

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

Appeal No. 153-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

DOUGLAS GOLDEN, Appellant

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

A hearing in this matter was held by Hearing Officer Joanna Lee Kaye on December 18, 2003 in the Career Service Hearings Office. Assistant City Attorney Niels Loechell represented the Denver Department of Human Services (DDHS or Agency). Douglas Golden (Appellant) was present and represented himself. The parties both filed written closing arguments by January 2, 2004, as the Hearing Officer requested at the close of the hearing.

MATTER APPEALED

Appellant, formerly a Senior Criminal/Civil Investigator for the Agency, challenges the Agency's decision to lay him off during an Agency-wide reorganization. Appellant argues that the seniority of two other Senior Criminal/Civil investigators was calculated incorrectly, and that he had greater seniority than those two employees. Appellant further asserts that the Agency failed to account for his lead-worker status and supervisory experience in determining his seniority. Based on these alleged errors, Appellant contends that the Agency's decision to choose these two employees over him was arbitrary, capricious, and in violation of CSR 14-10 *et seq.*, which establishes the method for determining lay-offs.

For the reasons set forth below, the Agency's action is **AFFIRMED**.

PRELIMINARY MATTERS

On December 2, 2003 the Agency filed a Motion to Place the Burden of Proof on Appellant. Appellant filed a Response to this Motion on December 11. Upon review of the case law governing this issue, the Hearing Officer ruled at the hearing that the burden of proof in any administrative action by an agency is on the Appellant. The Hearing Officer now memorializes that ruling as follows.

While an employee has a property interest to continued employment, this interest does not create any legitimate expectation that a given position will never be abolished. Velasquez v. Dept. of Higher Education, ___ P. 3d ___, WL 22097754 (Colo. App. 2003). Although in disciplinary actions the burden of proof is on the Agency to show cause for an action against an employee, the abolishment of a given position is an administrative action not specific to an employee's conduct or performance. Id. There is a presumption of "validity and regularity" in administrative actions. See, Garner v. Colo. State Dept. of Personnel, 835 P.2d 527 (Colo. App. 1992).

The "proponent of an order" is the person who brings the action in question. See, Velasquez, above. The proponent of a challenge to an administrative action (Appellant in this case) therefore bears the burden to prove the administrative action was *not* valid or regular. Garner, above; see, Dept. of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The proponent must prove by a preponderance of the evidence that the Agency's action was arbitrary or capricious, or contrary to rule or law. (See, Renteria v. Colo. State Dept. of Personnel, 811 P.2d 797 (Colo. 1991.)

In Lawley v. Dept. of Higher Education, 36 P.3d 1239 (Colo. 2001), the Colorado Supreme Court specifically restated that the arbitrary or capricious exercise of discretion by an administrative agency can arise in only three ways:

"(a) By neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it. (b) By failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion. (c) By exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable [persons] fairly and honestly considering the evidence must reach contrary conclusions."

Lawley, above at pp. 37-38, quoting Van DeVeght v. Board of County Comm'rs, 98 Colo. 161, 55 P.2d 703 (1936).

For these reasons, the burden of proof is on Appellant to show by a preponderance of the evidence that the Agency's action was arbitrary or capricious in one of the three ways set forth above in Lawley, or that it was contrary to rule or law.

ISSUES

1. Whether the Agency accurately calculated the seniority of two employees deemed to have greater seniority than Appellant.
2. Whether the Agency's action was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

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

1. A statewide budget crisis beginning in 2001 forced the Agency to undertake a major reorganization in 2003. 160 positions were included in the reorganization unit. 125 positions were eliminated, 33 of which were filled by employees (the remaining positions being vacant). The remaining 35 employees were subject to bumping by the 33 employees slated for lay-off.
2. Appellant was one of three Senior Civil/Criminal Investigators in the Investigations Unit at the time of the lay-offs. The other two were James Steadman (Steadman) and Harry Spikes (Spikes). The reorganization reduced the Investigations Unit from nineteen positions to seven. Only two of the original three Senior Civil/Criminal Investigator positions remained.
3. The unit's supervisory position was also eliminated. Supervisor Ivan Rodriguez (Rodriguez), a twenty-nine year veteran of the Agency at the time of the lay-offs, bumped into one of the two remaining Senior Civil/Criminal Investigator positions. It then became necessary for the Agency to determine which one of the three Senior Civil/Criminal Investigators had the greatest seniority to fill the single remaining position.
4. Under the CSA system, seniority is based on length of continuous service, with a permissive option in CSR 14-44 c) to place employees with greater "proficiency" above employees with greater length of service in determining the order of lay-off. The Agency elected not to use this option and instead used length of service only, viewing it as the most objective criterion.

I. Appellant's history of service.

5. Appellant was hired as a County Social Services Investigator (CSSI) II in June of 1988. He was promoted to the position of CSSI III in 1992.
6. Rodriguez was then the Lead Worker of the Investigations Unit, classified as CSSI IV. In 1996 Rodriguez was promoted to the position of Supervisor, leaving the CSSI IV Lead Worker position vacant. Appellant filled the vacancy and thereafter was second in command in the Investigations Unit. In this position, Appellant acted as supervisor in Rodriguez' absence, and had many supervisory duties including policy development, training, assigning work and reviewing work product.
7. From October 1998 through the end of the year in 1999, Rodriguez was temporarily assigned to another position. Appellant was in charge of the Investigations Unit as acting Supervisor during Rodriguez' absence. Rodriguez returned thereafter and served as supervisor, with Appellant continuing in his CSSI IV lead-worker capacity. Appellant's employment continued thereafter until the lay-offs giving rise to this case.

II. James Steadman's history of service.

8. Steadman was hired by El Paso County on November 15, 1984. He had a brief break in service in April of 1986, and returned to El Paso County as an investigator on May 1, 1986.
9. In October of 1991, El Paso County management informed its investigations unit that the unit was being abolished. The employees were to be laid off effective February 1, 1992 (Exhibit C). The last work day was to be January 31, 1992. Prior to the effective date of his lay-off, Steadman requested a transfer to a CSSI II position at DDHS, which was accepted.
10. Steadman worked on Friday, January 31, 1992 at El Paso County. February 1 and 2 fell on Saturday and Sunday. On Monday, February 3 Steadman began work in his new CSSI II position with DDHS. Some of the paperwork generated as a result Steadman's transfer was not processed by February 3, 1992. On February 14, 1992, Clerical Supervisor Donald Cordova made a written request for an upward salary adjustment to compensate for a difference between Steadman's pay and that of other CSSI II's. This request referred to February 3, 1992 in the future tense. The letter was designed to request a salary adjustment retroactive to Steadman's hire date. (Exhibit D.)
11. DDHS asked Steadman for an application to complete his personnel file for the transfer. He resubmitted pages from an old application with his original start date with El Paso County of November 15, 1984 still on it, failing to recognize that the start date needed to be changed to reflect the break in service in April of 1986 (Exhibit F). CSA did not use this date in the calculation of Steadman's length of continuous service. It used the start date of his continuous service as May 1, 1986.
12. Steadman was promoted to CSSI III at some point prior to 1999. His employment continued thereafter until the lay-offs giving rise to this case.

III. Harry Spikes' history of service.

13. Spikes was hired as an Administrative Clerk in the Food Stamp Program on March 21, 1988. Prior to this, Spikes had held positions as a Safeway Store Manager, a Xerox and electronics salesman, and a seafood department manager at a local grocery store (Exhibit G pp. 2-3). None of this prior experience was relevant to public benefits or investigations.
14. The Food Stamp Program was originally a county-run program. From January 1, 1988 to January 1, 1992 the Food Stamp Program was transferred to the state, and its employees were in the state personnel system. Spikes was hired during this period and therefore began as a state employee.
15. In his application, Spikes declared that he had attended college from 1962 to 1966 and had obtained a Bachelor's Degree in political science with a minor in psychology. (Exhibit G p. 3, Findings 7-8.)

16. Spikes was promoted to Eligibility Technician in December 1989, to Investigator IA in April of 1991, and to Investigator IB in November of 1991. Spikes re-submitted applications for the first two promotions, in both of which he reiterated the claim of a college degree. (Exhibit G p. 3, Finding 8)
17. Effective January 1, 1992, the personnel administration of the Food Stamp Program was transferred back to the Colorado Merit System (Merit System), a state-run personnel agency responsible for all employees in the county departments of human services. This transition included a preservation of continuous service dates for the employees who were affected. (Exhibit G p. 5, Finding 14.)
18. Food Stamp employees were required to re-submit applications for information purposes during the transition process. On his application, Spikes again claimed that he had a college education. (Exhibit A; see, Exhibit G p. 6, Finding 19.) Effective January 1, 1992 Spikes transferred into his new position as CSSI II, the Merit System equivalent of Investigator IB.
19. During the year 1993, it came to the attention of the DDHS that Spikes did not have a college education and lied on each of these applications. (Exhibit G p. 13). The Agency placed Spikes on a thirty-day suspension followed by a demotion to CSSI I for falsifying his application. Spikes appealed and the discipline was upheld (Exhibit G).
20. The minimum qualifications for CSSI II (a Professional Administrative Technical II skill-level position in the Merit System; see, Exhibit G p. 4; Finding 10) included a Bachelor's degree appropriate to the assignment, and one year of full-time professional work experience appropriate to the assignment. Applicants were permitted to substitute professional, high-level experience for the required education, on a year-for-year basis. (Exhibit G p. 7, Finding 20.)
21. Between 1993 and 1998, Spikes was promoted twice, and was in the position of CSSI III as of January 1, 1999.
22. In February of 1999, the Agency dismissed Spikes, who appealed his dismissal (see, In the Matter of Harry Spikes, Appeal No. 15-99). The Hearing Officer in that case reversed the dismissal. Because the dismissal was never finalized, it resulted in no official break in service. Spikes' employment continued thereafter until the lay-offs giving rise to this case.

IV. Abolishment of the Merit System and affect on titles.

23. On January 1, 1999 the state-run Merit System was abolished and the various county personnel entities absorbed their respective county human services employees. DDHS personnel administration was absorbed into the Career Service Authority (CSA) at that time.
24. The legislation governing the transfer of county employees to CSA is Section 9.1.9 D of the Career Service Charter (see, Exhibit 3). This subsection preserved

employees' continuous service dates under the Merit System or the Colorado Department of Personnel in their transfer to CSA.

25. Because CSA has a different classification scheme than that which existed under the Merit System, classifications were changed as a result of the transfer. Under the Merit System, the Investigations Unit of DDHS had six levels of classification. Under CSA, there are only two classification levels for investigators: Civil/Criminal Investigator, and Senior Civil/Criminal Investigator. When CSA absorbed DDHS employees into its personnel framework, all CSSI III's (including Spikes and Steadman), and CSSI IV's (Appellant), became Senior Civil/Criminal Investigators.
26. Despite that his title was the same as the others, Appellant continued to act as the lead worker for the Investigations Unit. Appellant's pay grade was higher than the other Senior Criminal/Civil Investigators to reflect his lead-worker status.

V. The lay-off process.

27. Once the Agency determined that the reorganization was necessary, it created a lay-off plan, and consulted with CSA on the plan. CSA reviewed the plan and assisted with determining the seniority of affected employees.
28. CSA determined that Steadman's length of continuous service was seventeen years, five months and nine days, with a start date of May 1, 1986. Spikes' length of continuous service was fifteen years, six months and nineteen days, with a start date of March 21, 1988. Appellant's length of continuous service was fifteen years, four months and two days, with a start date of June 7, 1988. Appellant's length of continuous service was therefore shorter than both Spikes and Steadman.
29. As the individual with the longest continuous service among the three employees, Steadman was chosen to encumber the remaining Senior Civil/Criminal Investigator position. Spikes and Appellant were chosen for lay-off.
30. The affected employees (including Appellant) were asked to submit general resumes for CSA to determine the alternate positions for which they were minimally qualified to bump into. Senior Personnel Analyst Tony Gautier generated a list of positions for which Appellant was minimally qualified based on his resume (Exhibit 2). Appellant eventually bumped into the lower-paying position of Program Administrator. Spikes also bumped into a lower-paying position.
31. Appellant timely filed an appeal of his lay-off on September 30, 2003.

DISCUSSION

1. The Hearing Officer has jurisdiction over this case.

The Hearing Officer finds she has jurisdiction over this case pursuant to Section 19-10 Actions Subject to Appeal, which states as follows in relevant part:

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in... lay-off... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

2. The Agency's decision to base seniority determinations solely on dates of continuous service was not arbitrary, capricious, or contrary to rule or law.

Appellant argues that as a lead worker who acted as supervisor for over a year, he is entitled to greater seniority considerations than either Steadman or Spikes. He asserts that the Agency's failure to take this into consideration was arbitrary and capricious. The Hearing Officer disagrees.

First, the CSA rules set out that for purposes of lay-off, seniority is determined by length of continuous service. Those rules state in relevant part:

14-43 Length of Service

- a) General rule: For lay off purposes, length of service shall mean the total number of years, months and days of continuous service in any class under career service...

14-44 Sequence of Lay-offs

...c) Effect of proficiency:

- ...2) Within lay-off groups, the appointing authority *may* place employees with greater efficiency above employees with longer length of service who are not eligible for military service credits...¹

(Emphasis added.) Thus, while the Agency may choose to place weight on proficiency, it may also elect not to do so. Senior Personnel Analyst Julie Maerz testified the reason the Agency elected not to consider proficiency was to avoid introducing a subjective and perhaps indefensible element into the lay-off process. Instead, the Agency chose to use service dates as the sole objective criterion in determining seniority.

While in Appellant's case this decision might seem unfair, the Agency's stated reason for electing not to apply the proficiency rule is not arbitrary or unreasonable in a massive reorganization. Nor is it contrary to the CSR rules. Those rules clearly permit the appointing authority use only the length of continuous service if it wishes to do so.

In addition, the transition of the county positions from the Merit System into CSA resulted in the three positions in question all falling under one classification title. Despite that Appellant was being paid at a higher step, the single classification rendered the three positions technically equal. Again, while treating these three positions equally

¹ There was no testimony on the issue of whether Spikes or Steadman are eligible for military service credits.

might appear unfair given Appellant's prior classification distinction under the Merit System, and his continuing supervisory duties and experience, once the positions were transferred into the CSA these distinctions technically no longer existed. The Hearing Officer has no jurisdiction to consider classification issues, or recognize a distinction that is not recognized by CSA unless there is a violation of the governing rules. The Agency violated no CSR rules in treating these positions equally for purposes of lay-off. Therefore, Appellant has failed to show this action was arbitrary, capricious, or contrary to rule or law.

Appellant also asserts that the actual distinctions between his duties and the other Senior Civil/Criminal Investigators made this a "promotional opportunity" for Steadman. For the above reasons, the Hearing Officer disagrees with this argument as well. It is further important to recall that Rodriguez bumped into one of the two Senior Civil/Criminal Investigator openings that remained after the reorganization. Assuming the additional duties that made Appellant's position distinct were preserved in the reorganization, it is more likely than not that Rodriguez, not Steadman, bumped into Appellant's position. Given that Rodriguez was formerly the supervisor, this cannot be seen as a "promotional opportunity."

3. The services dates established for Spikes and Steadman were not arbitrary, capricious, or contrary to rule or law.

Appellant argues that the Agency miscalculated the continuous service dates for both Steadman and Spikes. For the following reasons, the Hearing Officer disagrees.

a. James Steadman

Appellant argues that the paperwork evidencing Steadman's transfer from El Paso County to Denver County on February 3, 1992 (see, Exhibits D and E) reflects a several-day break in service from the time his position ended at El Paso County on January 31, 1992 to the time he actually began working at Denver County. The Hearing Officer is not persuaded that this is the case.

Rule 1 of the CSR defines a "break in service" as "any lapse of working time between the official separation of an employee and his subsequent rehiring." However, DDHS affected a transfer from El Paso County for Steadman in lieu of his lay-off. Steadman credibly testified that he worked at El Paso County on Friday, January 31, 1992 and at DDHS on the following Monday, February 3. This reflects no break in service. The fact that some of the paperwork wasn't processed for several days, or that a pay adjustment request was backdated, does not show the transfer itself was not effective. It gave the Agency no reason to doubt that Steadman's service was continuous.

Also, Appellant has provided no legal authority, and the Hearing Officer can find no such authority, to suggest that an inter-county transfer results in a break in service. On the contrary, the evidence shows that the transfer was initiated *in lieu of* Steadman's lay-off, thus *avoiding* his separation. Therefore, the Hearing Officer concludes that the

Agency's determination of no break in service, as defined in CSR 1, was not arbitrary, capricious, or contrary to rule or law.

Appellant further argues that Steadman's application to DDHS (Exhibit F) indicates a start date of November 15, 1984. Appellant asserts this amounts to deception as to his original start date for purposes of calculating continuous service. Yet there is nothing to indicate the Agency used the erroneous start date. On the contrary, the length of service of seventeen years, five months and nine days, indicates they used the correct start date of May 1, 1986.

b. Harry Spikes

The Agency argues that because there was only one remaining Senior Civil/Criminal Investigator position, Appellant had to show he had a greater length of service than both Steadman and Spikes. Appellant has not shown this with Steadman. However, even if he had, the Hearing Officer concludes that the Agency's determination of Spikes' length of continuous service was not arbitrary, capricious, or contrary to rule or law for the following reasons.

Spikes was hired as a Food Stamp Administrative Clerk in March 1988. On his application, he declared that he had obtained a BA in political science with a minor in psychology, when in fact he had no such degree. He was subsequently promoted several times, each time re-submitting applications in which he reiterated the fraudulent claim of a college degree. This included the application he submitted when the Food Stamp Program was transferred back to the Merit System effective January 1, 1992.

It is not likely that Spikes would have falsified an application in such a manner unless it were necessary to fulfill the requirements of the position. Since Spikes claimed a college education in each of his applications including the first one, it is more likely than not that the first position of Food Stamp Administrative Clerk, as well as the positions into which he promoted, also required a college education.

At the time Spikes transferred into his CSSI II position under the Merit System in 1991, the minimum qualifications allowed substituting professional, high-level experience for the required education on a year-for-year basis. Yet before he was hired as a Food Stamp Administrator in 1988, Spikes had no experience relevant to public benefits or investigations, and had been working in these fields less than four years at the time of the transfer. Appellant has thus shown it is more likely than not that Spikes was not qualified for any of the positions he held during the first four years the Agency included in his length of continuous service.

While inclusion of years of employment fraudulently obtained is deeply troubling to Appellant and appears very unfair, there is persuasive case law tending to suggest that including this time in Spikes' length of continuous service is not contrary to rule or law. In Jeffries Truck Line v. Grisham, 1964 OK 242; 397 P.2d 637 (1964), the Supreme Court of Oklahoma found an injured worker, who had falsified his application about prior injuries, was nonetheless entitled to worker's compensation benefits for a subsequent injury. There the Court held:

Generally, where employment is induced by false and fraudulent representations not going to the factum of the contract, the contract is merely voidable and not void. Therefore, the relation of employer and employee *does exist* in contemplation of law, although the misrepresentation may form a tenable ground for the rescission of the contract at the option of the employer.

Id. at 642, *citing* 58 Am.Jur. Sec. 335, p. 809; 56 C.J.S. Master and Servant § 180 e, p. 872; 71 C.J. 435; Annotation, 136 A.L.R. 1124 (*emphasis in original*).

In this case, the Agency discovered Spikes' fraudulent claim and disciplined him. However, it elected not to dismiss him. The Agency's action indicates it elected not to void or rescind the employment contract with Spikes. Its decision not to do so in turn permits the inclusion of those first years in its calculation of his length of continuous service.² This action was appropriate under the above persuasive authority. Therefore, the Agency's action was not arbitrary or capricious.

Appellant further asserts that his dismissal in 2000 resulted in a break in service. However, Spikes appealed this action. Once an employee appeals a disciplinary action, it does not become final or official unless and until the Hearings Office affirms the action (*see, CSR 1, above*). In that case, Spikes' separation was never finalized because his dismissal was reversed, resulting in no break in service.

Appellant further asserts there is no indication that seniority rights were preserved when the state transferred the Food Stamp Program back to the Merit System on January 1, 1992. Therefore, he argues that this was a break in Spikes' continuous service, requiring a start date of January 1, 1992. Again, the Hearing Officer disagrees. Section 9.1.9 D of the City Charter (*see, Exhibit 3*) specifically preserves years of service under the Colorado Department of Personnel. In addition, in Appellant's own Exhibit G (p. 5, Finding 15), the preservation of Spikes' seniority during this transition was found as a matter of fact in an administrative tribunal. Appellant has provided nothing to the Hearing Officer to conclude this finding is erroneous, inaccurate, or contrary to law.

The Hearing Officer concludes that in calculating the lengths of continuous service for Steadman and Spikes, the Agency used reasonable diligence in gathering the information, that it gave candid consideration to the evidence, and that reasonable individuals would not have been compelled to reach a contrary conclusion. Therefore, Appellant has failed to show the Agency's methods were arbitrary or capricious.

² In fact, once the Agency elected not to void the contract, it could arguably be compelled to credit Spikes for the years he worked. In Texas \$ N.O. R. Co v. Webster, 53 S.W.2d 656 (Tex. App. 1932), a worker died as a result of injuries he sustained while working for the railroad. The widow of the deceased worker sought recovery against the railroad under the Federal Employer's Liability Act, 45 U.S.C.S. §§ 51-59. The court rejected the railroad's argument that the worker never became an employee because of a false statement on his employment application. Because the railroad became aware of the false statement but then elected to retain the employee for some fifteen years thereafter, the court found in favor of the widow and awarded damages.

4. Appellant's argument that the Agency acted arbitrarily in determining his bumping rights must fail.

During Appellant's cross-examination of Agency witness Anthony Gautier, Appellant asked several questions tending to challenge the validity of Gautier's methods in determining the list of potential positions for which Appellant was minimally qualified for bumping purposes (Exhibit 2). Gautier satisfactorily explained that he used the affected employees' resumes to generate lists of potential eligible positions from the Agency's computer database, and to analyze each position in the list to determine whether the employee possessed the minimum qualifications.

Appellant asserts that he and the other employees submitted the resumes without knowledge of the positions open, and therefore could not tailor the resumes according to the openings. Thus, Gautier was not in possession of sufficient information to adduce which positions Appellant was qualified for. However, this was a massive reorganization, requiring an analysis of qualifications for 33 affected employees to generate lists of alternate positions for each one of them. The very reason the Agency requested the resumes in the first place was to generate these lists. Under these circumstances, the Hearing Officer concludes that the Agency used due diligence in gathering and considering the relevant data through this process. The Agency's method for determining bumping rights was not arbitrary or capricious.

Appellant argues that he was qualified for higher positions he knows were available at the time, but that those positions do not appear on this list (Exhibit 2). Appellant provided no evidence of who encumbered these positions, whether they had less seniority than Appellant, or any other evidence showing the list was arbitrary, capricious or contrary to rule or law. This claim is therefore dismissed.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to hear this case and render a decision.
2. The burden of proof is on Appellant to prove the Agency's administrative action in laying him off was arbitrary, capricious or contrary to rule or law.
3. Appellant failed to show that the Agency's determinations of Appellant's lay-off and bumping rights were arbitrary, capricious, or contrary to rule or law.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's action is **AFFIRMED**.

Dated this 12th day of January, 2004.


Joanna Lee Kaye
Hearing Officer
Career Service Board