

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

Appeal No. 78-08 through 124-08

ORDER DISMISSING APPEAL

IN THE MATTER OF THE APPEAL OF:

Michael Anderson, Robbie Anderson, Gabriel Amaro, Saul Amaro, Karl Biefel, Edgar Bonilla, David Trujillo, David Bougsty, Elizabeth Coyle, Christopher Dirks, John Dirks, Kristopher Dominguez, Marc Dominguez, Christin Foster, Patrick Guereca, James Grogan, Aseged Kebede, Wayne Kelly, Tony Kotris, Matt Kramer, Istvan Lohner, Victor Lovato, Adalberto Loya, Ronald Martinez, Kenneth Matuska, Hector Mendoza, Daniel Miller, Freddie Montoya, Thomas Neubert, William Peirce, Isaiah Phillips, Javier Ramos, Steven Ricci, Manual Rivas Gordon Rudebusch, Graham Sadler, Bill Schimpf, Joseph Serna, Jonathan Shafer, Ronald Shores, Joseph Short, Arthur Sickler, Jose Solis, Robert Stenke, Scott Trengrove, Charles Weaver, John Wilson
Appellants,

vs.

DEPARTMENT OF AVIATION,
and the City and County of Denver, a municipal corporation,
Agency.

This Order addresses two matters in the above-captioned appeal: 1. the qualification of the Appellants' non-attorney representative; 2. the Agency's Motion to Dismiss.

1. Appellants' non-attorney representative.

Ms. Cheryl Hutchison represents the Appellants in this case as a non-attorney representative from the Appellants' union. The case appears to hinge upon legal argument: whether the Appellants have stated a legal claim for which there is relief; whether the Hearing Officer has jurisdiction; and whether the claims of some of the Appellants are moot. A pre-hearing conference was conducted on January 6, 2009 to determine whether Ms. Hutchison was qualified to represent the Appellants.

Ms. Hutchison has extensive experience presenting cases in this venue. Most of her experience lies in making factual rather than legal argument. Ms. Hutchison consulted with legal counsel from her union in drafting her response to the Agency's motion to dismiss, and legal counsel would be available to consult with her in preparing for hearing. Finally, Ms. Hutchison consulted with the Appellants in this case. The Appellants acknowledge her non-attorney status and have approved of her representation. Under these circumstances, I find Ms. Hutchison is sufficiently qualified to represent the Appellants in this matter.

2. Agency's Motion to Dismiss.

In an agency motion to dismiss prior to hearing, statements in the appeal must be viewed in the light most favorable to the appellant, all appellant's assertions of material facts must be accepted as true, and the motion to dismiss must be denied unless it appears beyond doubt that the appellant cannot prove that the facts as he alleges them would entitle him to relief. In re Boden, CSA 86-06 (Order 11/22/06), citing Dorman v. City and County of Denver, 03 CV 4712 (order dated 2/4/05).

On December 8, 2008, the Agency submitted its "Agency's Motion to Dismiss." The Agency claims: the Appellants have failed to state a claim for which relief may be granted; the Hearing Officer is without jurisdiction over the subject matter of this case; and 23 of the 47 Appellants' claims are moot. The Appellant responded on December 18, 2008, stating the Agency has violated Career Service Rule 9-50 E. regarding the Appellants' pay. I have reviewed the filings, the case file, pertinent authority, and now find and order as follows.

a. Appellants' claims for relief.

The underlying facts are not in dispute. The Appellants comprise 47 employees of the Fleet Maintenance Division at Denver International Airport. The Appellants have working titles of Heavy Equipment Service Technicians, Associate Heavy Equipment Service Mechanics, Heavy Equipment Mechanics and Heavy Equipment Mechanic Line Supervisor. The Appellants filed identical or nearly identical grievances. They claimed the Agency hired new employees in October 2007 into the same working classifications as the Appellants, but at a higher pay step than they receive. The Appellants claimed their subsequent request for a pay adjustment was denied in violation of Career Service Rules (CSR) 9-50 D. and E. When their grievance was denied, this appeal followed.

CSR 9-50 D. This rule grants the Career Service Board authority, in its sole discretion, to make a market adjustment in a pay practice or create a temporary pay practice if certain conditions are met. The Appellants made no claim in their response that relief may be granted under this rule. Indeed, their prehearing statement fails to refer to CSR 9-50 D. Elsewhere in their appeal, the Appellants state only that "there have been issues with retaining new hires," explaining their perception that it has been difficult to retain employees, inferably due to

substandard pay. I find the Appellants failed to state a claim for which relief may be granted under CSR 9-50 D.

CSR 9-50 E. This rule grants the appointing authority the discretion to adjust pay for a current employee, subject to approval of the Career Service Personnel Director, in order to eliminate pay inequity created by market conditions. The rule is clearly discretionary, and therefore not subject to compulsion by a hearing officer. Thus, even assuming there is inequity between the pay step for new hires and Appellants within the same pay grade, the decision whether to adjust the Appellants' pay is discretionary with the appointing authority, if approved by the Director. Thus, the Appellants failed to state a claim for which relief may be granted under CSR 9-50 E.

b. Jurisdiction.

Pursuant to CSR 19-10 A. 2.b., only grievances which result in an alleged violation of the Career Service rules and negatively impact pay, benefits or status may be appealed. As found above, the Appellants cannot prove a violation of either Career Service Rule they cite, even assuming that the Career Service Board has not made a market adjustment under CSR 9-50 D. and all conditions listed there have been met. When a Career Service Rule grants the discretion to take or not to take a certain action under the rule, a hearing officer may not reverse the course taken unless it runs afoul of a supervening rule or law.

The appointing authority did not adjust the pay for all of the Appellants. A pay adjustment is discretionary under CSR 9-50 E., and therefore the choice of action or inaction cannot violate that rule, as required to obtain jurisdiction under CSR 19-10 A. 2. b. The Appellants claim no other rule or law was violated which might invoke jurisdiction otherwise.

c. Mootness.

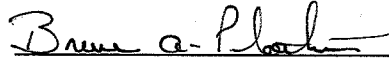
Twenty three of the Appellants acknowledge that, pursuant to CSR 9-50 E., the Agency requested and received a pay adjustment, approved by the Career Service Director. Therefore, even assuming those Appellants had stated a claim for relief and assuming they had established jurisdiction, their claim is moot since they were granted the remedy they requested. Thus for the following Appellants who received a pay adjustment, their claims are moot, as confessed in the Appellants' Response: Gabriel Amaro; Michael Anderson; Robbie Anderson; Aseged Kebede; Wayne Kelley; Javier Ramos; Joseph Short; Edgar Bonilla; Christopher Dirks; Kristopher Dominguez; Christian Foster; Tony Kotris; Saul Amaro; Karl Biefel; David Bougsty; John Dirks; Marc Dominguez; Adalberto Loya; Ronald Martinez; Steven Ricci; Bill Schimpf; Arthur Sickler; Charles Weaver.

As the Appellants have failed to state a claim for relief, have failed to establish jurisdiction, and because, as to the 23 above-named Appellants, their

claims have become moot, it appears beyond doubt that the Appellants cannot prove that the facts as alleged would entitle them to relief. The Agency's Motion to Dismiss is GRANTED as follows.

1. The Appellants' appeals are DISMISSED WITH PREJUDICE.
2. All other pending Orders in this case are rendered MOOT.
3. The hearing for these consolidated appeals, scheduled for January 22 and 23, 2009, is VACATED.

DONE JANUARY 7, 2009.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with CSR 19-60, 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](http://www.denvergov.org/csa/career-service-rules).

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

BY MAIL OR PERSONAL DELIVERY TO:

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