HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 73-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MELANIE PETAGO, Appellant

Agency: DENVER DEPARTMENT OF HUMAN SERVICES,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

Hearing Officer Joanna Lee Kaye held a hearing in this matter on September 15, 2003 in the Career Service Hearings Office. Assistant City Attorney Niels Loechell represented the Department of Human Services (Agency). Melanie Petago (Appellant) was present and represented herself. The parties both filed written closing arguments on October 6, 2003, as the Hearing Officer requested at the close of the hearing. On October 10, 2003 Appellant filed a written Reply to the Agency's Closing Statement, as permitted under the Hearing Officer's Order.

MATTER APPEALED

Appellant, formerly a career-status Agency Trainer (pay grade 805A), challenges the Agency's decision to transfer her from her training position to that of Program Case Manager (pay grade 614A). Appellant asserts that this reassignment was in violation of CSR 5-81, which states that an agency may reassign an employee to another position within his or her classification at any time. Appellant asserts that this transfer constituted an involuntary demotion because the reassignment was outside her classification.

The Agency responds that since Appellant's pay was not changed by the reassignment, it was permitted under CSR 5-81.

Shortly after Appellant's reassignment, she resigned, citing conflicts with school and daycare obligations caused by schedule changes, and the duties of the new position. Appellant's original position of Agency Trainer was eventually abolished.

For the reasons set forth below, this appeal is **DISMISSED** for lack of jurisdiction.

PRELIMINARY MATTERS

On July 8, 2003 the Agency filed a Motion to Dismiss on the argument that Appellant's resignation destroyed jurisdiction over the case because Appellant was no longer a career-status employee. Appellant filed a Response to the Agency's Motion on July 18, 2003, alleging that her resignation was a direct consequence of her reassignment, which forced her to quit due to unfamiliar duties, and conflicts with her personal and school schedules caused by the reassignment.

On July 23, 2003 the Hearing Officer entered an Order denying the Agency's Motion to Dismiss because Appellant's allegations tended to suggest a constructive discharge.

On July 25, 2003 the Agency filed a Reply to Appellant's Response to the Motion to Dismiss. This Reply was taken in the manner of a Motion to Reconsider, since although timely filed, it was filed after the Hearing Officer entered her Order. By Order of August 1, 2003 the Hearing Officer denied the Agency's Motion to Reconsider because genuine issues of material fact remained concerning the actual effect of the reassignment on Appellant's pay, status and/or tenure. *See,* Van Schaack v. Phipps, 558 P.2d 581 (Colo.App. 1976). This case therefore went to hearing on the merits.

ISSUES

1. Whether Appellant's resignation was voluntary, or a constructive discharge.

2. If voluntary, what if any remedies remain available to Appellant as a result of her resignation.

FINDINGS OF FACT

Based on the evidence presented at the hearing, the Hearing Officer finds the following to be fact:

1. The Denver Department of Human Services exists to provide program services to eligible citizens of Denver.

2. Appellant was hired as an Agency Trainer, Pay Grade 805A, on June 3, 2002. Her assignment was to train new caseworkers in the Temporary Assistance to Needy Families (TANF) unit. Her regular work shift in that position was 8:00 a.m. to 4:30 p.m. Monday through Friday.

3. Appellant was in the process of pursuing her master's degree when she was hired. She was enrolled in classes on evenings and weekends which did not interfere with her work schedule.

4. Appellant planned to take a graduate school class during the summer of 2003 which met in the midmorning hours of Tuesdays and Thursdays, during Appellant's

scheduled work hours. Her Training Unit supervisor and she had worked out proposed changes to her work schedule that would allow her to attend the class.

5. A citywide budget crisis led to a hiring freeze effective as of September, 2002. This hiring freeze prevented the Agency from filling several vacant positions. As a result, there was a growing shortage of caseworkers responsible for the front-line work of providing program services. Also, there were no new employees in need of training.

6. In response to the crisis in the Agency's case management workforce, Human Resources Director Diana Smith (Smith) took actions to cover the vacant positions responsible for providing program services. She reassigned a total of 50 employees, including Appellant and other Agency Trainers, to cover the duties of vacant caseworker positions in order to assure that program services were provided.

7. On April 22, 2003 Appellant's supervisor, Perry Ford, notified Appellant verbally that she was being reassigned to the position of Program Case Manager, Pay Grade 614A, effective May 1, 2003. Appellant was told this reassignment would continue for an indefinite period of time, but that the reassignment would be revisited on January 1, 2004.

8. The duties of an Agency Trainer primarily comprise "train[ing] employees for job related duties and responsibilities, including operational maintenance procedures, computer usage, the personnel system, and safety and health related procedures." The minimum qualifications include one year experience in education or training in a structured setting. (*See,* Appellant's Closing Argument, p. 4.)

9. The duties of a Program Case Manager primarily comprise the performance of "paraprofessional case management work with program participant cases in various city agencies." The minimum qualifications include one year experience performing intake, including assessment of a clients' strengths and needs, and providing referrals for assistance. (*See,* Appellant's Closing Argument, p. 4.)

10. Appellant had no prior experience as a Program Case Manager at the time of her hire and had never done intake casework. She had no prior exposure to the TANF Program. As an Agency Trainer, Appellant developed class curriculum and trained Program Case Managers in the TANF regulations.

11. The Agency's e-mail of April 30, 2003 (Exhibit A) refers to Appellant's reassignment as "temporary" but gives no date the assignment is to end.

12. Appellant's pay was not changed at any time as a result of the reassignment. Only her duties were changed.

13. On April 29, 2003 Appellant submitted a request for Leave Without Pay (LWOP) for the period of May 26, 2003 to August 15, 2003 (Exhibit 5).

14. On May 5, 2003 Appellant reported to her new Program Case Manager position under the supervision of Shavonda Thrower (Thrower). Appellant informed Ms. Thrower of her plans to attend the graduate class and her LWOP request. Thrower was supportive of Appellant's desire to attend the graduate class and her leave request.

15. On May 7, 2003 Appellant received notice that management expected her to work full time. On May 9, 2003 Appellant was notified that her LWOP pay request was denied (*see,* Exhibit 5). Appellant submitted several more increasingly modified LWOP requests over the next two weeks, all of which were denied.

16. Thrower met with Appellant in an attempt to work around her class schedule. Thrower offered to allow Appellant to go to class during her scheduled hours and make up the hours within the workweek. Thrower also offered to work Appellant's once-per-month extended hours during the months of June through August. (*See,* Exhibit 5.)

17. On May 9, 2003 Appellant submitted her written notice of intent to resign effective May 30, 2003. The reasons Appellant states for resigning are that "[t]he recent and unexpected reassignment of the training team... has changed my duties and expected schedule dramatically, so that I do not have childcare arrangements or class schedule to facilitate this change at this time." (Exhibit 4.) Appellant states that her reassignment "affected my school and child care arrangements significantly – voluntary LWOP requests to deal with the changes were denied." (Exhibit 2.)

18. The Agency continued to try to accommodate Appellant's schedule after she submitted her written notice of intent to resign. Perry and Smith met with Appellant and Medicaid Manager Marla Cole on May 12 and 16, 2003 to discuss the option of transferring Appellant to the Medicaid unit in the hopes that it could better accommodate an alternate schedule. This attempt failed. (*See,* Exhibit 5.)

19. One of Appellant's professors was willing to teach the graduate course in question on an independent study basis for Appellant so that she would not be required to attend the midmorning classes on Tuesdays and Thursdays.

20. Appellant filed an appeal of the reassignment on May 15, 2003 (Exhibit 1).

21. Appellant's resignation became effective on May 30, 2003.

22. Appellant's position of Agency Trainer was abolished during the week of September 15, 2003.

DISCUSSION

1. Appellant alleged sufficient facts to establish jurisdiction under the CSR rules.

Appellant argues that her reassignment from a position with a Pay Grade of 805A to one of 614A is in violation if CSR 5-81, which states:

> An appointing authority may assign or reassign an employee at any time to any position *within the employee's classification* in the same agency or within consolidated appropriation accounts except as provided below. (*Emphasis added.*)
>
> 5-82 Effect on Status
>
> A reassignment in no way effects the status of the employee involved.

Appellant alleges that her reassignment to a lower classification constituted an involuntary demotion. Based on these allegations, the Hearing Officer has jurisdiction to hear this case pursuant to CSR Rule 19-10 b), as follows in relevant part:

> Section 19-10 Actions Subject to Appeal
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> An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.
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> ...b) Actions of appointing authority: Any action of an appointing authority resulting in... involuntary demotion... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

2. Burden of proof

The City Charter, C5.25 (4) and CSR 2-104(b) (4) require the Hearing Officer to determine the facts of the case "*de novo.*" This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.)

In civil administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence. See,* 13-25-127, C.R.S (2001). In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

During the hearing, the Agency conceded it bears the burden of demonstrating that its reassignment of Appellant was proper under CSR 5-80, and that it therefore was not an involuntary demotion in violation of CSR 19-10 b) .[1]

[1] An agency responsible for taking a non-disciplinary action against a Career Service employee under CSR 19-10 b) typically bears the initial burden of establishing, by a preponderance of the evidence, that

3. The Hearing Officer lacks jurisdiction to grant any remedy to Appellant.

a. Appellant's resignation was not a constructive discharge.

The Hearing Officer recognizes Appellant's justifiable displeasure with being reassigned to a position of significantly lower classification, and one apparently of a different type than that of her chosen profession. However, displeasure with one's transfer position is not sufficient to establish a constructive discharge.

A demotion or other change in duties might constitute a constructive discharge in some cases. *See,* Montemayor v. Jacor Communs., Inc, 64 P.3d 916, 921 (Colo. App. 2002). A materially adverse action such as a change in benefits may constitute a "constructive discharge." Krauss v. Catholic Health Initiatives Mountain Region, 66 P.3d 195, 201 (Colo. App. 2003); *citing* Sanchez v. Denver Public Schools, 164 F.3d 527 (10th Cir. 1998). However, an adverse employment action "does not extend to a mere inconvenience or alteration of job responsibilities." Krauss, *above, citing* Peterson v. Utah Department of Corrections, 301 F. 3d 1182 (10th Cir. 2002).

"A 'constructive discharge' has been defined as 'an onerous transfer, having the purpose and effect of forcing the transferred employee to quit the employment.'" Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977), *citing* Newspaper Guild of Boston v. Boston Herald-Traveler Corp., 238 F.2d 471, 472 (1st Cir. 1956). The "burden imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign." Crystal Princeton Refining Co., 222 N.L.R.B. 1068, 1069 (1976). An employee "has no right simply to walk out; he must accept the orders of his superior, even if felt to be unjust, until relieved of them by judicial or administrative action. " Alicea Rosado, *above,* at 119.

> Before a "constructive discharge" may be found, entitling the employee to quit working altogether rather than accepting a transfer which he thinks is violative of his constitutional rights, the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.

Id., *citing* McKenna v. Commissioner of Mental Health, 347 Mass. 674, 675-76, 199 N.E.2d 686 (1964).

During the hearing in this case, several critical facts were entered in evidence. Based on those facts the Hearing Officer concludes that Appellant's resignation was not

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the Agency's action was not arbitrary or capricious. An agency's decision is arbitrary and capricious when it "is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Board of County Commr's v. O'Dell, 920 P.2d 48, 50 (Colo. 1996). However, the Hearing Officer concludes below that Appellant's resignation was voluntary. Since her actions effectively destroy any remedy she might otherwise have had available to her, the issue of whether the Agency's reassignment of Appellant to the new position was legal under the CSR rules is not reached in this decision.

a constructive discharge as described in the above case law. Appellant began her new assignment on May 5, 2003 and was only in the position for a few days when she prepared her letter of resignation on May 9. Her resignation became effective at the end of May. While many of the duties of a Program Case Manager may have been foreign to her, Appellant was only in the position for three weeks. There is no suggestion that she resigned as a result of some failure on her part to execute her duties, or any adverse action by the Agency for her failure to do so. Therefore, there is insufficient evidence to establish whether she was capable of performing the job.

Furthermore, Appellant's time conflict with graduate school was an unpleasant fact with which she had to contend, but she could have chosen to delay taking the classes, take an independent study, or make up the hours later during the week. The requirement to work extended hours one day a month may have caused day care problems for Appellant. But her supervisor volunteered to cover Appellant's extended hours during the months of June through August to give her time to adjust her day care schedule. In addition, testimony at hearing establishes that Appellant's pay was not affected by the reassignment. There was no suggestion of any change in Appellant's benefits or tenure. Therefore, there was no materially adverse action by the Agency in this case.

Finally, it is clear the Agency did not reassign Appellant out of any animus or punitive intent. Appellant's reassignment was part of a broader management decision made in an attempt to provide the benefits and services the Agency exists to provide during a hiring freeze, as well as to occupy trainers with no new employees to train. Its intent was not to impose working conditions so difficult or unpleasant so as to force Appellant to resign.

Taken together, this evidence does not rise to such a level at which the hearing officer can conclude that Appellant's new working conditions were so difficult or unpleasant that a reasonable person in her position would have felt compelled to resign, or that she was forced out intentionally by the Agency's actions. The Hearing Officer concludes that Appellant's resignation does not qualify as a constructive discharge under the governing case law. Therefore, Appellant resigned of her own volition.

b. Appellant's voluntary resignation renders the legality of her reassignment moot since it destroys all potential remedies.

The evidence at hearing further establishes that Appellant's reassignment was initially referred to as being temporary at the time it was made. The abolition of Appellant's position suggests the reassignment might not have been as temporary as originally anticipated. However, Appellant had already resigned from her reassigned position when this happened.

Had Appellant still been with the Agency when her original position was abolished, then this situation might have become one of an improper lay-off, as Appellant argues. However, since Appellant was not constructively discharged, her resignation was voluntary. Appellant's voluntary resignation results in the voluntary

relinquishment of her rights as a city employee. The Hearing Officer cannot affirm, modify or reverse any action respecting a position Appellant no longer holds as a result of her own actions.

Since all other remedies are now moot, the only remaining remedy would have been an order restoring to Appellant any losses she actually suffered while still a CSA employee, prior to her resignation as a result of the reassignment. However, the absence of a pay differential in this case leaves no remaining remedy to be granted, even if the original reassignment were found to be in violation of the CSR rules governing reassignments. Appellant's voluntary resignation renders any discussion about the legality of the reassignment, or the effect of the abolishment of her position, academic and speculative.[2]

For the reasons set forth above, the Hearing Officer concludes she lacks jurisdiction to grant a remedy in this case. It must therefore be DISMISSED.

CONCLUSIONS OF LAW

1. Appellant sufficiently alleged de-facto involuntary demotion and improper reassignment in violation of CSR 5-81 for the Hearing Officer to assume jurisdiction to hear this case.

2. Appellant's pay remained the same during the reassignment.

3. Appellant's resignation was voluntary, and was not a constructive discharge.

4. Appellant's voluntary resignation effectively destroyed any potential remedy the Hearing Officer has jurisdiction to grant.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, this appeal is DISMISSED WITH PREJUDICE.

Dated this 16th day of October 2003.

Joanna Lee Kaye
Hearing Officer for the
Career Service Board

[2]Since there is no remedy available to Appellant, the Hearing Officer does not reach the question of a CSR violation here.