a "Data Change", are not actions defined in CSR 1, or specifically covered elsewhere in CSB Rules.

50. CSR §§5-62 and 5-63 define the rights of Appellant herein:

§5-62 2) may file a grievance or appeal for any reason specified in Rule 18 GRIEVANCE PROCEDURE or Rule 19 APPEALS; and

8) is entitled to such other rights, privileges and benefits as set forth in these Rules.

§5-63 ...has the rights, privileges and benefits of an employee in career status, except that if the employee does not perform at or above "Effective" on a Performance Enhancement Program Report during the promotional probationary period, ...2

51. The following Charter provisions are contended to be applicable to the issues herein:

§1.2.1 General municipal policy
The administration of the City and County of Denver shall be nonpolitical, with economy and good service as its aim and purpose. All appointments are to be made solely upon merit and ability. It is the intent of the City and County of Denver that its officers, officials, and employees

2 CSR 18 DISPUTE RESOLUTION states in part:
§18-10 Definitions - A. Grievance - For purposes of the Career Service personnel rules the term "grievance" shall mean an issue raised by a Career Service employee relating to the interpretation of rights, benefits or conditions of employment as contained in the Career Service personnel rules, the Charter of the City and County of Denver or ordinances relating to the career service.

§18-12 Grievance procedure - If a work related dispute was not resolved through alternative dispute resolution or if alternative dispute resolution was not previously attempted and a career service employee has a grievance as defined in Section 18-10(a) of this rule, the employee may file a grievance according to the following procedures:
[Sub-paragraphs 1 thorough 3 concern filing with the agency that is the appointing authority]
4. Filing with Career Service Authority: If the employee still feels aggrieved after receipt of this decision, or the agency head has not responded within ten (10) calendar days, and the grievance concerns an alleged violation of Charter provisions relating to the Career Service, ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of Rule 19 APPEALS. The period of time shall be computed in accordance with subparagraph 19-22a)2.
A copy of the grievance and the replies from the immediate supervisor and the agency head or designee shall be attached to the appeal to the Hearings Officer.
adhere to high levels of ethical conduct so that the public will have confidence that persons in positions of public responsibility are acting for the benefit of the public.

§9.1.4 Powers and duties of Career Service Board
The Career Service Board shall:
§9.1.4(A) Execute the provisions of this Charter relating to the Career Service
§9.1.4(F) Administer and enforce its personnel rules:
§9.1.4(G) Perform all other functions appropriate to a central personnel agency for the Career Service; ...

§18-237 Certification by career service authority.
Proof of the existence of a personnel action duly certified by the career service authority that the employment complies with all existing Charter provisions, ordinances and rules and regulations of the career service authority shall be conclusive evidence that the personnel action was taken in strict accordance with the career service provisions of the Charter.

§18-247. Certification by career service authority.
Proof of the existence of a personnel action duly certified by the career service authority that the termination of employment, discharge, demotion or promotion complies with all existing Charter provisions, ordinances and rules and regulations of the career service authority shall be conclusive evidence that the personnel action was taken in strict accordance with the career service provisions of the Charter.

II. CONTENTIONS OF THE PARTIES

1. The three appeals herein all allege violations of Charter sections 9.1.4 and 9.1.5, and Career Service Rules 1, 2, 3 and 9.

2. Appellant contends that the Career Service Board had no authority for its action in canceling her promotion.

3. Appellant contends that at no time did the Agency question the application process for the position of Deputy Manager for Marketing and Government Affairs prior to the revocation contained in Ex. R or the hearing herein.
4. Appellant argues that Career Service Rule 3-42 gives the Personnel Director authority to interpret and apply the Career Service Rules. Specifically, this refers to the interpretation and application of the Policy and Procedure Guideline adopted by the Career Service Board effective June 26, 2002, regarding the substitution of experience for education.

5. Appellant argues that she was demoted from her position and was denied a hearing as required by Career Service rules regarding that demotion.

6. Appellant's displacement from her position as Deputy Manager amounted to a demotion under CSR 1 (Demotion Appointment at p. 1-4); 9 (§9-63 defining a demotion on the basis of a change in pay grade); §5-72(e) (Demotion appointment); and §§18-45(i) and 46, D.R.M.C.

7. The Agency cites Charter §9.1.4 (Ex. 1), in support of the right of the Career Service Board to protect the merit system.

8. The Agency presented testimony intended to show that the selection process for the position of Deputy Manager of Aviation for Marketing and Government Affairs was a sham designed to ensure the selection of Appellant.

9. In its opening statement the Agency argued that this appeal was about breaking rules, manipulating the merit system, and the authority of the Career Service Board to correct those actions. Counsel referred to the duty of the Career Service Board under CSR §2-10(b)(6) to enforce its own rules.

10. In its closing argument the Agency referred to CSR §§19-10(d) and 19-22, and stated that it was notable that the Agency was granting a hearing.
Counsel also referred to Charter provision §9.1.4 and 9.1.5. It appears that, as a result of the adoption of Amendment 1A, the latter rule is now found in §9.1.1(A) and (B), as reflected in D.R.M.C. Ch. 18, §18-4.

11. The Agency argues that under Charter §9.1.4(F) the Career Service Board has a duty to “administer and enforce its personnel rules;” and that a fundamental reason for the existence of the Career Service Board is to protect the City's merit system.

III. CONCLUSIONS

1. Pursuant to the Charter and CSR 2-104 this is a de novo hearing. “A trial de novo is commonly understood as a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken.”


2. Career Service Rules contemplate that following the completion of the recruitment, examination and certification process of applicants for employment or promotion, the appointing authority of the applicant will be accountable for its actions regarding the selected applicant.

3. The action at issue herein, “…revoking the waiver and the subsequent promotion reflected on Personnel Action Form 2-077370…”, was taken by the Career Service Board regarding the actions of its Personnel Director.

4. The provisions of CSR §18-12 Grievance procedure paragraphs 1 through 3 do not appear applicable in regard to the action of the Career Service
Board in revoking the waiver given Appellant, since the Board was not the appointing authority of Appellant.

5. The June 20, 2003 grievance having been timely filed regarding the June 11, 2003 letter of the Career Service Board (Ex. 17), I find that Appeal 92-03 was appropriately filed with the Career Service Authority pursuant to CSR §19-10(a), (b) and/or (d).

6. Based on the grievances filed in Appeals 102-03 and 113-03, they were appropriately filed pursuant to CSR §19-10(b) and (d).

7. CSR §19-10(d) is permissive in stating that: “An appeal may be dismissed if the appellant fails to cite the alleged rule(s) violation.”

8. The Hearing Officer has jurisdiction over the appeals filed herein.

9. Due process rights in termination cases are defined by Cleveland Bd. of Educ v. Loudermill, 470 U.S. 532 (1985), where the Court stated:

   We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the ... statute. Id. at 547-548.

The action here was not a termination, but was a revocation of waiver and subsequent promotion, resulting in the return of Appellant to her prior Career Service position at her prior lower rate of pay.

10. I find that Appellant's due process rights were met in that she had notice of the action of the Career Service Board; she was copied on both the May 22 and June 11, 2003 letters to the Manager of Aviation; and she had an opportunity to, and did, respond to the Board through Counsel, as evidenced by

11. The appeal forms herein state with sufficient specificity which career service charter amendment, ordinance or career service rule(s) are alleged to have been violated. The response of Counsel in his June 2, 2003 letter to the Board (Ex. 16) clearly put the Board on notice that Appellant was contesting the jurisdiction of the Board to remove Appellant from her “...promotional probationary status of a career service employee.” The parties having litigated all issues at the hearing herein, I have not limited my consideration to the charter and rules violations alleged in the appeal forms, especially since the Agency cited only Charter §9.1.4(F) as the authority for its action.

12. I find that §§18-237 and 247, Certification by career service authority, D.R.M.C., are not applicable to the issues herein. These sections provide that a duly certified personnel action form shall be conclusive evidence that the action was taken in accordance with the career service provisions of the Charter. Since both the promotion and the revocation of promotion of Appellant were reflected in duly certified Personnel Action forms, they cannot be taken to preclude either consideration by the Career Service Board of the improper waiver action by the Personnel Director, or the grievances of Appellant over her removal from her position as Deputy Manager of Aviation.

13. I find that the Personnel Director, having been appointed by the Career Service Board pursuant to CSR §2-82, was also subject to the
supervision and orders of the Board. Having determined that its Personnel Director had failed to carry out the provisions of CSR §2-10(b)(2) to properly certify an applicant for a Career Service position, the Board was required to follow CSR §2-10(b)(6) and enforce its personnel rules. The Board’s letter of June 11, 2003 (Ex. 17) states its “...obligation under Charter §9.1.4(F) to ‘administer and enforce its personnel rules’.”

14. The actions of the Career Service Board are vested with a presumption of regularity and validity, and Appellant has the burden of showing that the agency’s actions were arbitrary, capricious, or contrary to rule or law. Garner v. Dept. of Personnel, 835 P.2d 527, 532 (Colo. App. 1992); citing Renteria v. State Dept. of Personnel, 811 P.2d 797 (Colo. 1991).

15. I find that the action taken by the Career Service Board in its June 11, 2003 letter (Ex. 17) was an administrative action, the revocation of the waiver granted by its Personnel Director to, and the resulting promotion of, Appellant, and was not a disciplinary action. At no time did the Agency raise any issue regarding the Appellant’s performance of her job. Therefore, the burden of proof herein lies with the Appellant. Atlantic and Pacific Insurance Company v. Barnes, 666 P.2d 163 (Colo. App. 1983); In the Matter of the Appeal of Carla K. Vialpando, CSB Appeal No. 100-03 (October 30, 2003)

16. At issue herein is whether the action of the Career Service Board in its June 11, 2003 letter (Ex. 17) was an arbitrary or capricious exercise of discretion. The Colorado Supreme Court has defined arbitrary and capricious administrative action as follows:
Capricious or arbitrary exercise of discretion by an administrative board can arise in only three ways, namely: (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 men fairly and honestly considering the evidence must reach contrary conclusions. Lawley v. Dept of Higher Educ, 36 P.3d 1239, 1252 (Colo. 2001); quoting Van DeVegt v. Board of County Comm’s. of Larimer County, 98 Colo. 161, 55 P.2d 703, 705 (1936).

17. The administrative action of the Career Service Board in reviewing the actions of its Personnel Director and in revoking the waiver granted to Appellant were part of the “necessary review of work function...to assure organizational efficiency.” In Velasquez v. Dept. of Higher Education, No. 02CA1740; ___ P.3d ___ (Colo. App. September 11, 2003), the Court of Appeals stated:

“A reallocation decision is part of the necessary review of work function that an employer must make periodically to assure organizational efficiency. Unlike a hearing regarding discipline of an employee, reallocation decisions do not involve difficult judgments about credibility. Most importantly, such decisions do not involve allegations of misconduct against an employee, implicating the protections against wrongful discipline embodied in Article XII, section 13(8), of the Colorado Constitution.

The Court also recognized the potential for job abolishment to be pretextual, “when implemented for the purpose of terminating, or in a manner which terminates, a disfavored or targeted employee or group of employees.” Citing Hughes v. Dept of Higher Educ., 934 P.2d 891, 934 (Colo. App. 1997). Velasquez, supra.
18. The investigation by the Board of the waiver granted to Appellant by its Personnel Director was neither arbitrary nor capricious. The Board used reasonable diligence and care to procure evidence, and gave candid and honest consideration to the evidence before it, including the objections of Appellant's Counsel, in exercising its discretion.

19. The Agency attempted to show a "close personal relationship" between Appellant and Bruce Baumgartner. Both Appellant and Mr. Baumgartner denied anything other than a working relationship, and since Counsel failed to present evidence of anything other than a working relationship, I find nothing in such a relationship to support any illegality in the posting and filling of the position of Deputy Manager of Aviation for Marketing and Government Affairs.

20. I find the evidence presented is not sufficient to support the proposition argued by the Agency that the selection process for the position of Deputy Manager of Aviation for Marketing/Government Affairs was a sham. Appellant was given a waiver of the educational requirement allowing her to compete for the position. Thereafter she followed the required procedures in the application, testing and interview process. The fact that Appellant was rated first in this process is not surprising given the fact that she had been working in the position for four years. The Agency provided no evidence of illegality on the part of Bruce Baumgartner in his decision to fill the position on a permanent basis, or in his desire that Appellant be allowed to compete for the position. The evidence presented shows only that persons involved in the process knew each other, not
a surprising fact since Appellant had worked for the City of Denver since 1980, and had worked with these persons in numerous capacities.

21. Since the only action taken by the Career Service Board in its June 11, 2003 letter was the revocation of the waiver given Appellant, the testimony offered by the Agency regarding the management abilities of Appellant, and the intimation of collusion in the application process for the Deputy Manager of Aviation for Marketing/Government Affairs position, is inappropriate. The offer of such evidence constitutes allegations of misconduct by Appellant implicating protections against wrongful discipline. The Board raised no such claims. To permit such claims at this time would place the burden of proof on the Agency to justify its action in revoking the waiver.

22. I find that the testimony of Kelly Brough, Sally Covington, Steve Snyder and Andrew Hudson, has no bearing on the issue of the authority of the Career Service Board to enforce its rules by revoking the waiver granted Appellant by its Personnel Director.

23. The procedure for Recruitment and Examination, found in Rule 3, provides at §3-22c)2) for the rejection of applicants for failure to meet qualifications, and at §3-42 for an applicant to petition for review of a disqualification. These procedures were not applicable here because Appellant was never disqualified.

24. The word “typically” is used twice in the Education Requirements section of Ex. 2. The first time “Typically” appears before “classes”, in a paragraph stating that some classes will contain minimum education
requirements. This section of Ex. 2 continues with three bulleted paragraphs setting forth when a college degree will be established as an absolute requirement. This is the use of the word in its usual definition as "typically" or "characteristically."

25. The third bulleted paragraph in this section of Ex. 2 refers to "High level executive classes (typically at the third level of management)". I find that this use of "typically" refers to the understanding that "high level executive classes" are "typically" or "characteristically," but not necessarily, found at the third level of management. Thus a "high level executive" could be at either a level above or below the third level of management.

26. The action of Mr. Yearby taken in his July 31, 2002 letter, (Ex. 10) "...not waiving the education requirement for this executive position, but ... waiving the requirement so that [Appellant] may compete ... to fill this position.", was an ultra vires act.

27. In the July 31st letter Mr. Yearby states that Appellant "...has occupied an executive position ..."; "...has performed admirably in an executive position as an appointee ... but does not have the equivalency of a college degree."; and finally, "...I am not waiving the educational requirement for this executive position...".[emphasis added] I find that Mr. Yearby understood the position of Deputy Manager of Aviation for Marketing/Government Affairs to be a "High level executive class" as defined in the EDUCATION & EXPERIENCE

3 Ultra Vires – The modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation. Bouvier's Law Dictionary, Student Edition (1928); beyond the legal power or authority of a person, corporation, etc. Webster's New World Dictionary, Second College Edition, (1970).
REQUIREMENTS & EQUIVALENCIES POLICIES & GUIDELINES (Ex. A and 2). I do not credit Mr. Yearby’s testimony regarding this issue since I found him to be evasive in answering questions and in attempting to refer to Appellant and the position at issue to be that of a “high level manager”, a term or title not found in the Career Service Rules.

28. The EDUCATION & EXPERIENCE REQUIREMENTS & EQUIVALENCIES POLICIES & GUIDELINES (Ex. A and 2) is a rule of the Career Service Board, the policy having gone through the procedures required for adoption of a personnel rule set forth in CSR §2-90 Adoption, Amendment or Repeal of Personnel Rules.

29. The evidence presented further supports a finding that the position of Deputy Manager of Aviation for Marketing/Government Affairs was a “high level executive” position as defined in Ex. 2, since it:

...require[s] exposure to executive principles and concepts and the related knowledge(s), skills and competencies necessary to perform the essential duties and responsibilities of the job.

The Appellant’s testimony in regard to this issue is not credited since it was at best inherently contradictory. The support for the conclusion that this was a “high level executive” position is found in the duties assigned to the position, the level of supervision, and situation of the position in the organizational hierarchy of the Division of Aviation. This evidence is set forth above at paragraphs 14, 15, 17, 18, 19, 20, 22, and 24, under the Findings of Fact, and in Ex. 37.

30. The Appellant’s presentation of evidence regarding the ongoing Management Consolidation Study (Ex. S), is inapposite. The study is ongoing,
has not been adopted, and its recommendation regarding the position at issue herein is being opposed. I further find that even if the recommendation of the Study were to be followed, and the position of Deputy Manager of Aviation for Marketing/Government Affairs was placed at a Manager 2 level, it would remain a high level executive position as noted above, based on the duties assigned and its position in the organizational hierarchy.

31. CSR §2-84 sets forth the powers and duties of the Personnel Director. Additional specific authority is given the Personnel Director at CSR §§3-24(a), 3-31, 3-42, 5-52, 7-62, and 16-40. No specific authority is given to the Personnel Director in the Education & Experience Requirements & Equivalencies (Ex. 2).

32. Having found that Appellant was in a "high level executive" position, I find that the Personnel Director had no authority to take the action of waiving the educational requirement for the position of Deputy Manager of Aviation for Marketing/Government Affairs set forth in his July 31, 2002 letter. Ex. A states that substitution is permitted for management classes "other than high level executive classes". As noted above, Mr. Yearby did not waive the requirement for this executive position, but waived the requirement so that Appellant could compete for the position. Nowhere in the Career Service Authority Rules is there a provision granting authority to the Personnel Director to take such action. CSR §2-84 sets forth the powers and duties of the Personnel Director, including "2) To interpret and enforce the personnel rules adopted by the Career Service Board;". The rule at issue here did not require interpretation. Rather it required
enforcement, which Mr. Yearby chose not to do. Other sections of the Rules give authority to the Personnel Director in specified situations, but there is no authority given for the action taken here.

33. CSR §7-62, states: “The Personnel Director may, under special circumstances, substitute experience or other factors for the minimum educational requirement of the position.” This language has no application in the circumstances here, since it is in reference only to authority given to the Personnel Director regarding the “Effect of Reallocation on Incumbents.” There was no contention by either party herein that the Board action at issue was a reallocation.

34. Pursuant to CSR §2-82 the Career Service Board was the appointing authority of its Personnel Director, who is subject to the supervision and orders of the Board. Having found that its Personnel Director had exceeded his authority in granting a waiver to Appellant to compete for a position for which she did not meet the educational requirement, it followed that the Board must rescind the waiver and the promotion of Appellant that had resulted from the waiver.

35. The Career Service Board in its June 11, 2003 letter, (Ex. 17) acted legally and within the scope of its authority in revoking the waiver granted to Appellant, and revoking the subsequent promotion that resulted from the illegal waiver.

36. CSR §2-10 b) sets forth the duties and powers of the Career Service Board, including “6) Administer and enforce its personnel rules;”. These
"rules" include §2-10 b) 2) to "Recruit, examine and certify applicants for employment and for promotion in the Career Service;..." The Personnel Director exceeded his authority in granting a waiver to Appellant permitting her to compete for the position of Deputy Manager of Aviation for Marketing and Government Affairs. Had Appellant applied for the position without a waiver she would have been disqualified. Since Appellant was not qualified to compete for the position, she should not have been allowed to do so, and should not have been certified for the position.

37. I find that the action of the Career Service Board, taken in its June 11, 2003 letter, (Ex. 17) was taken pursuant to CSR §2-10(b)(6) to "Administer and enforce its personnel rules", to rectify the unauthorized action taken by the Personnel Director in granting the waiver to Appellant allowing her to compete for the position of Deputy Manager of Aviation for Marketing/Government Affairs.

38. The notice given to Appellant by the June 11, 2003 letter, Ex. 17, was legally sufficient. The requirement in CSR §16-30A of a pre-disciplinary meeting is not applicable, since the action here was the rescission of the ultra vires act of the Personnel Director in granting Appellant a waiver to allow her to compete for a position for which she did not meet the educational requirement. This resulted in the cancellation of the Appellant's promotion to the position of Deputy Manager of Aviation for Marketing/Government Affairs, and the return of Appellant to the Career Service status and position she had held prior to her promotion.
ORDER

For the reasons set forth above I hereby affirm the action of the Career Service Board revoking the waiver and the subsequent promotion reflected on Personnel Action form 2-077370. The appeals herein are dismissed. Having no authority to award attorney fees, the request for them is denied.

Dated 8th day of March, 2004
at Littleton, Colorado

Daniel C. Ferguson
Hearing Officer