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

Appeal No. 19-06

DECISION

IN THE MATTER OF THE APPEAL OF:

SUSAN FOLEY,
Appellant,

vs.

OFFICE OF ECONOMIC DEVELOPMENT, DIVISION OF HOUSING AND NEIGHBORHOOD DEVELOPMENT, and the City and County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was commenced on July 19, 2006 and concluded on August 18, 2006 before Hearing Officer Valerie McNaughton. Appellant Susan Foley was present and represented by David Fine, Esq. The Agency was represented by Assistant City Attorney Robert A. Wolf. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision:

I. STATEMENT OF THE CASE

Appellant Susan Foley appeals her layoff February 24, 2006 from the position of Senior City Planner with the Division of Housing and Neighborhood Development ("Housing Division" or "Division") within the Denver Office of Economic Development (OED), collectively referred to as the Agency. Appellant filed a timely appeal of the action on March 6, 2006 pursuant to the jurisdiction provided in the Career Service Rules (CSR) §§ 14-49 and 19-10 A. 5.

The following exhibits were admitted into evidence: Exhs. 1 – 18, A – C, E – L, N – S, V – W, Y – AA, CC – KK, PP, RR – SS, UU – VV, XX, ZZ, BBB, and DDD – III.

II. ISSUES

Appellant raises the following issues with regard to this appeal:

1. Was the layoff of Appellant arbitrary, capricious, or contrary to rule or law,

2. Was Appellant's layoff caused by discrimination on the basis of age, political affiliation or disability in violation of CSR § 15-101,

3. Did the Agency subject Appellant to a hostile work environment on the basis of age, political affiliation or disability in violation of CSR § 15-101, and

4. Did the Agency retaliate against Appellant for protected activity by means of the layoff, in violation of CSR § 15-106?

III. FINDINGS OF FACT

In 1984, Appellant was hired as a City Planner by the Denver Planning Department. In 1987, Appellant was promoted to Senior City Planner. In addition to planning duties, Appellant was responsible for numerous community development projects, including Cole Revitalization, Curtis Park, West Washington Park, Bruce Randolph Avenue, Five Points, and Wyatt School. Based upon the success of the Cole project, Appellant received awards from Denver City Council and invitations to speak at various local and national professional conferences. [Exh. E.]

In 1991, Appellant was transferred to the Community Development Agency. In 1993, Appellant was assigned to produce the city's five-year Comprehensive Plan and annual updates to Housing and Urban Development (HUD), the federal agency that provides funding for the work of the Agency through four grants: Community Development Block Grant (CDBG), HOME Investment Partnership Program (HOME), Emergency Shelter Grant (ESG), and Housing Opportunities for People with AIDS (HOPWPA). [Exh. C.] Appellant was also the lead person in developing the annual Consolidated Action Performance and Evaluation Report (CAPER), which reports to HUD on the projects and activities funded by the grants. Appellant continued to perform some community development duties. In 2002, Appellant produced the HUD and CAPER reports, performed environmental reviews, and provided technical support to the Compliance Unit within the Housing Division. [Exh. E, pp. 55 – 58.] Appellant generally received strong or outstanding performance ratings. [Exh. E.]

In 2003, the Office of Economic Development (OED) was created to include four divisions: Housing, Small Business Opportunity, Workforce Development, and Business Development. Appellant was assigned to the Housing Division, and remained there until her layoff in March 2006.

In late 2004, Appellant's supervisor, Division Director Jacky Morales-Ferrand, re-assigned Appellant from the Compliance Unit to work under her as Special Projects Coordinator. In March 2005, the Agency directors reassigned Appellant's main duty, production of the HUD plans, to the Agency's newly-created Policy Team. Ms. Morales-Ferrand did not select Appellant for the Policy Team because she believed the employee selected for the team possessed better analytical and writing skills. Appellant received no evaluations for 2005 and 2006 until after her layoff in April 2006. These evaluations show that Appellant performed some work on the HUD reports, organized

the annual HUD meeting, performed environmental reviews, did research on a number of initiatives and community participation processes, and coordinated the Agency's strategic plan. [Exhs. F, G.]

In May 2005, CSA Senior Personnel Analyst Pat Anderson began a field audit of Appellant's position as a part of her broader maintenance study of the city's planner classifications. [Exh. Q.] Ms. Morales-Ferrand and Ms. Hipp told Ms. Anderson to put the audit on hold because an Agency reorganization would result in removal of Appellant's planning duties. [Testimony of Pat Anderson; Exh. GGG.]

On September 14, 2005, Ms. Morales-Ferrand met with Appellant to discuss the possibility of her layoff and to encourage her to apply for other positions, specifically a vacancy for Community Development Program Specialist, pay grade 807, in Program Manager Jerry Garcia's Neighborhood Unit. At that time, Appellant expressed some reservations about taking that position. Earlier, Mr. Garcia had told Ms. Morales-Ferrand that he would be willing to forego hiring new staff in light of anticipated budget cuts. On September 21, 2005, a Rank Order List for an October layoff was produced for Layoff Consolidation Group A27, which contained 26 Agency employees and eight unlimited vacancies, including the Community Development Program Specialist position. [Exh. JJ, p. 3.] The August 2005 preliminary 2006 budget included Susan Foley's position. [Exh. ZZ, tab 6, p. 5.] It was eliminated in the September 2005 version of the 2006 budget. [Exh. ZZ, p. 1.] The September version was submitted to HUD as the Housing Division's preliminary budget.

From October 2005 to March 2006, Appellant made it clear to Ms. Morales-Ferrand that she wanted to transfer to Mr. Garcia's Neighborhood Unit, and would apply for any other Agency vacancy in order to avoid a layoff. [Exhs. H- K, N - O, S, Z, II; testimony of Appellant and Ms. Morales-Ferrand.] On October 6th, Appellant asked her supervisor to consider hiring from within for open positions rather than "laying off staff, especially those with many years of service and near retirement." Ms. Morales-Ferrand replied that "[n]o decisions have been made regarding your position yet." [Exh. J.] In January 2006, Appellant informed her supervisor that she had applied for a limited planning position, and asked her to support her for the position in the Neighborhood Unit. Ms. Morales-Ferrand agreed to "put in a good word. We are working on opening up the neighborhood position but it still isn't open." [Exh. Z.] In February, Mr. Garcia requested in writing that Ms. Morales-Ferrand transfer Appellant to the vacancy in his unit to do neighborhood revitalization and development. [Exh. AA.] On February 14, 2006, Ms. Morales-Ferrand informed Appellant that she was considering hiring or contracting the revitalization work. On February 15th, Ms. Morales-Ferrand put in a request to fill the vacancy. [Exh. 17-4.] The position was still in the budget as of February 23, 2006 as a vacancy to be filled by March 12, 2006. [Exh. DDD, p. 5.] At the hearing, Ms. Morales-Ferrand testified that the Agency does not plan to fill the vacancy.

As a result of a city-wide CSA maintenance study of the Senior City Planner classification pursuant to its duty to ensure like pay for like work under Rule 7, the CSA

announced on November 14, 2005 that the Senior City Planner classification would be upgraded from pay grade 808 to pay grade 810. [Exh. P.] The next day, Ms. Morales-Ferrand and Ms. Hipp informed Ms. Anderson that Appellant was not a city planner, and that she would therefore not be included in the anticipated upgrade for the Senior City Planner classification. Appellant was not sent a copy of the CSA announcement of the upgrade. Ms. Hipp told Ms. Anderson to "hold off [on the classification audit] until we found out where she would be reassigned." [Exh. GGG.] After Ms. Anderson informed Appellant of this conversation, Appellant requested a meeting with her supervisor to discuss her exclusion from the upgrade. [Exh. R.] Ms. Hipp told Appellant the issue would be resolved within 24 hours. [Exhs. P, p. 3.] Appellant did not hear back from either Ms. Hipp or her supervisor on the subject.

Ms. Morales-Ferrand later informed Ms. Anderson that Appellant was to be laid off. Based on that statement, Ms. Anderson discontinued all work on the audit of Appellant's position, but recommended that the Agency reclassify Appellant from Senior City Planner to Associate City Planner. Ms. Anderson made the recommendation in order to preserve Appellant's current 808 pay level pending her layoff, as well as to prevent other employees from using Appellant's classification to support their arguments for an upgrade to the Senior City Planner class. Effective December 16, 2005, the Senior City Planner classification was upgraded to the 810 pay grade. [Exh. A.] The Associate City Planner classification was then changed to 808.

That same day, the Agency processed a Personnel Action form for Appellant's reclassification to Associate City Planner, pay grade 808. [Exh. III, p. 1; testimony of Pat Anderson.] Appellant received notice of her reclassification to Associate City Planner on January 23, 2006, and believed based on this notice that she had been demoted to the entry level position she had last held in 1987. [Exh. S.] At Appellant's request, Ms. Morales-Ferrand agreed to look into the demotion, but Appellant heard no more about the matter. CSA Analyst Anderson was not informed of the Agency's decision to demote Appellant, and first learned of it just before August 18, 2006, the second day of the hearing in this appeal.

The reclassification of Appellant's position to Associate City Planner was not approved until after Appellant's layoff. [Exh. III, p. 2.] The position from which Appellant was laid off on March 28, 2006 was that of a Senior City Planner 808. [Exh. PP.] At the time of her layoff, Appellant was the only Senior City Planner with a pay rate of 808, since Appellant was the only one not included in the December 2005 reclassification.

Two weeks after the demotion was to take effect, but before Appellant received notice of it, the Agency submitted a layoff plan to the Career Service Authority (CSA). The layoff plan dated December 29, 2005 stated that "[d]ue to required budget reductions . . . we have decided to abolish one Senior City Planner position." Appellant was identified as the employee whose position would be abolished. [Exh. V.] The next day, the layoff plan for Consolidation Code A27 was approved. [Exh. W.] Consolidation Code A27 was the layoff unit, and included all employees in the September Rank Order List, plus an accounting supervisor position. The December 22nd Rank Order List also

eliminated one vacancy. [Exh. 12.] Ms. Morales-Ferrand stated she did not eliminate the other eight vacancies before the layoff because the majority of those vacancies were in units, and she did not believe the units could handle layoffs. The record is silent as to whether the revised layoff unit was approved by the Career Service Board after a mandatory public hearing in conformity with CSR § 14-42 b).

On Feb. 15, 2006, Ms. Morales-Ferrand made a request to fill Position No. 24298, a Community Development Program Specialist position formerly held by Emily Bustos. That position was in the budget as a vacancy from August 2005 to February 23, 2006. [Exhs. ZZ, tab 6, p. 5; DDD-5.] That request was cancelled by June 7, 2006. [Exhs. 12-3, 17-4.]

On Feb. 23, 2006, the Division's budget intended as the final budget was delivered to Finance Manager Chiquita McGowin. It showed a budget that complied with the HUD grants' 20% limits on administrative costs, and included Appellant's position as fully funded. [Exh. DDD, pp. 4, 5.] The next day, Ms. Morales-Ferrand informed Appellant that "the budget is twice as bad as we thought, and so we'll have to lay you off." Appellant was then served with the official notice of layoff. [[Testimony of Appellant; Exh. CC.] Appellant continued to seek other positions within the Agency. Ms. Hipp recommended to Ms. Morales-Ferrand that Appellant be given the position in Mr. Garcia's Neighborhood Unit. [Exh. GGG.] Ms. Hipp also made some telephone calls to attempt to obtain another position for Appellant in other divisions. She did not pursue the vacancies within Appellant's own division, since Ms. Morales-Ferrand informed her she had already done so. In fact, Ms. Morales-Ferrand declined Mr. Garcia's request to hire Appellant for his position, and took no action to secure Appellant a position within her division. Appellant's last day of work was March 27, 2006. [Exh. III, p. 1.] In April 2006, the Agency received official word of its HUD allocation, which showed the same grant amounts as the Agency had predicted in its August budget. [Testimony of Ms. McGowin; Exh. ZZ, tab 6, p. 1; ZZ, tab 7, p. 1.]

The Agency's official layoff plan stated that abolishment of the position was requested "due to required budget reductions." [Exh. V.] At hearing, the Agency conceded that the stated reason was not correct. Former Deputy Director Myrna Hipp testified that the layoff plan was "kind of a form letter" written by the Human Resources Department for her signature. Ms. Morales-Ferrand did not review the plan before it was submitted. The Agency contends that the actual reason for the layoff was that the Agency had no planning work for a Senior City Planner. [Exh. PP.]

Ms. Morales-Ferrand testified that she was the official who decided that the layoff was necessary, and that she selected Appellant to be laid off. Ms. Morales-Ferrand testified that the layoff was required by a 20% decrease in grant funds over the past five years, which was more relevant than any future budget cuts. In her opinion, that steady decrease in funds created a need to evaluate the worth of each position. Ms. Morales-Ferrand conceded that the Agency never performed the required evaluation of positions, or an analysis of budgetary issues created by those cuts.

Ms. Morales-Ferrand testified that she did not consider for layoff any of the positions assigned to the four units in her division (small business lending, compliance, housing, and neighborhood), since she believed that the work done in the units delivered grant funds directly to the community. Ms. Morales-Ferrand determined that she should consider only the positions directly under her supervision. The organizational chart dated February 7, 2006 shows that Appellant was listed as assigned to the compliance unit. [Exh. 18.] However, Ms. Morales-Ferrand added that her decision to lay off Appellant would not have changed even if Appellant had been assigned to one of the units.

In addition, Ms. Morales-Ferrand stated that she believed keeping Appellant's position would limit the Agency's future ability to staff the programmatic areas. Ms. Morales-Ferrand admitted that her decision to lay off Appellant would not have changed regardless of the Agency's 2006 or 2007 grant fund allocations.

On March 7, 2006, Appellant asked Deputy Director Myrna Hipp to tell her what was really going on. Ms. Hipp replied, "Sit down. I'm going to be as honest as I can be. It's your performance. Nobody ever liked your work." As Appellant emerged from Ms. Hipp's office, Senior Housing Economic Development Specialist Beth Truby came by to pick up Ms. Hipp for their next meeting. Ms. Truby noticed the serious look on both faces. Ms. Truby testified that "[i]t looked like it was a painful conversation." Ms. Hipp volunteered to Ms. Truby, "I had to tell her it was about her performance." Ms. Truby assumed that Ms. Hipp meant Appellant was being laid off because of her performance, since she knew Appellant had just been informed of her layoff. Ms. Truby asked, "[i]f it's a performance issue, why is this just coming up now? Why hasn't anyone said this to her before?" Ms. Hipp replied, "I know, I know."

On July 17, 2006, Ms. Hipp signed an affidavit recalling this conversation. Therein, Ms. Hipp admitted that "I told Ms. Truby that Ms. Foley's employment was being terminated for performance reasons." She added that "I was not tracking on the technical implications of the point that I now believe, in retrospect, that Ms. Truby was trying to make." [Exh. GGG.] When Ms. Truby asked Ms. Hipp why it hadn't been said before, Ms. Hipp replied, "I know, I know." Ms. Hipp agreed with Ms. Truby "that it was wrong for a position to be abolished for performance issues." [Exh. GGG, p. 2.] In her second affidavit, Ms. Hipp admitted that she told both Appellant and Ms. Truby that "there were performance issues" when both asked about the reasons for Appellant's layoff. Ms. Hipp explained that she had intended to convey to Ms. Truby that performance issue "would most likely keep Ms. Foley from receiving a job offer from somewhere or someone else, thereby finalizing her layoff". Ms. Hipp stated that Appellant was not being given any transfer opportunities because Ms. Hipp "would not force Ms. Foley on anyone", and that "performance issues . . . would most likely keep Ms. Foley from receiving a job offer" before her layoff. [Exh. HHH.]

IV. APPLICABLE RULES

1. City Charter and Laws Regulating Personnel System

In creating the Career Service personnel system, the Denver City Charter empowered its governing board to "adopt, administer and enforce rules necessary to foster and maintain a merit-based personnel system according to the principles . . . of competitive examinations of competence, probationary periods" to test an employee's work performance, "appointments . . . made solely on the basis of merit and ability," and discipline "only for cause, including the good of the service". City Charter, § 9.1.1. The Career Service Authority, the city's central human resources agency, "shall maintain and foster a merit-based personnel system for employees in the Career Service and shall be committed to equal employment opportunity." D.R.M.C. § 18-1. The Career Service Rules "shall be consistent with the Charter and ordinances of the City." D.R.M.C. § 18-3.

A local agency that maintains a merit-based personnel system is eligible to receive federal funds for programs such as food stamps, Aid to Families with Dependent Children, OSHA, and Social Security grants. 42 U.S.C. § 4728; 5 CFR § 900 Appendix A Subpart F. I take judicial notice that the City and County of Denver accepts federal funds to administer several federally mandated assistance payments and social services to eligible city residents after approval by city council pursuant to D.R.M.C. § 20-52. Denver's merit-based Career Service personnel system ensures that employees in career status are paid "like pay for like work" under an approved classification and pay plan, and that they may be disciplined or dismissed only for cause. D.R.M.C. § 18-3.1; CSR §§ 7-20; 5-62. Career Service employees are also entitled to lay-off protection. CSR §§ 5-62 5); 14-40 et. seq.

2. Layoffs

The Career Service Rules protect career-status employees from separation resulting from the abolishment of their position by the requirement that all such separations shall comply with CSR §§ 14-41 – 14-49. CSR § 5-62. The layoff rules mandate that "[l]ayoffs shall be determined by layoff unit", which are appropriation accounts, sub-accounts or some combination of accounts consolidated into a unit "if it can be shown that there is a high correlation between the activities of one unit of the department and others proposed to be consolidated." CSR § 14-42 a), b)1). Changes to layoff units must be approved by the Career Service Board "based on business functions" after a mandatory public hearing. CSR § 14-42 b). A layoff decision must be based upon the position to be abolished rather than the incumbent in that position. CSR § 14-42 d).

An employee selected for layoff shall be given a transfer appointment to any vacancy for which qualified within the layoff unit subject to some exceptions. Laid off employees are also entitled to "bump" into a demotional position in the same layoff unit under certain conditions. CSR § 14-45. "Layoff planning, including actions in lieu of

layoff, is the responsibility of the appointing authority. However, the Career Service Authority is available for procedural assistance and consultation as soon as the appointing authority had decided the number of positions by class to be abolished." CSR § 14-46 a). A "written layoff plan for the lay-off unit shall be submitted to CSA and shall have been audited and approved in writing by the Career Service Personnel Director for conformance to Section 14-40 Lay-Off of the Personnel Rules, including all subsections thereof." CSR § 14-46 b).

3. Classification

The classification and pay plan covers "all classifications in the Career Service". CSR § 7-10. Appointing authorities have a responsibility to assign duties to a position under CSR § 7-31, and are encouraged to request audits "as soon as possible" after permanent changes to a position's duties. CSR § 7-34. It is the responsibility of the Career Service Authority to develop, maintain and administer classifications and their attendant pay plans for all positions covered by the classification and pay plan. CSR § 7-20. Changes to the plan that alter pay rates must be recommended by the Personnel Director and approved by the CSB and City Council. CSR §§ 7-21; 7-22. Under Rule 7, allocations to a different classification must be made by CSA "on the basis of essential duties of the position and in accordance with generally accepted personnel standards and procedures". CSR § 7-32.

V. ANALYSIS

1. Was the layoff of Appellant arbitrary, capricious, or contrary to rule or law in violation of Career Service Rule 14?

In an appeal challenging a layoff action, an employee has the burden to prove the action taken was arbitrary, capricious or contrary to rule or law. In re: Romberger, CSA 89-04, 5 (6/13/05); Velasquez v. Dept of Higher Education, 93 P.3d 540 (Colo. App. 2003).

An agency action is arbitrary and capricious if an agency 1) fails to use reasonable diligence to determine facts necessary to its decision, 2) fails to give proper consideration to facts relevant to the decision, or 3) bases its action on conclusions that reasonable persons considering the facts would not reach. Lawley v. Dept. of Higher Education, 6 P.3d 1239, 1252 (Colo. 2001). The core of the concept is rationality. Columbia Broadcasting System v. F.G.C., 454 F.2d 1018, 1028 (D.C.Cir. 1971). A decision is an abuse of discretion "if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination" or other considerations not intended by the governing law. Wong Wing Hang v. INS, 360 F.2d 715 (2nd Cir. 1965), citing United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2nd Cir, 1950).

Appellant asserts that the layoff was arbitrary, capricious or contrary to the Career Service Rules, and requests reversal of the action. In order to resolve this issue, the factors used to support the layoff decision must be analyzed.

The layoff plan states that the layoff was caused by "required budget reductions." Ms. Morales-Ferrand told Appellant at the Feb. 24th layoff meeting that "the budget is twice as bad as we thought, and so we're going to have to let you go." [Testimony of Appellant.] The evidence contradicts both this statement and the layoff plan. On the day before Appellant was served with the layoff notice, the Agency's budget analyst projected grant funds in the identical amounts as projected in August 2005. [Exhs. ZZ, tab 6, p. 1; BBB, pp. 3-4.] The February 2006 Housing Division budget shows a higher projected surplus than that shown in the August 2005 projection. [Exhs. ZZ, tab 6, p. 4; DDD, p. 4.] There is no evidence of the entire Agency's 2006 budget, even though the layoff unit included employees from other divisions within the Agency. The Agency concedes that the budget was not the real reason for the layoff.

Ms. Morales-Ferrand testified that the layoff was necessary because of the five-year decline in HUD Community Development Block Grant funds, as a result of which "we had to clearly evaluate the worth and value of each position in the Agency." However, she admitted that that evaluation was not done. Ms. Morales-Ferrand also stated that the past revenue decline was more relevant than current or future increases in grant funds. The budget shows a surplus carryover from past years. The Agency did not attempt to reconcile these facts, and presented no other evidence in support of this rationale for layoff.

Next, Ms. Morales testified that she sought layoff to give her budgetary flexibility to meet future programmatic needs. A mere desire for future budgetary flexibility, without more, does not justify the abolishment of a Career Service position. A layoff does save an agency the affected employee's salary. If that fact was sufficient to render a layoff decision in compliance with Rule 14, the layoff protection of CSR § 5-62 5) would be rendered a nullity. In any event, Ms. Morales-Ferrand conceded that Appellant would have been the employee selected for layoff even if the Agency obtained funding increases in 2006 and 2007.

The Agency contends that the actual reason for Appellant's selection was that the Agency had no Senior City Planner duties for Appellant to perform. However, it is undisputed that there were senior planning duties in the Agency at the time, but they had been reassigned to other employees. While a supervisor is free to change employees' work assignments, the testimony remains an exaggeration of the relevant facts. The Agency failed to seek a reclassification "as soon as possible" after the change in Appellant's duties, as required by CSR § 7-34. Most significantly, when a CSA analyst independently began an audit which could have corrected any misclassification based upon an erosion of Appellant's duties, two Agency directors instructed the analyst to postpone the audit. Later, before presentation of the layoff plan, the analyst was told by the same directors to cease all work on the audit because Appellant was to be laid off. Moreover, Appellant's supervisor did not evaluate

Appellant's performance for the two years prior to the layoff, neglecting a powerful and mandatory tool for assurance of "like pay for like work" under the municipal ordinance and Career Service Rules.

Ms. Morales-Ferrand also noted that she decided not to consider for layoff any employee assigned to any of the four work units. She later stated she would have selected Appellant for layoff even if she had been in a unit.

The most convincing evidence of the reason for layoff was given in Ms. Hipp's separate private conversations with Appellant and Ms. Truby. All three testified that Ms. Hipp confided that Appellant was laid off for performance reasons. At hearing and in her affidavits, Ms. Hipp attempted to place a different interpretation on her March 7th conversations with Appellant and Ms. Truby. Ms. Hipp testified that she intended to convey that Appellant's performance issues would affect her ability to obtain another job with the Agency after her layoff. I do not find that interpretation credible for several reasons. First, Ms. Truby's comment that "it was wrong for a position to be abolished for performance issues" is clear and lacks "technical implications." [Exh. GGG, p. 2.] Ms. Hipp's affidavit states that "I told Ms. Truby that Ms. Foley's employment was being terminated for performance reasons." [Exh. GGG, p. 2.] Ms. Hipp admitted at hearing that she made that statement, but adds that the statement was intended to mean something else. Since neither Ms. Truby nor Ms. Hipp's statements were ambiguous, Ms. Hipp's later attempt to change the meaning of her statement is not consistent with common sense. Second, Ms. Hipp's almost 25 years with the Agency under city policies make it unlikely she misunderstood the plain meaning of Ms. Truby's words. Third, Ms. Truby's unchallenged testimony corroborated Ms. Hipp's admission as to the reason for the layoff. I find Ms. Truby's testimony persuasive based upon her status as a current employee who testified against her employer's interest, and her lack of any personal interest in the appeal or the controversy. Finally, Appellant corroborated Ms. Truby's recollection of the conversation by her consistent testimony at the hearing about her own discussion with Ms. Hipp.

The above facts support a conclusion that the real reason for the layoff was the Agency's desire to terminate Appellant's employment based upon concerns with her performance.

The events relating to Appellant's employment before and after the layoff decision are also relevant to a full consideration of this issue. In the twelve months before the layoff, the Agency halted an audit of Appellant's job duties, excluded her from a classification upgrade intended to apply to all Senior City Planners, and attempted to demote Appellant to her entry level position. Two months after Appellant's work on the HUD reports was reassigned to the Policy Team, CSA began an audit of Appellant's position. Ms. Hipp told the CSA analyst to hold off on the audit because the Agency intended to remove Appellant's planning duties and reassign her. Ms. Hipp and Ms. Morales-Ferrand later instructed the CSA analyst to exclude Appellant from a classification and pay upgrade for the city's Senior City Planners. The managers then told the analyst to cancel the audit because Appellant was to be laid off. Two weeks

before submission of the layoff plan, the Agency began the process of reclassifying Appellant to Associate City Planner, effective on the day of the upgrade for Senior City Planners. Appellant was mailed a notice of her demotion in January, a month before she received her notice of layoff. At layoff, Appellant was the sole Senior City Planner still in the 808 pay grade. All of these actions tend to support a conclusion that the Agency inexplicably departed from established personnel policies as to Appellant's employment.

In addition, the chronology of events regarding the layoff is germane to the issue. Ms. Morales-Ferrand first mentioned the possibility of layoff to Appellant on September 14, 2005. On September 27, 2005, Appellant's position was excluded from the initial HUD budget upon instructions from an Agency manager. On December 16th, Appellant's position classification was upgraded, and the Agency simultaneously began the demotion process for Appellant. Two weeks later, the layoff plan requested that CSA approve the elimination of Appellant's position "due to required budget reductions", a reason the Agency later admitted was incorrect. Ms. Morales-Ferrand refused to consider Appellant for a vacancy despite her qualifications and the recommendations of the unit supervisor and the Agency's Deputy Director, or to consider her for other positions that would have avoided layoff. This sequence of events is circumstantial evidence that the Agency targeted Appellant for layoff for the purpose of eliminating her position.

The evidence shows that the layoff failed to comply with the Career Service Rules in two respects. First, the appointing authority failed to perform layoff planning mandated by CSR § 14-46 a). The Agency conceded that the layoff plan was a form letter that was not reviewed by the layoff decision-maker, and its stated reason was incorrect. The plan gave "required budget cuts" as the reason for the layoff for a layoff unit of 27 employees and eight vacancies, and it was approved on that basis. Ms. Morales-Ferrand testified that she selected the Senior City Planner for layoff because she concluded there was no need for the position, but that the layoff was caused by five years of budget cuts requiring the Agency to evaluate the worth of each position in the Agency. However, the Agency did not do that evaluation or consider budgetary factors to determine either the need for a layoff or the positions to be affected. The Agency's failure to include the actual reason for layoff prevented the CSA from conducting a meaningful audit of the plan under CSR § 14-46 b). Ms. Morales-Ferrand admitted at hearing that the layoff rules are "not my area of expertise." Nonetheless, Ms. Morales-Ferrand served Appellant with the layoff notice and stated she was being laid off because "the budget was twice as bad as we expected". Appellant was actually selected for layoff based on her managers' concerns about her performance. These Agency actions and statements demonstrate that the Agency failed to perform layoff planning under CSR § 14-46 a).

Secondly, the Agency identified Appellant in advance as the employee who would be laid off, in violation of CSR § 14-42 d), which states that "there is no relation between the positions which are abolished and the incumbents of those positions." Appellant was selected for layoff by September 2005, as demonstrated by the removal

of her position from the September budget and Ms. Morales-Ferrand's luncheon discussion of layoff with Appellant. The Agency's audit, classification, and demotion actions convincingly show that the Agency sought Appellant's removal from her position. Ms. Morales-Ferrand failed to consider other employees for layoff, as indicated by her statements that Appellant would have been selected regardless of other factors she claimed were relevant, and her rejection of other clearly relevant factors such as the budget, job and Agency functions, and seniority in making the layoff decision.

This pre-selection for layoff was further demonstrated by the Agency's unexplained failure to consider Appellant for an existing vacancy, despite strong recommendations and her admitted qualifications. The layoff unit included a vacancy for the position of Community Development Program Specialist. Mr. Garcia requested that Appellant fill the vacancy, and Deputy Director Myrna Hipp supported that request. Ms. Morales-Ferrand testified that she did not eliminate this vacancy because of an Agency practice to maintain vacancies in order to avoid the difficult CSA process of justifying a new position. In fact, Ms. Morales-Ferrand submitted a request to fill the vacancy one week before serving Appellant with the layoff notice. Her refusal to consider Appellant for this position supports the conclusion that the Agency sought to remove Appellant from employment rather than implement a layoff that was consistent with the intent of Rule 14.

An agency decision must be based upon factors that would be relevant to a reasonable person fairly and honestly considering the matter, including the governing laws and rules.

In a similar layoff appeal, the Colorado Supreme Court noted that the University of Colorado considered the following factors in making its layoff decision: 1) a drop in student enrollment affected the university's state funding under the Colorado Taxpayer's Bill of Rights (TABOR), requiring an approximately $160,000 spending reduction in order to balance the budget; 2) the cost-saving plan should strive to retain existing employees, salaries, and essential services; 3) past internal distributions should be considered, 4) the layoff should take into account salary comparisons, and 5) the layoff should prevent a certain employee from being bumped out of his job. The Supreme Court upheld the Colorado State Personnel Board's reversal of the layoff because the decision-maker "failed to give candid and honest consideration to evidence before it on which it was authorized to act in exercising its discretion", to wit: an alternate proposal that would have avoided the layoff, an informal salary survey, and consultation with interested parties. Lawley v. Dept. of Higher Education, 6 P.3d 1239 (Colo. 2001).

In marked contrast, this Agency considered only the decision-maker's perception that Appellant did not have Senior City Planner duties to perform. The Agency chose to avoid completing a position audit which would have confirmed the position's assigned duties and corrected any misclassification, in conformity with Career Service Rule 7 regarding the classification and pay plan. The Agency failed to perform an analysis of the worth of the positions in the Agency or the layoff unit, in spite of its testimony that

five years of budget reductions required that analysis. The Agency also ignored relevant budget, funding and job analysis information which would have indicated whether a layoff was necessary, and what positions could be eliminated without damage to the mission of the Agency. Ms. Morales-Ferrand rejected an opportunity to place Appellant in a vacancy within the layoff unit, despite her qualifications, the manager's need to fill that vacancy, and the Deputy Director's recommendation. The Agency did not consider the effect of Appellant's 22 years of seniority with the City, despite the relevance of that factor within the Career Service system. All of these factors would have been considered by a reasonable person fairly and honestly considering the matter of layoff under these circumstances. I conclude that the Agency decision was not based upon factors that would be relevant to a reasonable person fairly and honestly considering the matter, including the governing laws and rules.

In addition, the Agency failed to give an honest consideration to evidence presented to it on which it was authorized to act. Ms. Morales-Ferrand first postponed and then cancelled an audit of Appellant's position, the very instrument a manager in her position would have sought in evaluating whether the Agency needed a Senior City Planner. Ms. Morales-Ferrand failed to consult with others to obtain an analysis of the worth and value of positions within the Agency. Ms. Morales-Ferrand's testimony showed a reluctance to give Appellant credit for her legitimate and undisputed accomplishments, and placed a more negative interpretation on Appellant's statements than was called for by their plain meaning. Ms. Morales-Ferrand conceded Appellant's qualifications for the community development position only after vigorous cross-examination, even though Appellant had over ten highly successful years of experience in that field. After an opportunity to assess the credibility of the witnesses, I conclude that the totality of the evidence, and the shifting and sometimes inconsistent reasons given for the layoff, indicate that the Agency did not give honest consideration to evidence a reasonable manager would have used in making the layoff decision. In contrast, Appellant's testimony and contemporaneous statements were consistent, and were corroborated by other credible testimony.

Finally, the Agency's decision that Appellant should be laid off is not the type of conclusion a reasonable person would have made based on the facts. The budgetary and other evidence did not support Ms. Morales-Ferrand's conclusion that the budget necessitated the layoff, or that layoff savings would give her flexibility to meet future programmatic needs. A reasonable person who had concerns about Appellant's loss of senior planner duties would not have acted to cancel an ongoing audit of Appellant's position. The evidence shows that the Agency decided to lay off Appellant because it believed her performance was inadequate. However, a layoff for inadequate performance violates the Career Service Rules mandating that layoffs shall be directed at positions, not their incumbents, and that performance and discipline issues must be addressed in conformity with Rules 13 and 16, respectively. It is therefore concluded that the Agency's action was arbitrary and capricious and contrary to the Career Service Rules governing layoffs.

2. Was Appellant's layoff caused by discrimination on the basis of age, political affiliation or disability?

In support of her age discrimination claim, Appellant testified that during their first discussion of layoff, Ms. Morales-Ferrand asked Appellant when she was going to retire, and that Ms. Morales-Ferrand had previously expressed the opinion that there were too many "retired people" at the Agency. Appellant admitted on cross-examination that she did not really believe Ms. Morales-Ferrand was "like that", i.e., that she would discriminate against an employee on the basis of age. There is no other evidence in the record supporting an age discrimination theory.

Appellant also testified that she believed Ms. Hipp resented her because of her political affiliation with former Denver Mayor Federico Pena. However, Ms. Hipp did not make the layoff decision, and Appellant presented no other evidence that Appellant's 22-year old affiliation with a previous mayor influenced the layoff decision in any respect.

Appellant did not support her claim of disability discrimination with either evidence or argument. I conclude that Appellant has failed to establish that the layoff was caused by discrimination on the bases of age, political affiliation or disability.

3. Did the Agency subject Appellant to a hostile work environment based upon age, political affiliation or disability?

Appellant presented no testimony to support a claim that her working conditions were intolerable based upon any protected status. Therefore, I find that this claim has not been established.

4. Did the Agency retaliate against Appellant for protected activity by means of the layoff, in violation of CSR § 15-106?

In order to establish a claim of retaliation, Appellant must show that she was engaged in some protected activity before the imposition of the adverse action; here, the layoff. CSR § 15-106. Appellant has not proven that she took any action covered by this rule before the layoff. Therefore, I find that this claim is not proven by the evidence.

ORDER

The Agency's layoff action dated February 24, 2006 is hereby REVERSED. Appellant's claims of discrimination, hostile work environment and retaliation are dismissed.

Dated this 10th day of November, 2006.

Valerie McNaughton
Career Service Hearing Officer

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NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY PERSONAL DELIVERY:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, First Floor
Denver CO 80202

BY FAX:

(720) 913-5995

Fax transmissions of more than ten pages will not be accepted.