

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

Appeal No. 100-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

CARLA K. VIALPANDO, Appellant,

v.

Agency: Department of Budget and Management, Risk Management, and the City and County of Denver.

INTRODUCTION

For purposes of these Findings and Order, Carla Vialpando shall be referred to as "Appellant." Department of Budget and Management, Risk Management shall be referred to as "Department" or "Risk Management." The City and County of Denver shall be referred to as "City." They will be referred to collectively as "Agency." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held January 5 and 6, 2004, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by John Moseby, Esq. The Agency was represented by Linda Davison, Assistant City Attorney, with Ray Sibley as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Appellant:

Ray Sibley, Appellant, Beatrice Medina, Regina Padilla

The following witnesses were called by and testified on behalf of the Agency:

Ed Geitl, Ray Sibley.

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

A – H.

The following exhibits were offered and admitted into evidence on behalf of the Agency:

1-16, 18.

The following exhibits were admitted into evidence by stipulation:

A, B, C, E, F, 1-16.

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

NATURE OF APPEAL

Appellant is appealing her non-disciplinary demotion pursuant to a layoff under CSR 14-40, *et seq.* She alleges the lay-off and demotion was not done properly under the Rules. She also alleges the lay-off was done in bad faith as part of a past pattern of retaliation/discrimination and harassment. She seeks reinstatement into her former Career Service classification and a return to the position she previously held in Asset Management, plus back pay and benefits

ISSUES ON APPEAL

Was the decision to lay-off and demote Appellant part of a pattern of retaliation/discrimination and harassment?

Whether the non-disciplinary demotion due to lay-off was conducted in compliance with the Rules?

If the non-disciplinary demotion due to lay-off was not done in compliance with the Rules, what is the remedy?

PRELIMINARY MATTERS

Appellant, initially appearing *pro so*, filed her appeal of her non-disciplinary lay-off on June 27, 2003. This matter was set for hearing on the merits on October 20 and 21, 2003. Appellant, who was still appearing *pro se*, filed a Motion to Hold In Abeyance on October 9, 2003, in order to join this matter with a grievance appeal of a Performance Enhancement Program Report evaluation of "below expectations" not yet filed. The Motion was denied by this Hearing Officer on October 14, 2003, because, among other reasons, the matters were not sufficiently similar to require consolidation.

The Hearing Officer also initially denied Appellant's October 9, 2003, Motion for Discovery and Production of Documents. That ruling was reversed by the Hearing Officer, consistent with an order issued on October 30, 2003, after a prehearing conference on October 20, in which the Hearing Officer ordered the Agency to provide any documentation it has in its possession regarding allegations of a hostile work environment in Asset Management.

At the prehearing conference, the Agency raised the issue of the burden of proof for this case. The Hearing Officer, in the October 30 order ruled that the burden on all claims lay with Appellant. She would need to establish that the Agency's action in executing the lay-off/demotion were arbitrary, capricious or otherwise contrary to rule or law. She would bear the burden of proof on her discrimination/retaliation/harassment claims.

FINDINGS OF FACT

1. Appellant has worked for the City for twenty-five years. She is a Chicano female. Prior to the lay-off/demotion, she was classified as a Financial Management Specialist at pay grade 811 A. Subsequent to the lay-off/demotion, she was classified as a Risk Analyst at pay grade 807 A.

2. Prior to coming to Risk Management in 2001, Appellant worked in Asset Management, which was directed by Derek Brown,

3. Asset Management and Risk Management are both under Margaret Browne, Finance Director. Under the Career Service Rules, Asset Management and Risk Management are considered separate "agencies."¹

4. Appellant filed claims of harassment and discrimination against Kurt Schumacher (her then-supervisor) and Mr. Brown in 2000. As a result of an investigation into those allegations, Appellant was offered a transfer to Risk Management in 2001.²

5. When Appellant accepted the transfer to Risk Management, she was assured by Ms. Browne that the transfer would not impact her career.

6. When Appellant started with Risk Management, she was supervised by Joel Hirschboeck.

7. Ray Sibley became Director Risk Management in July 2001, after Appellant's transfer.

8. Mr. Sibley met with Appellant and the other employees sometime during his first week in Risk Management. Since she was working on projects for Mr. Hirschboeck, Appellant continued to be supervised by him. In September 2001, M. Sibley restructured the responsibilities of the individual employees; after that, Appellant worked directly for Mr. Sibley.

9. Appellant testified that she met individually with Mr. Sibley three or four weeks after he came to Risk Management. They talked about her projects and her background. He indicated to her that he had talked to Mr. Brown and said, "I know what you are all about." She also stated that Mr. Sibley would not give her specifics when she asked him what he was talking about.

10. Appellant also testified that, on another instance, Mr. Sibley came up to her at her desk to ask about something. She indicated that she was working with Mr. Brown on the matter. According to Appellant, Mr. Sibley replied, "I'm surprised Derek would talk to you after what you did to him." Appellant replied, "I talk to Derek. I'm professional. I'm able to work with him."

¹ For further discussion of the reasoning behind this Finding of Fact, see, *In the Matter of the Appeal of Carla Vialpando*, CSA Appeal No. 182-03. In that case, this Hearing Officer discusses the definition of an "agency" under the CSR as a "fund-organization" number under an appropriation ordinance, and the effect this has on the different divisions within the Department of Finance.

² The investigatory report into Appellant's discrimination claims was not available for the hearing as it is not in the possession of Risk Management or Asset Management. Therefore, the Hearing Officer is unable to make any findings about the substance of the report.

11. Beatrice Medina, who works in the Workers' Comp Unit of Risk Management, remembered overhearing this conversation between Appellant and Mr. Sibley sometime in 2002.

12. Mr. Sibley testified that he had no information about the reasons for Appellant's transfer in July or September 2001. He denied that he ever made the statement that he knew "what she was about." He said he might have learned of the issues with Asset Management when he went to do Appellant's Performance Enhancement Program Report. He stated that he met with Mr. Brown in order to do the PEPR because Appellant had been in Asset Management much of the year. Mr. Brown told him he would rate Appellant "Below Expectations." Mr. Sibley did not ask for details behind this conclusion. Mr. Sibley, in fact, informed Appellant that he would not consider the opinion offered by Mr. Brown and would look only at the work she had done with Risk Management.

13. On June 17, 2003, Budget Director Mel Thompson sent a memorandum to all department and agency heads directing an immediate implementation of the proposed 2004 budget cuts in 2003. Managers were directed to consult with the CSA when conducting any lay-offs as part of the budget cuts. (Exhibit 13-1).

15. Risk Management was advised to cut its 2004 budget by at least \$60-70,000.

16. Mr. Sibley's first choice for reducing Risk Management's budget was not to purchase insurance for the Police Department's helicopter. This would have reduced Risk Management's Budget by \$67,000 per year. (Exhibit 15) However, that solution could only be accomplished if, and only if, the Police Department decided to ground the helicopter. As of the date of the hearing, the helicopter had not been grounded.³

17. Because the issue of the insurance premium for the helicopter was not resolved favorably for Risk Management's budget, the only other option Mr. Sibley had was to look at possible personnel savings.

18. In June 2003, there were only six people under Consolidation Code A22: Mr. Sibley, the Division Director; Appellant, the Financial Management Specialist; Joel Hirschboeck, the Risk Administrator; Dave Stewart, the Safety and Loss Coordinator; Peggi Miller, the Risk Analyst; and Mike Ludington, the Senior Safety and Loss Analyst.

19. Mr. Sibley determined that the duties performed by the Safety and Loss Coordinator and Senior Safety and Loss Analyst positions could not be assumed by other employees. He determined that the duties performed by the Financial Management Specialist could be reassigned and redistributed to the Division Director, Risk Analyst and the Risk Administrator.

20. The savings to the Risk Management budget by the elimination of the Financial Management Specialist would be \$7,432.26 per month for the months remaining in 2003 and \$89,187.12 per year starting in 2004. (Exhibit 16-1)

21. Once a determination was made that the only way to meet the budget cut was to

³ The Hearing Officer takes judicial notice that the helicopter has not been grounded as of the date of this Findings and Order.

eliminate the Financial Management Specialist position, Mr. Sibley contacted Vivian Atkins and Stacey Schalk at the Career Service. He also met with Ed Geitl, Senior Personnel Analyst with the CSA.

22. Appellant's lay-off was one of the first, if not the first, lay-off handled by the Career Service.

23. Mr. Sibley provided the lay-off plan (Exhibit 14) to the Career Service. He received verbal approval from Stacey Schalk on June 20. He was told by Ms. Schalk at the time that, since the CSA was operating with two interim Directors, the written approval would come later; but that he could be assured that the plan would be approved.

24. Mr. Sibley prepared the official notification of lay-off, effective July 15, 2003, and had it reviewed by CSA personnel. Once the content was approved, he handed it to Appellant on June 20, 2003. (Exhibit 1)

25. Written approval of the lay-off plan was approved by Steve Adkison and Jim Nimmer, CSA's Interim Co-Directors, on July 1, 2003. (Exhibit 7)

26. No new letter notifying Appellant of the lay-off was issued after Mr. Sibley received the written approval from the CSA.

27. As part of the lay-off process, Mr. Geitl performed a classification analysis and produced a list of Risk Management job classifications under her consolidation code for which Appellant was qualified to perform pursuant to CSR 14-45 b)1)a). Mr. Geitl determined that Appellant met the minimum education and experience requirement for the Risk Analyst position. (Exhibit 5-2)

28. Mr. Geitl testified that Appellant was not qualified for any other position within Consolidation Code A22 by education or experience.

29. Employees within consolidation codes have bumping rights within the consolidation code. However, employees do not have bumping rights across consolidation codes. This means that personnel from Risk Management cannot bump into Budget Management or Asset Management, or vice versa.

27. Mr. Sibley provided Appellant with notice that she was entitled to a demotion to Risk Analyst on July 1, 2003. (Exhibit 2) Appellant accepted the demotion in lieu of lay-off on July 2, 2003. The demotion became effective July 16, 2003.

28. This appeal was filed in a timely manner.

DISCUSSION AND CONCLUSIONS OF LAW

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

This is an appeal of a lay-off and non-disciplinary demotion. She claims age, race, national origin, and sex discrimination and retaliation. Appellant has the burden of proof on all issues.

A. Lay-off

Because Risk Management was required to cut at least \$60-70,000 from its operating budget, and the option of canceling the insurance on the Police Department helicopter was not available as the helicopter had not been grounded by the Police, Mr. Sibley's only alternative was to reduce personnel.

The Career Service Rules set out the procedures for lay-off and non-disciplinary demotion. CSR §14-42 a) defines a lay-off unit as an appropriation account or combination of accounts as approved by the Career Service Board. In this case, Appellant was part of the appropriation unit designated by Consolidation Code A22, which consisted of six persons: Mr. Sibley, the Division Director; Appellant, the Financial Management Specialist; Joel Hirschboeck, the Risk Administrator; Dave Stewart, the Safety and Loss Coordinator; Peggi Miller, the Risk Analyst; and Mike Ludington, the Senior Safety and Loss Analyst.

Next is the execution of the lay-off itself. CSR §14-46, as it existed in June 2003, has several steps. First, a lay-off plan must be prepared by the appointing authority. CSA personnel may provide procedural assistance and consultation as soon as the appointing authority decides the number of positions by class to be abolished. CSR §14-46 a). This step was complied with. Mr. Sibley decided to abolish the Financial Management Specialist position as the abolishment of the position would meet the budget constraints and the work could be reassigned to the other three positions within the consolidation code. He spoke with CSA personnel and prepared the lay-off plan.

Appellant complains that the lay-off plan (Exhibit 14) is deficient. The Hearing Officer disagrees. There was no evidence that the plan developed by Mr. Sibley was not done in accordance with the requirements of CSR §§14-42 through 14-45, which detail the order of lay-offs, effect of the length of service, sequence of lay-offs, and actions which might be taken in lieu of lay-off, respectively. While the information contained within the plan might have provided more information, the plan was found to be sufficient by CSA personnel to convey the information needed to perform the abolishment of the position.

The next step requires that, before an official notice of lay-off is given to the affected employee, the plan must be audited and approved by the Career Service Authority. CSR §14-46. This did not happen in this case.

Mr. Sibley testified that on June 20, Stacey Schalk gave him verbal approval because she was "sure" the lay-off plan would be approved by Mr. Adkison and Mr. Nimmer. This is problematic. Ms. Schalk did not have the authority to give approval, either verbally or in writing. Approval could only come in writing and only from Mr. Adkison and Mr. Nimmer. The written approval from the persons authorized to give same did not come until almost two weeks later on July 1. (Exhibit 7) As a result, all actions taken by Mr. Sibley between June 20 and July 1 were premature. Most significantly, this includes the notification of lay-off Mr. Sibley gave to Appellant on June 20. (Exhibit 1)

As a result, a new notice of lay-off should have issued to Appellant. It was not. This is error. The question is the effect of this error.

CSR §14-46 c) requires that notice of lay-off must be no less than ten calendar days before the effective date. In this case, the defective notice of lay-off actually gave Appellant over three

weeks notice. And if a new notice of lay-off had been issued on any day between July 1 until 3, the effective date need not have been changed and would still have provided sufficient notice. Therefore, the Hearing Officer concludes that, although the notice of lay-off was premature, this was, under the circumstance of this case, harmless error.

B. Possibility to transfer back into Asset Management

Appellant also claims that she should have been permitted to retain her former classification and be returned to Asset Management. This relief is not possible.

Lay-offs, actions done in lieu of demotions (*i.e.*, bumping rights) and demotions must be done within consolidation codes. Risk Management and Asset Management not only are not within the same consolidation code, they are separate agencies as defined by Career Service Rule 1.⁴ Therefore, the suggested relief, that Appellant be permitted to retain the Financial Management Specialist title and return to Asset Management, is not available.

C. Discrimination/Harassment/Retaliation Claims

The requirements for establishing an employment discrimination case were originally set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Appellant bears the burden to prove that she was discriminated against on the basis of her being a member of a suspect or protected class. The burden then shifts to the Agency to show that there was a *bona fide* business reason for its actions. If the Agency shows a *bona fide* business purpose, then Appellant has to show that the *bona fide* business purpose is pretextual. See also *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center et al. v. Hicks*, 509 U.S. 502 (1993).

The Colorado Supreme Court adopted the federal standard for discrimination claims for violations of CRS §24-34-402, the Colorado statute covering discriminatory or unfair employment practices, in *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P.2d 397 (Colo. 1997). Discrimination may be presumed by the establishment of a *prima facie* case which shows: 1) that the employee belongs to a protected class; 2) that the employee was qualified for the job at issue; 3) that, despite her other qualifications, the employee suffered an adverse employment decision *e.g.*, a demotion or discharge or a failure to hire or promote; and 4) that the circumstances give rise to an inference of unlawful discrimination.

Appellant is alleging race, gender, national origin and age discrimination, as well as harassment and retaliation. Appellant has established the first three prongs of the test. However, she has not provided sufficient proof that there are circumstances that could give rise to an inference of unlawful discrimination, harassment or retaliation.

The basis of Appellant's claims is that, while she worked with Asset Management, she filed a gender and national origin complaint against a co-worker, and that this then affected Mr. Sibley's decision to "target" her for the lay-off and demotion.

Appellant's evidence of discrimination, harassment and retaliation consisted of Mr. Sibley's statement in September 2001, nearly two years earlier, that he had talked to Derek Brown about her and the he "knew what she was about" and Mr. Sibley's indication sometime in 2002 that he was surprised Appellant could work with Mr. Brown. These two statements are insufficient to

⁴ See, Footnote 1.

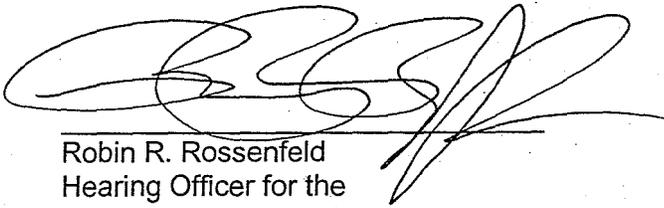
establish that Mr. Sibley chose Appellant for the lay-off based upon a discriminatory animus or in retaliation or to harass Appellant for having filed a complaint about a co-worker in another Division and before Mr. Sibley began to work for Risk Management.

The discrimination, harassment and retaliation claims are dismissed.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer DENIES the appeal in its entirety with prejudice.

Dated this 31st day of March 2004.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in the U.S. mail, this 1st day of April 2004, addressed to:

John Mosby, Esq.
621 17th Street, #925
Denver, CO 80293

Carla K. Vialpando
1900 W. 32nd Ave., # 5
Denver, CO 80211

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 1st day of April 2004, addressed to:

Linda M. Davison, Esq.
Office of the City Attorney
Employment Law Section

Ray Sibley
Office of Risk Management

