

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 81-09

ORDER DISMISSING APPEAL WITH PREJUDICE

IN THE MATTER OF THE APPEAL OF:

THEODORE KALLMAN, Appellant,

vs.

TECHNOLOGY SERVICES,
and the City and County of Denver, a municipal corporation, Agency.

The Agency filed a motion to dismiss this appeal on October 26, 2009. Appellant responded in opposition on November 4, 2009. After considering the pleadings, file, and applicable authority, I find and orders as follows.

The Appellant is appealing his layoff. He claims the Agency should have considered his proficiency prior to laying him off and, had the Agency done so, it would have retained him. He seeks reinstatement to his former position. [Appeal and Appellant's pre-hearing statement]. The Agency asserts the relief requested by the Appellant may not be granted, and the case should be dismissed, because the Hearing Office lacks jurisdiction to overrule a purely discretionary decision.

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 him to relief. In re Boden, CSA 86-06 (Order 11/22/06).

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]. 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 does not dispute the Agency's allegation that he had less seniority than the other employee in his class. [Motion to Dismiss]. He also did not dispute the appointing authority (agency head) ranked employees for layoff based on seniority under the general rule, and did not invoke this exception. [Motion to Dismiss ¶10].

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) and CSR 14-44 c) is to provide for situations such as his where he possesses a "unique skill set and capabilities that are essential to the duties of Television Programmer." [Appellant's Pre-hearing Statement].

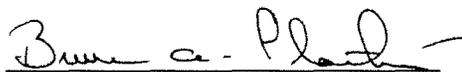
Even taking the Appellant's statements to be true, that he possesses unique skills and experience that make him the more qualified of the two incumbents in his layoff group, discretionary nature of the two rules remains unchanged. The Agency and the Personnel Director may ignore qualifications and may even consciously choose to retain a less-proficient employee. However, contrary to the assertion of the Agency, the Personnel Director, under CSR 14-42 f), and the appointing authority, under CSR 14-44 c), do not retain unrestricted discretion under those respective layoff rules. First, 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. Second, the inherent terms of CSA 14-44 c) do not permit the appointing authority an arbitrary re-ranking of incumbents in a layoff group; the Career Service Authority must approve the criteria employed by a hiring authority in re-ranking incumbents for layoff from a seniority-based ranking to a proficiency-based ranking. CSR 14-44 c) 2). Third, neither the Personnel Director nor the appointing authority may use those respective rules to engage in unlawful discrimination, harassment, retaliation, or other any other unlawful act.

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. Hence, it appears beyond doubt the appellant cannot prove the facts as he alleges them would entitle him to relief. 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.

ORDER

For reasons stated above, the Agency's motion to dismiss is GRANTED.
The Appellant's appeal is DISMISED WITH PREJUDICE.

DONE November 9, 2009.



Bruce A Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this order, in accordance with the requirements of CSR 19-60 through 19-80, within fifteen calendar days after the date this order is sent as stated in the attached certificate of delivery. **Please note the 15-day deadline begins from the date sent, not the date received.** The Career Service Rules are available as a hyperlink at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.