CAREER SERVICE BOARD,
CITY AND COUNTY OF DENVER, COLORADO

Appeal Nos. 34-16A and 36-16A

In the Matter of the Appeal of:

MICHELLE LEE TENORIO, and
RAMON DELGADO,

Petitioners-Appellants,

v.

OFFICE OF ECONOMIC DEVELOPMENT,
and the City and County of Denver, a municipal corporation,

Respondent-Agency.

DECISION AND ORDER

Due to a change in federal law, The Agency, Office of Economic Development, and specifically, its Workforce Development Unit, drastically changed the way it did business. The Agency restructured internally and, and in addition, outsourced certain functions. These changes resulted in the Agency laying off numerous employees, including Appellants, Michelle Tenorio and Ramon Delgado.

Appellants appealed their layoffs to a hearing officer. The Hearing Officer affirmed the Agency's actions, finding that the Appellants had failed to prove that their layoffs were arbitrary, capricious, or made in violation of applicable Career Service Rule or law.[1] Appellants have appealed the Hearing Officer's decision to this Board.

RAMON DELGADO

At the time of his layoff, Appellant Delgado was employed as Business Development Associate (BDA). All Business Development Associate positions were closed by the Agency restructuring. The facts found by the Hearing Officer, which are supported by substantial

[1] Because these are appeals of administrative actions and not disciplines, the burden of proof is on the employee, given that administrative actions, under the law, are afforded a presumption of validity.

evidence in the record, demonstrate that the functions formerly performed by Appellant Delgado were outsourced as a result of the restructuring. While the restructuring saw the opening of new positions within the Agency called Business Development Representatives (BDR), the Hearing Officer determined, after a thorough review of both the old BDA positions and the new BDR positions, that the two were not substantially similar. Because the old closed positions and the newly created positions were not substantially similar, Appellant Delgado had no right under Career Service Rules to assume a newly opened BDR position.

We agree with the Hearing Officer's analysis concerning the layoff of Appellant Delgado. The work which he had performed was simply not being performed within the Agency after the restructuring. Appellant Delgado's job responsibilities had been outsourced and the newly created BDR positions were sufficiently distinct and not sufficiently similar to Appellant Delgado's former BDA position so as to give rise to any inference that the two positions were substantially similar, entitling Appellant Delgado to one of the new positions. We agree with the Hearing Officer that Appellant Delgado failed to meet his burden to demonstrate that his layoff was arbitrary, capricious, or violative of applicable Career Service Rule or law. The Hearing Officer's decision is AFFIRMED concerning Appellant Delgado's layoff. For purposes of appeal, this Decision and Order is final and appealable.

MICHELLE TENORIO

Appellant Michelle Tenorio was laid off from her position with the Agency as a Manager. The Hearing Officer ruled against her appeal on two separate grounds. First, he determined that Appellant lacked standing to assert her claims because she failed to apply for any of the new Manager positions opened up after the Agency reorganization. Second, the Hearing Officer determined that Appellant's old Manager position was not substantially similar to the newly opened Manager position created in the reorganized Agency. Based on the state of this record, we do not believe we are in a position to affirm or reverse the Hearing Officer.

Based on this record, it is unclear to this Board whether, under our rules, Appellant Tenorio was required to apply for any newly created Manager position. It is also unclear as to whether the Hearing Officer's analysis of the comparability of the old and new Manager positions was necessary and proper under our rules[2]. We REMAND this matter back to the Hearing Officer for the taking of further evidence, and further analysis of that evidence,

[2] If CSR Rules 14-45 and 14-47 are self-executing, then Appellant Tenorio would not have been required to apply for positions into which the Agency might have been obligated to place her. And if, as suggested below, Appellant Tenorio might be entitled to a re-assignment or transfer appointment or a re-instatement appointment, it would appear that neither rule requires an identity or substantial similarity of job duties. Rule 14-45 (transfer appointments) requires only that the employee be "qualified" for a vacant position. CSR 14-47 (re-instatement appointments) references the terms of Rule 3, which, per Rule 3-52, requires an employee to be reinstated to a position in the "job classification within the layoff unit". Substantial similarity between old and new job duties is not a stated requirement for either reinstatement or transfer appointments.

concerning the following Career Service Rules which went unmentioned in the Hearing Officer's decision.[3]

First, we note that the Hearing Officer failed to analyze Appellant's layoff in light of Career Service Rule 14-45A which states:

> An employee selected to be laid off shall be given a transfer appointment to any vacancy for which qualified within the layoff unit, subject to paragraphs 14-45 C D and E.

It is not clear from this record why Appellant Tenorio was not afforded a transfer appointment to one of the new Manager positions. We could not discern from this record whether the old position from which Appellant was laid off and the newly created Manager positions resided within the same layoff unit, as that term is defined by Rule.[4] In addition, the question of whether Appellant Tenorio was qualified for one of the new manager positions was not developed at hearing; and there is insufficient evidence in the record to determine if any of the qualifying conditions for a transfer appointment listed in subparagraphs C-E would be applicable to Appellant Tenorio's situation.

It is also unclear based on this record why Appellant was not afforded a Re-instatement Appointment per CSR 14-47. The Rule refers to the right of a former employee who was laid off, to be re-instated as set forth in CSR 3. Rule 3-52 currently states:[5]

> Re-instatement After Layoff
>
> Employees or former employees who have been laid off within the past twelve (12) months shall be re-instated to the job classification within the layoff unit from which they were terminated in accordance with Rule 14 **SEPARATION OTHER THAN DISMISSAL.**

We note that Appellant was laid off from a Manager position and that Manager positions were re-opened pursuant to the reorganization. The job classifications of Appellant's old position from which she was laid off and the newly created positions appear, at least at this stage of proceedings, to be the same. It also appears to us that both Appellant's old position and the

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[3] The current layoff rule is different from the layoff rule in effect at the time of these layoffs. The Hearing Officer and the parties referenced the layoff rule as it existed at the time of the layoffs.

[4] CSR 14-42A, defining layoff units as appropriation accounts or sub-accounts, considering consolidation or de-consolidation of said appropriation accounts. An appropriation per CSR 1, is defined as, "An authorization by the City Council to a specified agency to expend a specified sum of money from a specified fund during a specified period for a specified purpose."

[5] As noted, this is the language of the current Rule in effect as of January 2017. We believe the applicable rule regarding reinstatement after layoff may have been different back in 2016 when the layoffs were implemented. We direct the Hearing Officer and the parties to refer to the version of Rule 3-52 (or its cognate if the numbering has been changed) in effect at the time of the layoffs, at the remand hearing.

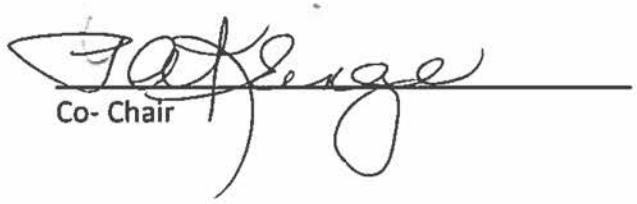
newly created positions reside within the same layoff unit. If either or both of these appearances are misleading, and the job classifications or appropriation accounts are different, then we would expect to see such evidence adduced at the remand hearing.

Finally, we would note that CSR 5-10B speaks to the issue of Re-instatement Appointments, while 5-10C speaks to Re-employment Appointments. The two rules make it clear that these two appointments are not identical. Given that they are not identical, however, we still do not understand, from this record, why if, say Appellant is not entitled to a Re-instatement Appointment, that she would not be entitled to a Re-employment appointment, and vice-versa.

For the above reasons, the Matter of Appellant Tenorio's appeal is REMANDED for further proceedings to develop the record concerning the issues raised herein and for the Hearing Officer to make further findings in light of the augmented record.

SO ORDERED by the Board on September 21, 2017, and documented this 21st day of December, 2017.

BY THE BOARD:



Co- Chair

Board Members Concurring:

Neil Peck

Karen DuWaldt

Tracy Winchester

Patricia Barela Rivera