

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF
COLORADO

Appeal No. 05-09

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

ROBERT F. AUGUSTINE,

Appellant/Petitioner,

vs.

DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT DIVISION,
and the City and County of Denver,

Agency/Respondent.

This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record before it and **REVERSES** the Hearing Officer's Decision dated April 28, 2009, on the grounds outlined below.

FINDINGS

The issue before the Hearing Officer was whether Appellant voluntarily resigned his employment with the Agency.

On Friday, January 16, 2009, at 6:12 a.m., Appellant left the following telephone message with his supervisor:

Good morning, Doc. This is Bob Augustine. I will not be into work today. You will be contacted some time later today by either my Teamster' representative or my lawyer. Thank you for the opportunity to work with you. See you in court. Bye.

Appellant's supervisor and the Agency's Director of Operations listened to the message and concluded that Appellant had resigned. The Agency then mailed a letter to Appellant, dated January 16, 2009, acknowledging his call as a resignation and

accepting it. During the afternoon of January 16, Appellant learned from a coworker that the Agency had interpreted his early morning call as a job resignation. Appellant immediately called the Director and left a telephone message, followed by emails, insisting he had not resigned. On Tuesday, January 20, (following the Martin Luther King Jr. holiday), Appellant delivered a letter explaining that he was absent from work on January 16 under doctor's advice and would provide evidence of the same. In the meantime, Appellant received the Agency's notification by mail that it had accepted his resignation.

On January 23, the Agency sent another letter notifying Appellant that a meeting had been set for January 28, 2009. The letter advised that one of the purposes of the meeting was to determine whether the Agency would rescind its earlier acceptance of Appellant's resignation. However, the letter also served as a contemplation of discipline notice, advising Appellant that at the meeting he would be given the opportunity to explain why discipline should not be imposed for alleged misconduct in violation of the career service rules.¹ Appellant did not attend the meeting.

The Hearing Officer concluded that Appellant's telephone message on the morning of January 16 was susceptible to different interpretations; however, once the Agency received Appellant's follow-up phone calls and emails, it could no longer consider the resignation voluntary. Nevertheless, the Hearing Officer also concluded that when Appellant failed to attend the meeting on January 28, the Agency was then entitled to ratify its earlier conclusion that he had voluntarily resigned.

The Board agrees with the Hearing Officer's conclusion with regard to the telephone message. The language in the voice message is ambiguous and does not express a clear intent to resign. Following Appellant's telephone messages and emails on the afternoon of January 16, it was no longer reasonable for the Agency to maintain that Appellant had voluntarily resigned his employment earlier that morning. However, the Board disagrees with the Hearing Officer's conclusion regarding the meeting.

Given the unique circumstances that unfolded on January 16, it was reasonable for the Agency to set up a meeting with Appellant to discuss whether it should rescind his resignation. But the Agency's letter notifying Appellant about the meeting set conflicting and ambiguous reasons for the meeting, and, as a result, Appellant's failure to attend does not provide clear evidence of an intent to resign.

The Agency's letter of January 23 states as follows:

This is official notification that a **pre-disciplinary meeting** is set on Wednesday, January 28, 2009, at 11:00 a.m. at the Wastewater Management Building to determine if Wastewater

¹ The contemplation of discipline notice contained multiple allegations, but the most serious was an allegation that Appellant threatened to kill someone "if this situation doesn't get fixed."

Management will rescind the resignation submitted based on your phone message of Friday, January 16, 2009. In addition, this is notification that if you are returned to active status, **disciplinary action is being contemplated against you** for alleged misconduct which may violate the following Career Service Rules. (emphasis added).

(Agency Exhibit 3, Record, p. 56.) If Appellant was no longer employed on January 28, he had no obligation to attend a pre-disciplinary meeting. Under the career service rules, pre-disciplinary meetings are held with current, not former employees.² It is unclear why the Agency was attempting to hold a pre-disciplinary meeting before making any decision on whether to rescind its acceptance of the purported resignation.

This appeal turns on making reasonable conclusions about Appellant's intent based on his actions. With regard to the January 28th meeting, Appellant may have wanted to attend a meeting that was limited to a discussion about his resignation, as such a meeting could have resulted in his reinstatement of employment. On the other hand, Appellant had nothing to gain from attending a meeting where he would be expected to answer to new allegations of misconduct, and his answers (or failure to answer) would undoubtedly impact the Agency's decision on whether to rescind the resignation.

Thus, the Agency's attempt to hold a dual-purpose meeting placed Appellant between a proverbial rock and a hard place in deciding whether or not to attend. Consequently, his response in not showing up for the meeting, like his early morning telephone call on January 16, is susceptible to different interpretations as to his intent. The Board finds that Appellant's failure to attend the January 28th meeting did not entitle the Agency to simply ratify its earlier conclusion that Appellant had voluntarily resigned.

Finally, the Hearing Officer's decision indicates that Appellant's subsequent appeal of his March 11, 2009, termination of employment, (*In re Augustine*, CSA 24-09), is rendered moot by his decision in this case. While the Board takes no position as to the merits of that appeal, to the extent that it became moot because of the Hearing Officer's decision in this case, it is no longer moot.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision of April 28, 2009, is **REVERSED**.

² CSR 16-40 provides that before an employee with career status is suspended, given an involuntary temporary reduction in pay, involuntarily demoted or dismissed, the appointing authority shall hold a pre-disciplinary meeting.

SO ORDERED by the Board on September 3, 2009, and documented this
30th day of September, 2009.

BY THE BOARD:



Luis Toro, Co-Chair

Board Members Concurring:

Nita Henry
Tom Bonner