CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 54-14A

In the Matter of the Appeal of:

JOVEDA SCOTT,

Appellant/Petitioner,

v.

OFFICE OF ECONOMIC DEVELOPMENT, DENVER EMPLOYMENT FIRST DIVISION, and the City and County of Denver, a municipal corporation,

Agency/Respondent.

DECISION AND ORDER

Appellant, Joveda Scott, was an Administrative Support Assistant IV for the City's Officer of Economic Development. Nine months after having received a demotion, she was terminated from her employment for continued poor work performance.

The crux of the charges against Appellant involved four customer complaints brought against her in a short period of time, as well as her inability to keep up with the reasonable demands of her work. Significantly, according to the Hearing Officer, Appellant admitted, at hearing, that four valid complaints had been made against her. She also admitted that she had failed to keep up with her work as required, though she offered excuses for this failure.

Appellant bases her appeal on two grounds, 19-61 New Evidence, pursuant to CSR 19-61(A) and Insufficiency of Evidence under CSR 19-61(D).

We reject Appellant's claim regarding new evidence. As noted by the Agency, all of the exhibits which Appellant claims to constitute new evidence are dated prior to her hearing. On their face, they do not appear to be new. In addition, our rule requires an affidavit from Appellant explaining why she could not have presented the "new" evidence at hearing. Specifically, CSR 19-62 states, "If the party is asserting "new evidence," the party shall include an affidavit stating the nature of the new evidence and the reason(s) for its unavailability at hearing...." Appellant has not provided us with the required affidavit.[1] Appellant has not demonstrated any entitlement to relief under CSR 19-61(A).[2]

Appellant next claims there is insufficient evidence to support the Hearing Officer's decision.

We overturn a Hearing Officer's factual findings for insufficiency of evidence under CSR 16-61(D) only where the Hearing Officer's factual findings are "clearly erroneous." A factual finding is clearly erroneous when it is unsupported by substantial evidence in the record considered as a whole; that is, where the factual finding has no support in the record. *In the matter of the Appeal of: Catherine Martinez and the Department of Safety*, No. 09-12A.

Typically when confronted with this issue, we review the entirety of the record. Pursuant to our rule 19-64, we obtain the record from the Appellant. Appellant, however, is not strictly required to provide us with the entire record. Our rule states:

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[1] Even though Appellant appears before us *pro se*, she is required to know and follow our rules.
[2] We have, nevertheless, looked at the new evidence and find that should this evidence had been considered by the Hearing Officer, it most likely would not have changed the outcome of the hearing and most certainly would not have changed the outcome of this appeal.

19-64 Hearing Transcript and Record

A. Within twenty (20) calendar days after filing the petition for review, the petitioner shall file with the Hearing Office a request for the transcript of the hearing, ***or such portions of the hearing, if any, that the petitioner deems necessary for consideration of its petition by the Board.*** The petitioner shall file a copy of the request for the transcript with the Board and serve a copy on the other party on the same day that the petitioner files the request with the Hearing Office.

Appellant, however has made a strategic decision concerning the record. Specifically, she has chosen to provide us with only testimony from herself and her witnesses and her cross examination of the Agency's witnesses. She has provided us with no transcripts of the testimony offered by Agency witnesses in the Agency's case in chief.

Appellant chose to not allow us to make a proper review of this record. She could have provided us with the entire transcript, but chose not to. While it is Appellant's burden in this appeal to convince us that the Hearing Officer's decision is not supported by sufficient evidence, she makes it impossible for us to review for sufficiency of evidence, and thus, impossible for her to prevail on her appeal. By providing us solely with the cross-examination testimony of the Agency's witnesses, we cannot say that the Hearing Officer's findings or conclusions are not supported by record evidence.[3]

In any event, we have reviewed the record as it has been made available to us,

[3] The Agency has provided us with persuasive precedent from outside of this administrative arena which confirms the correctness of the position we take. See, e.g., *Bonham v. Aurora*, 133 Colo. 276, 294 P.2d 267 (Colo. 1956) ("[I]t is the well established rule in this state that in the absence of the reporter's transcript, the regularity of the findings and judgment and support thereof by the evidence must be presumed."); *Northstar Project Mgmt., Inc. v. DLR Grp., Inc.*, 295 P.3d 956 (Colo. 2013) (Where a Defendant's fails to include in the record a transcript of *all evidence relevant* to the court's judgment, sufficient support for the judgment is presumed).

and we find, thorough documents admitted into evidence, as well as admissions made by Appellant herself, that there is sufficient evidence in the record to support the findings and conclusions made by the Hearing Officer.

Appellant has also claimed the Hearing Officer has erred generally in finding that Appellant violated specific Career Service Rules of conduct.[4] We have reviewed each such argument and in every case, Appellant asks us to re-weigh evidence and re-assess credibility of witnesses. We will do neither.

The Appellant also appears to claim that the punishment she received was too harsh. We do not believe the record reflects that the Hearing Officer erred in upholding the penalty of discharge. The Hearing Officer took into account Appellant's disciplinary history and the fact that prior discipline did not result in improved or corrected behavior by Appellant. The Hearing Officer also took into account Appellant's own testimony which revealed that Appellant did not acknowledge any need to improve her performance or conduct, leading the Hearing Officer to reasonably conclude that any punishment less than discharge would not result in any improved or corrected behavior.

Finally, Appellant complains that her claim of unlawful retaliation was improperly dismissed. It suffices for our purposes to note that we see no evidence in this record of any causal link between any alleged protected activity[5] and Appellant's discharge. As a result, the dismissal by the Hearing Officer of Appellant's retaliation claim was proper.

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[4] Specifically, CSR 16-60 B,J, K and O.
[5] We assume, without so holding, that Appellant engaged in protected conduct.

The Hearing Officer's decision upholding the discharge of Appellant is AFFIRMED[6].

SO ORDERED by the Board on May 7, 2015, and documented this 16th day of July, 2015.

BY THE BOARD:

Chair (or Co-Chair)

Board Members Concurring:

Gina Casias, Esq. (Co-Chair)

Patti Klinge

Derrick Fuller

Neil Peck, Esq.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER** on July 16, 2015, in the manner indicated below, to the following:

Career Service Hearing Office
CSAHearings@denvergov.org

[6] Appellant has filed a reply brief and the Agency has moved to strike that brief. Our rules do not allow for Appellant to file a reply brief. Nevertheless, because we have not considered the reply brief in our decision, we deny the motion as moot.