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Report of Investigation

FILE NO: 24-0031-C

SUBJECT MATTER: Return from Physical Layoff

STATUS: Final

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June 26, 2024
Date of Approval

DISTRIBUTION:

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EXECUTIVE SUMMARY

The City of Albuquerque Office of Inspector General conducts investigations, inspections, evaluations, and reviews following the Association of Inspectors General (AIG) standards.

According to City Ordinance 2-17-2, the Inspector General's goals are to (1) Conduct investigations in an efficient, impartial, equitable, and objective manner; (2) Prevent and detect fraud, waste, and abuse in city activities including all city contracts and partnerships; (3) Carry out the activities of the Office of Inspector General through independence in both fact and appearance, investigation and interdiction, and (4) Propose recommendations to increase the city's legal, fiscal and ethical accountability to ensure that tax payers' dollars are spent in a manner consistent with the highest standards of local governments.

The Office of Inspector General (OIG) received a complaint from a City employee (E1) who stated that they were on physical layoff for eleven (11) months due to a medical issue and they were having issues with the Human Resources Department (HRD) in returning to work. According to E1, E1 was placed in a position that was thirty-five percent lower than the salary E1 was making before going on physical layoff which was a violation of City Personnel Rules and Regulations.

The OIG determined that the allegations contained elements of potential fraud, waste, or abuse and that it was appropriate for the OIG to conduct a fact-finding investigation.

As defined in the Inspector General Ordinance §2-17-3, fraud is the knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Waste is the thoughtless or careless expenditure, mismanagement, or abuse of resources to the detriment of the City. Abuse is the use of resources or exercise of authority that is contrary to rule or policy, or knowingly inconsistent with any established mission or objectives for the resource, or the position held by the person exercising the authority. Abuse does not necessarily involve fraud or illegal acts.

Below is a summary of the findings and recommendations derived from the OIG's investigation.

Finding:

Based on the evidence gathered and in accordance with Personnel Rules and Regulations 307.7, the OIG substantiated that HRD had the opportunity to place E1 in a position that would have been comparable in pay to E1's position before going on physical layoff. However, the department chose to place E1 in a lower class and pay position which was approximately thirty-five (35) percent lower than what E1 was making before going on physical leave.

Recommendations:

1. **Review and Reinforce Procedures:** HRD should review and reinforce procedures for returning employees from physical layoff to ensure compliance with established regulations and guidelines.

2. **Training and Education:** Provide training and education to HRD staff regarding the importance of equitable treatment and compliance with regulations when managing employee return-to-work processes.
3. **Ensure Equitable Placement and Timeliness:** HRD should ensure employees returning from physical layoff are appropriately placed in a position and pay comparable to what the employee was previously making. The process should also be timely.
4. **Amendment to Interoffice Memorandum:** The City should amend the October 3, 2022 Interoffice Memorandum, Subject: Rules and Regulations 700- Compensation Pause, to better describe the intent of the pause.
5. **Clarification of Referenced Sections:** HRD should not reference, in the Interoffice Memorandum, “Recall from Physical Layoff”, Section 709 Personnel Rules and Regulations if they are paused.

ABBREVIATIONS

CITY:	City of Albuquerque
OIG:	Office of Inspector General
ACD:	Arts and Culture Department
HRD:	Human Resources Department
E1:	City Employee
E2:	City Employee
E3:	City Employee

INTRODUCTION

The mission of the Office of Inspector General (OIG) is to promote a culture of integrity, accountability, and transparency throughout the City of Albuquerque (City) to safeguard and preserve public trust. Investigations, inspections, evaluations, and reviews are conducted in accordance with AIG Standards.

Complaint

The Human Resources Department (HRD) did not comply with Personnel Rules and Regulations in regards to job placement of E1 when E1 returned from physical layoff.

Background

The City offers the status of physical layoff to classified employees meeting specific criteria. This status permits classified employees to separate from and return to employment for up to a year upon certification of a licensed physician or a licensed psychologist indicating the employee is physically or mentally incapable of performing the duties of their position. Employees unable to return to work after exhausting sick and FMLA leave will be transferred to physical layoff at the end of an FMLA leave without pay period. An employee who is on physical layoff initiates the return to work process by notifying the Human Resources Department that his or her personal physician has released him or her to return to work. The City's medical center must also clear the employee to return to work.

E1 was put on physical layoff status on January 20, 2023. As of December 15, 2023, E1 had been cleared to return to work by their personal physician and also the City's medical center. The medical report stated that E1's previous job description was provided by the employer and reviewed by the medical provider. E1 was cleared to work without limitations or restrictions.

On January 22, 2024, E1 received an interoffice memorandum with the subject, "Recall from Physical Layoff" from the City's HRD. The memorandum stated that E1 would be starting a new position in the department at an hourly rate of \$26.79. Before the physical layoff, E1's position had an hourly rate of \$41.12. E1's new position was approximately thirty-five (35) percent less per hour.

SCOPE AND METHODOLOGY

Scope: Review of the process for E1's return to work and review of pertinent City documents.

The methodology consisted of:

- Review employee Human Resources Personnel Rules and Regulations
- Review HRMPROD data
- Review City policies and procedures
- Conduct inquiries and interviews
- Review emails

This report was developed based on information from interviews, inspections, observations, and the OIG's review of selected documentation and records.

INVESTIGATION

Allegation: The Human Resources Department (HRD) did not comply with Personnel Rules and Regulations concerning the job placement of E1 when E1 returned from physical layoff.

Authority:

102.5 Authority to Place Employees with Preference

The Human Resources Director, with the prior approval of the Chief Administrative Officer, will have the sole authority to place employees who are granted a placement preference in a position for which they qualify as provided in this section.

307.7 Physical Layoff

Physical layoff is the separation of a classified, non-probationary employee from the service of the City upon the certification of a licensed physician or a licensed psychologist indicating the employee is physically or mentally incapable of performing the duties of the position. An employee in physical layoff may return to work within one year of the effective date of physical layoff. The employee will be placed in a vacant position, for which they qualify, and is of equal or lesser grade or comparable pay to the employee's previous position.

To be eligible for physical layoff, an employee must have twelve (12) months of continuous uninterrupted active employment immediately prior to the effective date of physical layoff. Unclassified, temporary, seasonal or students are not eligible for physical layoff. Before transferring to physical layoff employees must exhaust sick leave and will be paid accrued vacation or compensatory leave in a lump sum.

Before an employee is transferred into physical layoff, the City will determine whether the employee has a disability as defined by the Americans with Disabilities Act (ADA). If so, the City will engage in an interactive process with the employee to determine whether a reasonable accommodation can be made in the employee's existing position or transfer to another position.

Employees unable to return to work after exhausting sick and FMLA leave will be transferred to physical layoff at the end of an FMLA leave without pay period. However, the effective date of transfer will be the date the paid leave was exhausted. When an employee is transferred to physical layoff, the City will provide notice to the employee of his or her rights under this section as well as the employee's obligation to keep the City informed of his or her physical or mental condition during the physical layoff period.

An employee in physical layoff initiates the return to work process by notifying the Human Resources Department that his or her personal physician has released him or her to return to work. A City doctor must also certify that the employee has reached maximum medical improvement and may return to work. A City doctor must also certify that the employee has reached minimum medical improvement and any return to work. The Human Resources Department will then attempt to locate a position of equal or lesser grade or comparable pay to the employee's previous position. If there is a question whether the employee is physically or mentally able to perform the essential duties of an identified position, a City doctor, after consultation with the employee's personal physician, must certify that the employee is able to perform all of the essential functions of the position. If the physician determines that the employee cannot perform the essential functions, the City's ADA Coordinator will determine if the employee is disabled. If it is determined that the employee is disabled as defined by the ADA, the ADA Coordinator will engage in an interactive process with the employee to determine if a reasonable accommodation would enable the employee to perform the essential functions of that position or another position.

Employees in physical layoff status placed in an equal position will be compensated in accordance with Section [709](#). Employees in physical layoff status placed in a lower position will be compensated in accordance with Section [706](#).

Employees on physical layoff status will be terminated one (1) year from the effective date of physical layoff or upon refusal to accept an offer of placement into a position of equal grade or comparable pay.

Employees in physical layoff are not eligible for donated leave or hardship leave.

NOTE: On October 5, 2022, the City Administration paused Rules and Regulations 700-Compensation. As of the date of this report, they are still paused. See Exhibit 1)

Evidence:

- Personnel Rules and Regulation
- Interview
- Information received from Central HR
- PeopleSoft Data
- Correspondence

Interviews and Inquiries:

E2 Interview:

The OIG interviewed E2 who stated that E2 entered their current position part-time in early January 2024 and fully transitioned to their current position at the end of January 2024. It was

E2's understanding that when E1 provided information to return to work from being on physical layoff the department did not have an available position at E1's level or a comparable position. E1 had previously held a high-level fiscal position at the Biopark. E2 stated the Arts and Culture Department (ACD) had an opening that paid around \$26.00 per hour and seemed to somewhat align with E1's skill sets and qualifications. E2 stated that because ACD did not have an open position that was the same or comparable to E1's previous position there would be a process of finding a position within the City to place E1. As a placeholder ACD put E1 in a position that ACD had open so E1 would at least be working. The OIG asked what is a "placeholder position" and if it is defined in Personnel Rules and Regulations. E2 stated that it is not as far as E2 knows. E2 explained this was an "ad-hoc solution" where the City had an individual who was able to come back to work and HRD wanted to give them a job to do so that E1 could get paid while we went through a longer process.

The OIG asked E2 if there was an obligation to pay E1 at the same pay rate E1 received before going on physical layoff. E2 replied that when E2 reads the Personnel Rules and Regulations, 307.7, "it does not have a whole lot to it", implying it was not clear. It states that when the employee is eligible to return from being on physical layoff HRD will attempt to locate a position of equal or lesser grade or comparable pay to the employee's previous position. E2 stated that there are some variables, HRD has to try to find a job that is equal or below or of comparable pay that the employee is qualified for. What ACD found with HRD's help was a placeholder position of lesser grade that E1 was qualified for, while HRD embarked on a process to try to find E1 something closer to their prior pay.

The OIG asked E2 if there was a Fiscal Officer position open within ACD as of December 15, 2023. E2 stated not that E2 was aware of, but that E2 would not really have known because E2 was not involved at that point. In mid to late January 2024, E2 took on some responsibility for E1's position placement process. E2 was told there was a list of positions that was pulled through HRD and given to E1 so that E1 could identify their job preference by ranking the positions in order of preference. E2 stated HRD went through the process to see if any of the positions were still vacant and HRD arranged meet and greets with E1 and the two (2) department directors for the positions that were still available. The meeting was to ask each other questions regarding the positions. E2's concern and reason for this was to ensure that E1 was not in a position where E1 could not perform the duties or where E1 did not fit in. E2 also stated they did not want to set up the department for somebody whom they have no trust or can't develop rapport. E2 did not want E1 and the department to fail. The meetings were held and E1 chose the position they were placed into.

E2 was asked if it was HRD's responsibility to place E1 or did it fall under the department. E2 stated that under section 100 of Personnel Rules and Regulations, employees who are returning from physical layoff are subject to administrative transfer or placement. It states that the HRD director has the sole authority to do that with the approval of the Chief Administrative Officer (CAO). It does not put the obligation on the HRD director to place them, it just gives the HRD director the authority to do so, but they still have to get the CAO approval. The OIG asked E2 who determined the placement of the position that E1 is in right now. E2 stated that as far as E2 knows, that decision was made by ACD management. Strictly under the rule, it says we would

attempt to find a position of equal or lower grade or pay. If the fiscal officer position had been available it would have at least been on the list of potentials.

E2 stated E2 would do the same process again when E1 came back to work. E2 would have discussed with E1 and management to make sure they were both in agreement. E2 does not like a “force people process”, but rather an interactive process. E2 believes in working together to ensure this is going to be a solution that fits. E2 stated that E2 did not have that discussion with ACD management because at the point E2 became involved there was no fiscal officer position available.

The OIG asked E2 if this was considered a demotion for E1 and if so whether section 706.4 of the Personnel Rules and Regulations limiting a pay decrease for E series employees to 5% applied. E2 stated it is a little unclear, but it is certainly a reduction in grade and pay. E2 stated, “some would call this a demotion, some might say it is a voluntary downgrade because we are offering the job and they can choose to accept or not.” However as far as E2 knows, all the rules in section 700 about increases, demotions, and pay adjustments are currently not in effect, they are paused. The OIG asked if E2 could provide the memo that went out to the entire City stating section 700 had been suspended at some point. E2 stated they would look, but E2 has never seen one. The OIG stated they had asked for that memo in the past and had not received one. E2 stated that this took effect sometime at the end of 2022.

The OIG informed E2 that according to E1 the lower-paying job was accepted because there was no choice. E2 stated the rules do say that if an employee rejects the job offer their employment may be terminated and E2 can understand how E1 feels that way. E2 stated from their perspective, “If there is an employee who can return to work, we want to give them a job, even if it is not the final answer. Some income is better than no income, even temporarily.” E2 stated that physical layoff is a benefit to employees and pointed out that in other places if one had been on disability for a year there would not be a job to return to.

After the interview, E2 provided an Interoffice Memorandum dated October 3, 2022, with the subject line, “Rules and Regulations 700 – Compensation Pause” which was approved on October 5, 2022. (See Exhibit 1)

E3 Interview:

The OIG spoke with E3 who stated that E3 let E1 know everything E1 had to do to return to work from physical layoff, and on December 15, 2023, E1 presented all the paperwork to ACD. E3 stated at that time ACD had a fiscal officer position open at \$38.49 per hour, which would have been around \$4.00 less than what E1 was making before going on physical layoff. E3 stated that management refused to bring E1 back to that position because in 2017/2018 E1 did not want to supervise. However, the lower position ACD placed E1 in was a supervisory position. E3 stated that putting E1 in a position that supervised totally contradicted why they did not put E1 in the more comparable fiscal officer position. HRD had the authority to put E1 in the fiscal officer position, but instead let ACD come up with a solution of putting E1 in a “place holder” position. E3 stated that the fiscal officer position was vacant and ACD sat on it for forty-five (45) days plus from the time E1 was eligible to return to work. The CAO can move anyone in the City and

Department Directors can only move people within their departments given the person is qualified for the positions.

E3 reiterated the following:

A: E1 was eligible December 15, 2023, to come back to work and E1 did not come back until January 22, 2024.

B: There was a vacant position that was within E1's range of pay and E1 was denied that position.

(NOTE: A review of the job posting stated that the position opening date was December 7, 2023 at an hourly salary of \$38.49. The job posting closed January 25, 2024)

NOTE: During the OIG investigation, E1 was administratively transferred to another department at an hourly rate of \$36.38 which is still lower than the fiscal officer position that was available at an hourly rate of \$38.49.

Analysis:

In an email provided to the OIG, E1 stated to HRD that "As of December 14, 2023, I am no longer receiving Long-Term Disability benefits. I still owe some payments to HR to cover my benefit premiums. Since I have not been placed in a position I am losing money in salary as well."

On January 22, 2024, approximately twenty-five (25) working days after being cleared to return from work, E1 signed a memo with the subject, "Recall from Physical Layoff". The memo stated:

Effective the payroll period beginning Saturday, January 13, 2024 you will be recalled from physical layoff and returned to the Department of Arts and Culture. Please refer to section 709 of the Rules and Regulations – Return from Physical Layoff and 102.4 (D) Employees Given Placement Preference.

(NOTE: The OIG would like to emphasize that the memo from the HRD Director refers to section 709 of Rules and Regulation, which the HRD department stated was paused as of October 5, 2022.)

This memo stated the position E1 would be placed in was at an hourly rate of \$26.79.

E1's signature included the following statement written by E1:

I am signing this memo excepting this placement because; 1. I need an income, and 2. Per the HRD director, this is a temporary placement until a permanent assignment is made. I do not agree that this position meets the "equal position" outlined in the City's Personnel Rules and Regulations, section 307.7 re: physical layoff. Nor do I agree that this compensation is in line with the City's Personnel Rules and Regulations Section 706.4 re: Compensation. Furthermore, I feel as though I am being penalized for being out of work with a serious medical condition.

E1 signed and dated the memo on January 22, 2024

The OIG reviewed an email string dated December 22, 2023, between an HRD employee and ACD, which revealed the following:

- HRD to ACD 10:01 am – “Ok, here is the updated memo, please fill in the TO information and the Reporting instructions then you can send back to me for routing.” (Attached was an Interoffice Memorandum that was drafted to begin the recall of E1 from physical layoff into the position of Fiscal Officer at ACD.)
- ACD to HRD 10:18 am – “All of this information is now with my director. Feel free to reach out to her for any questions.”
- HRD to ACD 10:30 am – “Director, shall you have any questions please feel free to reach out, this action will be effective December 30, 2023 so I will need the memo by early next week so we can enter the action.”
- HRD to HRD 10:59 am – “I did confirm with E2, E2 is available to return on 12/30 so go ahead and draft the memo.”

In reviewing the email and attachment, the OIG could verify that originally E1 was going to return from physical layoff to the position of fiscal officer at ACD. This position paid an hourly rate of \$38.49, which would have been more aligned with E1’s salary of \$41.12 before E1 went on physical layoff, but instead, E1 was put into a position with an hourly rate of \$26.79.

In a review of the job descriptions available, both job descriptions required the position to “Exercise direct supervision over supervisory, professional, technical and clerical staff.”

During the OIG investigation, E1 provided documentation showing on January 4, 2024, HRD and E1 had a meeting to try to rectify the issue by giving E1 several job positions available for E1 to rank in order of what position E1 would prefer. E1 did not select the ACD fiscal officer position. E1 stated that was the position E1 was supposed to originally get, HRD started the return to work process for approval, but it was stopped by ACD and HRD. E1 did not select the fiscal officer position because E1 knew they were not going to place E1 in that position.

Several weeks after the interview with E2 the OIG requested clarification of whether the City’s Rules and Regulations were paused from 700 through 715 or just 700 Compensation. E2 replied with the following:

My understanding is that the Pause on section 700 was written and implemented broadly in order to stop all non-compliant processes. However, the City has continued to employ practices based on parts of the rule structure that are compliant and in the City’s best interest. For example, Section 712 pertains to payroll deductions, and it is clearly in everyone’s best interest for the City to continue withholding taxes and deductions appropriately. Similarly, the City continued to apply compliant practices based Section 709. The pause was cast broadly to enable the City’s review and analysis of the structure as a whole while revised policy can be developed, negotiated if necessary, and implemented.

In reading this statement, Section 700 of the Personnel Rules and Regulations had been paused, and any application is judgmentally applied. The City of Albuquerque’s Merit System Ordinance establishes the framework for the administration of the City’s personnel system. Pursuant to the

Merit System Ordinance, these Personnel Rules and Regulations are hereby promulgated to interpret and implement the Ordinance. Placing a pause on the compensation section of the Merit System/ Personnel Policy without having an alternative solution implemented is of concern and puts the City at risk for potential liability.

Finding-Allegation:

Based on the evidence gathered and in accordance with Personnel Rules and Regulations 307.7 which states; “The Human Resources Department will then attempt to locate a position of equal or lesser grade or comparable pay to the employee’s previous position,” the OIG substantiated that HRD had the opportunity to place E1 in the fiscal officer position. However, the department chose to place E1 at a lower class and pay position which was approximately thirty-five percent lower than what E1 was making before going on physical leave.

Recommendations:

1. **Review and Reinforce Procedures:** HRD should review and reinforce procedures for employees returning from physical layoff to ensure compliance with established regulations and guidelines.
2. **Training and Education:** Provide training and education to HRD staff regarding the importance of equitable treatment and compliance with regulations when managing employee return-to-work processes.
3. **Ensure Equitable Placement and Timeliness:** HRD should ensure employees returning from physical layoff are appropriately placed in a position and pay comparable to what the employee was previously making. The process should also be timely.
4. **Amendment to Interoffice Memorandum:** The City should amend the October 3, 2022 Interoffice Memorandum, Subject: Rules and Regulations 700- Compensation Pause, to better describe the intent of the pause as described by E2.
5. **Clarification of Referenced Sections:** HRD should not reference the Interoffice Memorandum, “Recall from Physical Layoff”, Section 709 Personnel Rules and Regulations if it is paused.

In conclusion, the findings underscore the necessity for HRD to uphold principles of fairness and adherence to regulations in all aspects of employee management, ensuring the effective utilization of resources and fostering trust within the organization.

Management’s Responses:

1. HRD disagrees with the findings. Returns from physical layoff are rare, and are treated as health condition or disability accommodation process. Such processes are evaluated based on good-faith participation and reasonableness, not hard deadlines and one-size-fits-all solutions. Rather, accommodation processes are intended to deliberately treat particular employees differently than others based on their health-conditions. HRD also has grave concerns about the OIG’s exercise of jurisdiction in this matter because these findings reflect not only a lack of understanding of the health-related accommodation process, but also represent waste and abuse themselves because there is a pending legal process

involving E1 where the City could be held liable and the findings are likely to create or increase unnecessary exposure for the City.

At the time E1 provided notice of their intent to return from physical layoff his pre-layoff position was not available so his pre-layoff department provided a temporary placement while the parties engaged in an interactive process. Moreover, E1 had previously specifically asked for a demotion out of a supervisory role, and the City had to balance that with what positions were available. It is common in accommodation procedures such as this for employers to utilize temporary solutions to evaluate their efficacy or to allow time to identify long term solutions. Within days of E1's return to work HRD provided him a list of potential placements so he could prioritize those based on his preference. HRD then worked diligently with E1 to evaluate those placements for viability and ensure an appropriate placement was made. Within approximately four weeks the parties had conducted evaluation meetings and E1 selected between the viable possible placements, and E1 was placed within four weeks of that. In this process, HRD met its obligation under anti-discrimination laws and Rule 307.7 to "attempt to locate a position of equal or lesser grade or comparable pay to the employee's previous position." Nonetheless, HRD will develop a procedure for placement on return from physical layoff.

2. HRD can deliver refresher training to its staff on placements from return from physical layoff. However, these processes are very case specific and systematizing them will require limiting options such as were afforded the employee in this instance to select from multiple potential placements and the chances of setting up employees or departments for failure will increase.
3. E1 was appropriately placed in a position with comparable pay in a timely manner given all attendant circumstances.
4. The City is working on developing revisions to Section 700 that will require negotiation with labor entities, and a temporary replacement is impractical.
5. Although Section 700 is paused, the HRD still follows practices based on those rules' structures where doing so is compliant with regulation so reference to that section remains instructive.



Timothy M. Keller, Mayor

City of Albuquerque

Human Resources

Interoffice Memorandum

October 3, 2022

To: Lawrence Rael, Chief Administrative Officer

From: Anthony Romero, Director of Human Resources

Subject: Rules and Regulation 700- Compensation Pause

After review of the Class & Compensation Plan, we have identified opportunities with the current written methodology used to calculate compensation. The current methodology provides adjustments (promotions, demotions, and/or transfers between pay plans) to an employee's base rate based on a percent of the employee's current base rate of pay then compares that result to the "closest-highest" step within the new positions pay grade structure to establish the new base rate of pay. The current practice is creating inconsistency of compensation levels by position. In addition, new hire compensation is set at the lowest levels within many pay grades and may create risk with regulatory compliance beyond the probationary period.

To mitigate these inconsistencies and risks, we are recommending a pause to the current City of Albuquerque Personnel Rules and Regulations, Section 700. During this pause, we would implement a 2-step methodology to setting base rates of pay within the City. The 2-step methodology has been successfully utilized in many of our pay plans. HR would establish probationary and non-probationary (2-step) rates of pay by position utilizing the current compensation levels of incumbents within positions and aligned positions within the City. These new rates will be used for all positions and would be applicable to new hires and employees who transfer, promote, or demote to other positions within the City. This 2-step methodology will eliminate the multiple step process currently available under some of the pay plans.

HR will be conducting the Class & Compensation Study in 2023. This pause of PRR Section 700 will remain in effect until recommendations provided by the Class & Compensation Study are approved.

Temporary Upgrades

In addition, individuals selected to fill a vacant position and who are eligible for temporary upgrade compensation shall be provided with:

- The position's probationary rate of pay if still in their probationary period, or
- The position's non-probationary rate of pay if outside their probationary period, or
- The temporary upgrade compensation allowable under the applicable collective bargaining agreement.

Approved:

Lawrence Rael, Chief Administrative Officer

10/5/22

Date