

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

LORENA RODRIGUEZ, *Applicant*

vs.

CITY OF RICHMOND, permissibly self-insured, *Defendant*

**Adjudication Number: ADJ15538281
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

This matter proceeded to trial on February 15, 2023. The only issues framed for trial were temporary disability, permanent disability including apportionment, need for further medical treatment, and attorney fees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 2/15/23, at p. 2:24-32.) The affirmative defense of lawful, nondiscriminatory, good faith personnel action was not raised as an issue at either the mandatory settlement conference (MSC) or at trial. While it appears that this issue was actively litigated between the parties, issues not raised on the record at the first opportunity that they may properly be raised are waived. (Lab. Code, § 5502(e)(3), see also *Gould v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145].) Even if we did not consider the affirmative defense of lawful, nondiscriminatory, good faith personnel action waived, we would deny defendant's petition on the merits for the reasons stated in the WCJ's Report.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 5, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**LORENA RODRIGUEZ
LAW OFFICES OF GREENBERG
STOCKWELL, HARRIS, WOOLVERTON & FOX**

PAG/abs

I certify that I affixed the official seal of the
Workers' Compensation Appeals Board to this
original decision on this date. *abs*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on March 21, 2023, defendant seeks reconsideration of the decision filed herein on March 1, 2023, in this case, which arises out of injury, whose compensability is disputed, to the psyche of an employment specialist, during the period of employment ending July 1, 2021. Petitioner, hereinafter defendant, contends that it was error to find that its personnel actions, which proved injurious, were taken in bad faith, rendering the claim compensable. Applicant has filed an answer, which is singularly unhelpful.

FACTS

As summarized in the opinion on decision:

Applicant Lorena Rodriguez began work for the City of Richmond (the City) in 2007. In 2020, as now, her job title was employment specialist I. This entails various tasks involving the training, placement and retention in employment of residents in need of help joining or rejoining the labor market. The position is at least partially grant-funded.

On July 1, 2020, Ms. Rodriguez was given an employee performance appraisal by her supervisor, Rosemary Viramontes. This appears to have two related functions, the first being the standard-issue job-performance evaluation. The second is in the last section: A recommendation that applicant be “upgraded to Employment Program Specialist II.” Such upgrade would bring with it a pay increase, along with recognition of the quality of her work. The appraisal was signed by the department head, Sal Vaca, as well as the supervisor who prepared it, and accompanied by a form entitled “personnel requisition” and signed by Mr. Vaca; this contains specifics regarding the position’s salary and vacant position number; it classifies the position as an existing allocation. (Exh. 2)

The change did not take place, for reasons not explained in the record; applicant’s current supervisor, Emmanuel Njome, who took the place of Ms. Viramontes, testified that “something in HR [human resources] went wrong.” (Summary of evidence)

Four months later, on November 1, 2020, Mr. Vaca signed a second personnel requisition identical to the first. (Exh. 4) Again, this did not bear fruit.

Mr. Vaca retired. Four months after the second requisition, on March 8, 2021, the new interim division head,¹ Jim Nantell, appears to have submitted a third such request; the copy in evidence (Exh. 5) is unsigned, but emails support that Mr. Nantell submitted the request that Ms. Rodriguez receive the upgrade.

¹ A division head appears to be below a department head on the City’s organizational chart.

Again, this was not acted on, but by July, 2021, Mr. Nantell appears to have soured on the idea. There is some indication that other employees expressed negative impressions of applicant's job performance. There is no indication, however, of any negative treatment of her from a supervisory level; there is no record of discipline, and no negative performance appraisal. Mr. Njome testified variably that failure to act on a recommended job upgrade was "not normal" but that he did not know if it was odd, and "you'll have to ask HR." Mr. Nantell did not testify at trial.²

Eventually, Mr. Nantell offered Ms. Rodriguez the EPSII position, but on a probationary basis, telling her that she would have to prove herself "again" to him. She declined such an arrangement. Her supervisor had not heard of any other instances of a probationary upgrade. His own appraisal of applicant's job performance, from "late 2022" (the only one) was not offered in evidence; he described it as positive.

After trial, I concluded that defendant had not met its burden of proving that its action in rescinding the thrice-recommended upgrade was taken in good faith, in the sense of following its own institutional procedures.

DISCUSSION

Defendant's central tenet is that an employer must be afforded "the independence, autonomy, and flexibility to assess whether previously suggested promotions are still appropriate..." and that the City of Richmond in this instant acted in good faith in reassessing the "suggested" promotion of Ms. Rodriguez.

First, I believe that the three "personnel requisitions" were somewhat more than suggestions: They were requests, by applicant's managers, to upgrade her position. (The evidence further suggests some measure of impatience with the bureaucracy of approval.) Moreover, as expressed in the opinion, the good-faith prong of defendant's burden of proof is not as simply demonstrated as would be the case in a small business:

This question often turns on whether an employer has followed its own procedures, and that is the case here. The decision to reverse course on applicant's upgrade, after he and his predecessor had recommended it, appears to be Mr. Nantell's, although there are references to a possible role played by someone (unidentified) in human resources. Thus, we are left to wonder about its rationale. Among applicant's exhibits are some emails calling Ms. Rodriguez's work into question, [although] those who supervised that work have not criticized it; rather, they have praised it. Between the third of the three personnel requisitions, in March, 2021, and the apparent withdrawal of that request, less than five months later, there is no evidence of a change in applicant's performance, or of discipline, or of budgetary shortfalls,³ or of any

² There is no explanation for Mr. Nantell's absence, other than the fact that he left the City's employ.

³ It appears that the position, while vacant, was funded; in fact, two such positions were available.

other impediment that might remove her recommended upgrade from the normal course of things. No one from the human resource department testified at trial, and no documentary evidence suggests an untoward response – or any response – to the three requisitions. Applicant’s current supervisor could not explain the failure to grant the upgrade, only stating that it was unusual.

I do not believe that it is correct, as defendant contends, that its witness testified that a recommended promotion must be approved by a budgeting committee and can be rescinded prior to such approval, “presumably for any purpose.” Rather, Mr. Njome essentially professed ignorance of the mechanism involved. When he surmised that budgeting must have been involved, and was referred to documentary evidence showing funding for the position, he stated that there must have been some reason. (Summary of Evidence, pg. 5) In fact, when he was not disowning any personal knowledge of the process (“Ask HR,” *id.*, pg. 4), this witness often appeared defensive, perhaps even combative, but not particularly in control of the events under discussion.

None of this should be surprising to anyone accustomed to institutional employers such as the City of Richmond. The testimony in this case and the documentary evidence suggest a typically complex web of processes involved in carrying out personnel decisions. Because it is defendant’s burden, however, to show that it did in fact adhere to those processes, I believe that “there must have been some reason” does not suffice.

In sum, I remain persuaded that defendant has not proven that its action in rescinding applicant’s three personnel requisitions, in the absent of any intervening negative performance, either demonstrated or implied, was taken in good faith.

RECOMMENDATION

I recommend that reconsideration be denied.

Date: April 12, 2023

Respectfully submitted,

Christopher Miller
Workers’ Compensation Judge