

**DECISION AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**JACEK BURGHARDT,**

Petitioner/Appellant,

vs.

**CLERK AND RECORDERS OFFICE,** and the City and County of Denver, a municipal corporation, Agency,

Respondent/Agency.

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Jacek Burghardt ("Appellant") was an Administrative Support Assistant ("ASA") III employed in the Clerk and Recorders Office. That office oversees two distinct operations: those involving traditional clerk and recorder functions; and those overseeing elections. When Burghardt started working in that office, employees of both sections were all within the same appropriation account.<sup>1</sup>

Appellant originally worked in the Clerk and Recorders section, but in 2012, he was officially transferred to the Elections division. In 2013, the Colorado legislature fundamentally changed the way elections in Colorado would be conducted by requiring the implementation of state-wide mail-in ballots. As a result of this change, the need for polling places, workers to staff those polling places, and workers to generally implement the election process, decreased dramatically. Because of the distinct functions performed by the two sections of the office, for operational reasons, the head of the Agency sought and obtained (from the Career Service Board) a deconsolidation of the appropriation account pursuant to Career Service Rules 14-42(B)(2-3). Eventually, as a result of the need for fewer employees in the Elections division, layoffs were planned.

Appellant's position was scheduled for layoff. He was the only ASA III within his layoff unit. There was no position within his layoff unit into which Appellant could bump. In addition, because of the deconsolidation, our rules did not permit him to bump any ASA III in the Elections division. Consequently, Appellant lost his job.

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<sup>1</sup> As we understand it, an appropriation account is the "bucket" of money funding the positions the employees hold. The makeup of an appropriation account is critical in determining layoffs because it those accounts which make up "layoff units" under Career Service Rule 14-42.

Appellant appealed his layoff claiming both that the Agency failed to follow rules in effectuating the layoff and that his layoff was discriminatory based on his national origin and gender and sexual orientation. The Hearing Officer held that Appellant failed to prove any of his claims. Appellant has filed a Petition for Review asking us to overturn the Hearing Officer's decision and to reinstate him to a position in the Clerk and Records Office. For the following reasons, we will not do that.

Appellant first argues that the Hearing Officer erred when he affirmed the layoff while holding that the Agency had, in fact, followed the appropriate rules regarding layoffs.<sup>2</sup> Appellant claims this was error because, "[t]he case is not covered by OHR rules." While this statement is technically true as "OHR" rules do not govern layoffs, it is immaterial in that the layoff was governed by Career Service Board rules, specifically, Rule 14-40, et seq. The Hearing Officer plainly judged the propriety of the layoff against these rules, and found that the Agency's layoff of Appellant did, in fact, comport with all applicable Career Service Board Rules.

Appellant claims that a specific error made by the Hearing Officer was his refusal to grant him layoff protection to which he was entitled by virtue of having received only a temporary assignment to the Elections division. Appellant appears to claim that because his assignment to Elections was temporary, he remained an employee within the Clerk and Records layoff unit, and, therefore, had bumping rights over other ASA III's in the Clerk and Records section. But the Hearing Officer found as fact that Appellant's assignment to the Elections division was not temporary but instead, was permanent. This fact is supported by record evidence in the form of testimony and documents. Because this factual finding is not clearly erroneous, we will not disturb it. Appellant was an employee employed within the Elections division layoff unit, and, as such, had no bumping rights over anyone in the Clerk and Records unit, because bumping rights exists only within one's layoff unit. (C.S.R. 14-45(b)(1)). The Hearing Officer did not err in this determination.

Appellant also argues that his layoff was discriminatory. He claims he was laid off because of his national origin and his gender and sexual orientation. The Hearing Officer found no evidence to support these claims. Our independent review of the record confirms the Hearing Officer's conclusions. There is no evidence in the record to support Appellant's claim that he was targeted, or that his layoff was motivated, on account of animus against him based on his national origin or gender and sexual orientation.

Appellant further claims that his position should have been audited, but was not. This argument is made, we believe, in an attempt to show that Appellant's duties were improperly transferred out of his division so as to make it look as if there was no work for him to perform, thereby artificially causing the need for his layoff. The Hearing Officer, at page 4 of his decision, considered this claim and held that Appellant had failed to produce sufficient facts to prove it. We agree. The record is devoid of facts supporting this allegation. The Hearing Officer did not err when he ruled that Appellant had failed to prove this claim.<sup>3</sup>

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<sup>2</sup> This is our interpretation of Appellant's argument. Appellant appears *pro se*. While we appreciate the daunting task as well as the effort required to appear *pro se*, Appellant's brief is, for the most part, unintelligible.

<sup>3</sup> Because the layoff is an administrative action and not a disciplinary action, the burden of proof rested with Appellant to demonstrate that his layoff was improper.

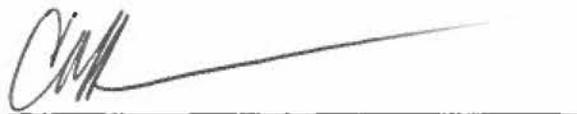
Appellant also appears to make the policy argument that his layoff was improper because it had a negative impact on the diversity of the workforce. As authority for this proposition, Appellant cites *Rice v. Auraria Higher Educ. Center*, 131 P.3d 1096, 1100 (Colo. App. 2005). *Rice* is inapposite. *Rice* involved a layoff within the State of Colorado's civil service system. That system, like ours, has certain rules that must be followed to properly effectuate a layoff. Those rules, however, are not our rules. Our layoffs are not governed by state civil service rules. In any event, consideration of diversity, even in the state system, is not mandatory. State agencies implementing a layoff within the state's civil service layoffs must consider seniority and performance factors, but are *permitted* to consider workforce diversity, but only for the purpose of mitigating (what we understand to be) potential disparate impact. *Id.* Even assuming, however, that the City would have the right to avoid a lawsuit and consider potential disparate impact implications of a particular layoff, in this case, Appellant has failed to produce sufficient evidence with which it could be concluded (1) that his layoff created a disparate impact on whatever protected group he would claim to be a member of, or (2) that the City was required to mitigate that alleged disparate impact by taking into account his personal characteristics and retaining him as an employee.

Finally, Appellant argues that his Agency improperly hired additional employees. We assume the import of this argument is that if the Agency was hiring, there was no real need to lay him off. However, it appears that the Hearing Officer found<sup>1</sup> that these employees were either hired into the Clerk and Records section, so that they would have in no way impacted a decision to lay him off from the Elections division, or that they were hired into the Elections division, but to perform tasks substantially different from those performed by him. In either case, the new hires do not prove that Appellant's layoff was in any way improper.

Consequently, the Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on September 4, 2014, and documented this day of November, 2014.

BY THE BOARD:



Colleen Rea

Chair (or Co-Chair)

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<sup>1</sup> Hearing Officer decision, p. 4.

Board Members Concurring:

**Patti Klinge** \_\_\_\_\_

**Derrick Fuller** \_\_\_\_\_

**Gina Casias** \_\_\_\_\_

**Neil Peck** \_\_\_\_\_