

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

Appeal No. 317-01

ORDER

IN THE MATTER OF THE APPEAL OF:

MARTHA DOUGLAS, Appellant,

Agency: CAREER SERVICE AUTHORITY,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

This Order concerns the Agency's September 26, 2001 Motion to Dismiss, which the Agency verbally renewed prior to the beginning of the proceedings on January 25, 2002, the day this matter was set for a hearing on the merits.

BACKGROUND

Appellant appeals the denial of a grievance she timely filed on August 8, 2001 in response to a written reprimand dated July 20, 2001.¹ The written reprimand under appeal is a lengthy recitation of various interactions alleging supervisory performance failures, as well as employee relations problems on Appellant's part.

On September 19, 2001 Appellant filed her prehearing statement in this case. That document specifically uses the terms "harassment" and "discrimination" to describe the nature of her allegations regarding the written reprimands. This is the first time Appellant referred to "harassment and discrimination" during the grievance and appeal process.

On September 26, 2001, the Agency filed a Motion to Dismiss, alleging that Appellant did not cite a violation of the CSR Rules in her appeal, which it argues is necessary to appeal a grievance of a written reprimand under CSR Rules 18-12 and 19-10 d).

¹ Appellant had received a previous written reprimand on November 30, 2000. Appellant filed a grievance of that written reprimand, and the parties eventually agreed in mediation that that written reprimand would be withdrawn from Appellant's personnel file, with further understanding that it would be reinstated in the event of subsequent similar disciplinary issues. The November 30, 2000 written reprimand was subsequently reinstated upon Appellant's written reprimand of July 20, 2001. Because there is no indication Appellant waived her appeal right to the November 30, 2000 written reprimand, it will be considered as part of this appeal.

On November 5, 2001, Hearing Officer Michael L. Bieda entered an Order denying the Agency's Motion to Dismiss. Citing Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), he stated that because Appellant's "pay or status is in jeopardy" as a result of the written reprimand, she "is entitled to a due process administrative hearing before that property right may be affected." Hearing Officer Bieda concluded that the Hearings Office has jurisdiction over a written reprimand as part of the scheme of progressive discipline set forth in the CSR Rules, and that a hearing is a constitutionally protected right.

On January 25, 2002, the hearing in this matter convened. The Agency verbally renewed its Motion to Dismiss at that time. Upon review of that verbal Motion and extensive oral arguments thereon, it came to the hearing officer's attention that there were several jurisdictional questions that needed to be resolved before the hearing officer could exercise jurisdiction.

ISSUES

First, it appeared to the hearing officer that reliance on the Loudermill case as a basis for denying the Motion to Dismiss was misplaced in the absence of a present affect on Appellant's property right of employment.

Second, there was some question whether CSR Rule 19-10 d) required Appellant to cite a CSR Rules violation where she was challenging a written reprimand as the basis for her grievance.

Third, given the implications of the above questions, it was also unclear who should bear the burden of proof, as this case is the appeal of a grievance (in which cases the burden typically rests on the Appellant), but the grievance is of a written reprimand (the burden of proof in disciplinary actions typically falling to the Agency).

Fourth, the Agency asserted that Appellant had not preserved her claims of harassment and discrimination by sufficiently raising them in her grievance, thus providing the Agency notice of these allegations and an opportunity to respond, and that these allegations were therefore not ripe for appeal.

Finally, the parties informed the hearing officer that an investigation under CSR Rule 15-100, *et seq.* was underway and was not complete. Therefore, it appeared that the case was not ripe for appeal under CSR Rules 15-100 *et seq.* and 19-10 f).

Upon consideration of the arguments on the issues set forth above, the hearing officer vacated the hearing, continued the case and requested written briefs on these issues. The hearing officer subsequently memorialized her bench ruling in an Order entered January 31, 2002 (hereafter "Order").

On February 12, 2002 Appellant timely filed her Response to the hearing officer's Order. On February 20, 2002, the Agency timely filed its Response to the Order. Appellant also filed a Rebuttal and Request to Set Hearing Date on February 25. Having read those Responses, the

file, the relevant case law, and being otherwise fully advised in the premises, the hearing officer now finds as follows.

DISCUSSION

1. Basis for jurisdiction over the appeal of a written reprimand.

a. The application of due process protections afforded in Loudermill to a written reprimand.

In his Order denying the Agency's Motion to Dismiss, Hearing Officer Bieda concluded this forum has presumptive jurisdiction over this written reprimand as a "disciplinary action" giving rise to the due process protections set forth under Loudermill, *above*. The hearing officer reaches a different conclusion.

The reasoning in Loudermill and its progeny assumes an infringement of the employee's property or liberty right; namely, the status or tenure of the employee's job. Due process rights protect individuals from *deprivations* of "life, liberty, or property, without due process of law." *See*, U.S. Const. Amd. 14. "The standard for the existence of a property right in employment is whether the plaintiff has a legitimate expectation of *continued employment*." Hennigh v. City of Shawnee, 155 F.3d 1249, 1253 (10th Cir. 1998) (emphasis added) (*citing Loudermill*).

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'... *Only after finding the deprivation of a protected interest* do we look to see if the State's procedures comport with due process." American Mfg. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59; 119 S.Ct. 977, 989 (1999) (emphasis added) *citing* U.S. Const. Amd. 14, Mathews v. Eldridge, 424 U.S. 319, 332 (1976). There must be a demonstrated deprivation of a protected property or liberty interest before the question of the "appropriate" level of process is even examined. Greene v. Barrett, 174 F.3d 1136, 1140 (10th Cir. 1999) (*citing Loudermill*).

It is undisputed that Appellant has a protected property interest in her legitimate expectation of continued employment as a Career Service employee. But there is no suggestion of an adverse impact on Appellant's current pay, status or tenure. In addition, the facts do not suggest a liberty interest deprivation under the controlling case law:

First, to be actionable, the statements (in a written reprimand) must impugn the good name, reputation, honor, or integrity of the employee. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972). Second, the statements must be false. Codd v. Velger, 429 U.S. 624, 628 (1977). Third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities. Paul v. Davis, 424 U.S. 693, 710 (1976). And fourth, the statements must be published. Bishop v. Wood, 426 U.S. 341, 348 (1976). These elements are not disjunctive; all must be satisfied to demonstrate deprivation of the liberty interest. *See, e.g., Melton v. City of Oklahoma City*, 928 F.2d 920 (10th Cir. 1991) (*en banc*) (trial court erred in instructing jury to find either stigmatization or loss of employment opportunities), *cert. denied*, 502 U.S. 906 (1991).

Workman v. Jordan, 32 F.3d 475, 481 (10th Cir. 1994). The Court in Workman further elaborated that "damage to 'prospective employment opportunities' is too intangible to constitute a deprivation of a liberty (or property) interest." Id., quoting Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1269 (10th Cir. 1989).

While written reprimands might have some *potential future* affect on the status or tenure of Appellant's position, there is no indication that the Agency's actions "occur(red) in the course of terminating the employee or... foreclose(d) other employment opportunities" (*see, Paul v. Davis, above*), or otherwise rise to the level of deprivation required above. Therefore, the infringement giving rise to the due process protections provided under the Loudermill analysis is not presented by Appellant's grievance.²

The appeal of a written reprimand is therefore not constitutionally guaranteed. However, such an appeal is at least conditionally provided by the CSR Rules. The Agency's Motion to Dismiss raises several questions concerning what those conditions are, and whether Appellant's appeal satisfies them.

b. The requirement to articulate a specific violation of the CSR Rules.

The primary basis for the Agency's Motion to Dismiss, as reiterated in its Response Brief, is the lack of jurisdiction for Appellant's failure to cite a specific CSR Rule violation which it alleges is required under the CSR Rules. CSR Rule 19-10 d) governs the appeal of grievances. The Rule says:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...d) Grievances resulting in rules violations: Any grievance which *results in* an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Personnel Rules... *The appeal form must state with specificity* which career service charter amendment, ordinance or career service rule(s) are alleged to have been violated. An appeal *may* be dismissed if the appellant fails to cite the alleged rule violation(s).

The Agency has historically challenged an appellant's failure to cite a CSR Rule violation in the appeal of a written reprimand. *See, In the Matter of the Appeal of Gloria Maria Richardson*, Appeal No. 23-01 (7/23/01) (motion to dismiss for failure to cite CSR violation denied); *In the Matter of the Appeal of Mary L. Shafer*, Appeal No. 117-00 (10/30/00) (motion to dismiss for failure to cite CSR violating denied, distinguishing Parr, below); *In the Matter of the Appeal of Oliva Canales*, Appeal No. 128-99 (3/17/00) (motion to dismiss for failure to cite CSR violation denied as discrimination was facially described in grievance and appeal); *In the Matter of the Appeal of Jane Parr*, Appeal No. 94-99 (dismissal entered on other grounds

² For these same reasons, the predisciplinary meeting required under Loudermill is not provided for written reprimands under CSR Rule 16-30 as it is for terminations and the like.

9/27/99); In the Matter of the Appeal of Bruce Marshall, Appeal No. 51-99 (dismissal entered for appellant's failure to respond to Show-Cause Order 11/28/99).

Thus, in two of the past five written reprimand cases where the appellants failed to cite a CSR Rule violation, Richardson and Shafer, the Hearings Office has apparently exercised presumptive jurisdiction over the appeals of written reprimands as forms of disciplinary action. In one case, Canales, the motion to dismiss was denied because the appellant's discrimination claim was facially apparent in her grievance and appeal. In two other cases, Parr and Marshall, the appellants were required to cite a CSR violation.

Notably, all but two of these cases were decided before an August 24, 2000 change in CSR Rule 19-10 d) requiring the appellant to "state" the CSR violation "with specificity." Therefore, while apparently this was not required a majority of the time prior to the rule change, the recently added language lends weight to the argument that the CSR rules now require something they previously did not in appeals of grievances. The remaining question is what that new language actually requires.

i. There is no requirement to cite a CSR Rule violation during the grievance process.

The Agency asserts in its Response that Appellant's failure to "cite" a CSR Rule violation during the *grievance process* is in violation of the CSR Rules and prior case law. The plain language of the grievance rules does not have any such requirement.

CSR Rule 18-12, Grievance procedure, states as follows in relevant part:

1. Form: The grievance shall be presented in writing and shall be dated. *It shall include* the name and address of the grievant, the action which is the subject of the grievance, the date of the action, and a statement of the remedy sought...
4. Filing with the Career Service Authority: If the employee still feels aggrieved after receipt of (the second-level grievance) decision... and the grievance *concerns* an alleged violation of the Charter provisions relating to the Career Service, ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of **Rule 19 APPEALS**. The period of time shall be computed in accordance with subparagraph 19-22 a) 2.

(Italics added.) CSR Rule 18-12 4 requires only that the grievance *concerns* an alleged CSR Rules violation for it to be appealable. All that is required is that the substance of the grieved behavior constitutes a violation of the CSR Rules. If the employer has a meaningful opportunity to respond to the allegations which form the substance of the alleged violation in the grievance, then the purpose of the grievance process is fulfilled.

The Agency claims that the hearing officers in Marshall and Parr found a lack of jurisdiction over the appeal "for failure to *cite* violations rules (sic), charter provisions or ordinances *anywhere along the grievance process*." (Emphasis added.) The Agency fundamentally misapprehends what these cases actually stand for.

In Parr, Hearing Officer Bieda said of the old CSR Rule 18 (e):

The (Rule) clearly states that the grievance being appealed must "concern" an "alleged violation of Charter provisions relating to the Career Service, Ordinances relating to the Career Service, of the Career Service Rules..." The Rule does not explicitly REQUIRE the *appeal* to cite the rule or charter provision allegedly violated. However, without such a citation, the requirement becomes meaningless. If the appellant merely recites facts, or states that the agency's action is "unfair" or "uncalled for" or asks for "fairness" as this appeal does, *then there is no way to determine if there has been a violation of the (CSR Rules).*"

(Italics added.)

Citing Parr, Hearing Officer Rossenfeld likewise stated in the Marshall case that "(w)hile neither version of Rule 18 explicitly REQUIRES that the grievance *appeal* cite the (Rule) violated, the failure to make such an allegation renders the Rule's requirement meaningless..." (Italics added.)³

It is clear from this language that both hearing officers were specifically talking about the citation being required in the *appeal*, not the grievance.

In its Response Brief, the Agency places great weight on a subsequent sentence in the Parr case. Hearing Officer Bieda continued: "In the present case, the problem is compounded, due to the fact that appellant did not cite any rules or charter provisions anywhere along the grievance process." The hearing officer is not persuaded that Hearing Officer Bieda's statement somehow implies the requirement of a citation in the grievance process, or anything other than that it had not been made clear to the Agency what the nature of the complaint was. The problem was the appellants' failure to cite the Rules violation in the *appeal*. Thus this sentence is mere dictum.⁴

Career Service employees rely on the CSR Rules governing the grievance and appeal processes. If they satisfy the requirements set forth in those Rules, then they must be considered as having preserved their appeal rights. The very first time the Rules require an appellant to "state with specificity" the CSR Rule allegedly violated is under CSR Rule 19-10 d), on the appeal form, after the employee has already completed the grievance process. To impose such a requirement during the grievance process, where none exists in the Rules, ambushes employees by creating a non-existent, artificial technical requirement that destroys jurisdiction on appeal. Thus the hearing officer concludes that Appellant was not required to cite a specific CSR Rule at any time prior to the filing of her appeal.

³ It is important to note that Parr and Marshall were also heard before CSR Rule 19-10 d) was amended on August 24, 2000. It was this previous deficiency Hearing Officer Bieda apparently found inconsistent and was trying to compensate for in Parr.

⁴ Hearing Officer Bieda characterized this language as much in his Order denying the agency's Motion to Dismiss in the Shafer case, *above*.

Furthermore, in Appellant's grievance form, she states under Remedy Sought: "...There is no just cause for her to place this reprimand in my file." This allegation clearly articulates a violation of CSR Rule 5-62 1), which states that Career Service employees "may be disciplined... only for cause..." The hearing officer concludes that the Agency was reasonably put on notice during the grievance process that Appellant was challenging the validity of the written reprimand.

ii. Requirement to state a specific CSR Rule violation in the appeal of written reprimands.

Under CSR Rule 16-20, a written reprimand is clearly considered a form of "discipline." In prior appeals of other types of disciplinary actions, there has been a presumption that the employees challenge the lack of just cause and reasonableness in violation of CSR Rules 5-62 1) (requiring that discipline be issued only "for cause") and 16-10 (requiring that the discipline be "reasonably related to the severity of the offense"). In the Matter of the Appeal of Leamon Taplan, Appeal No. 35-99 (entered 11/22/99). No CSR Rule violation was required. *See, In the Matter of the Appeal of Robin Castillo*, 31-00; In the Matter of the Appeal of Anita Miller, Appeal No. 41-00; (motions to dismiss for failure to cite CSR violations denied in other disciplinary actions). The Hearings Office has not historically required the articulation of a specific CSR Rules violation in written reprimand cases unless it was requested by the Agency. Further, jurisdiction was typically taken despite the Agency's objection, depending on the particular facts of the case. *See, e.g., Richardson, above, Shafer, above, Canales, above.*

CSR Rule 19-10 sets forth the bases for Hearings Office jurisdiction. Disciplinary actions are one of the subjects addressed. CSR Rule 19-10 b) states:

Actions by an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.⁵

The disciplinary actions of verbal warning and written reprimand are conspicuously absent from the above list of disciplinary actions over which the Hearings Office has such "presumptive jurisdiction." On the other hand, CSR Rule 16-40 C. states:

A verbal warning *may not* be grieved or appealed. An employee may file a grievance on a written reprimand in accordance with **Rule 18, Dispute Resolution** but *may not file an*

⁵ The distinction between disciplinary actions which presently affect the employee's status or tenure, and those that do not, is most likely the reason for the exclusion of written reprimands and verbal warnings from the list of disciplinary actions over which the Hearings Office has presumptive jurisdiction under CSR Rule 19-10 b). *See also*, CSR Rule 16-30, which mandates a pre-disciplinary meeting as required in Loudermill for contemplation of suspension, involuntary demotion or dismissal, but not for a written reprimand. *But see*, CSR Rule 16-54, which requires that notice of a written reprimand be issued in the same form as notice of a suspension, involuntary demotion or a dismissal.

appeal, except as permitted under Rule 19, Appeals. An employee may appeal a suspension, involuntary demotion or dismissal in *accordance with Rule 19, Appeals.*

(Italics added.) The language prohibiting the appeal of a verbal warning is plain and unambiguous. The language permitting the appeal of dismissals and the like under CSR Rule 19 is also clear. The appeal of a written reprimand initially appears to be some sort of hybrid.

CSR Rule 19-10 d) has been amended since the majority of the cases cited above were decided. It now states that "an employee may appeal "any grievance which results in an alleged (CSR Rule) violation... The appeal form must *state with specificity* which career service charter amendment, ordinance or career service rule(s) are alleged to have been violated. An appeal *may* be dismissed if the appellant fails to cite the alleged rule violation(s)." (Emphasis added.) This Rule governs the appeal of grievances, and a grievance is the only procedural conduit through which a written reprimand may be appealed. The Rule requires the specific statement of the CSR Rule(s) violated in the appeal of any grievance. It makes no exception in the case of appeals of grievances concerning written reprimands. The requirements of this Rule therefore must be presumed to include written reprimands.

The Agency contends that Appellant's failure to cite a CSR Rule number is jurisdictionally fatal. Yet the word "cite" does not appear in the mandatory portion of the Rule. The two requirements are 1) that the underlying grievance must have alleged facts which "result in" a violation of the CSR Rules, and 2) that the employee now "state with specificity" the rule (s)he alleges the agency's actions violated.

The hearing officer's fundamental responsibility in interpreting a regulation is to find and give effect to the promulgator's intent in enacting the regulation. Reg'l Transp. Dist. v. Lopez, 916 P.2d 1187, 1192 (Colo. 1996); Lakeview Assocs. v. Maes, 907 P.2d 580, 584 (Colo. 1995). If that intent is not readily discernible from the language, then the hearing officer may rely on other factors to determine the meaning of the regulation, including prior case law, the consequences of a given construction, and the end to be achieved by the regulation. *See*, § 2-4-203, 1 C.R.S. (1999); Schubert v. People, 698 P.2d 788, 793-94 (Colo. 1985). The hearing officer "should give effect to each word and construe each provision in harmony with the overall statutory design, whenever possible." City of Florence v. Bd. of Waterworks, 793 P.2d 148, 151 (Colo. 1990).

When the CSR Rules are read in their entirety, the end to be achieved by the requirement in CSR Rule 19-10 d), to "state with specificity" the Rule violation, is clear. The reasons for this requirement are to establish 1) jurisdiction over a violation of the CSR Rules, and 2) ripeness of the grievance appeal.

First, the Hearings Office only has jurisdiction over actions resulting in CSR Rules violations. Recalling that virtually any action, not just CSR Rules violations, can be grieved, CSR Rule 19-10 d) provides the vehicle to determine whether a CSR Rules violation has been alleged in the grievance being appealed.

Second, the Rule works harmoniously with CSR Rule 18-12 4) (above) to require a demonstration that the agency has been provided *actual notice of the allegations* and the

opportunity to respond to the substance of the complaint during the grievance process. These Rules plainly intend to make the employee illustrate that the substance of the grievance is indeed sufficiently related to the CSR Rule specifically referenced, in the event that there is any question. It prevents the guessing game of what the appellant intends to charge in his or her appeal.

Moreover, the dismissal option in this Rule is plainly permissive ("may") not mandatory ("shall"). This is where the word "cite" appears. Therefore, failure to "cite" the CSR Rule cannot automatically destroy jurisdiction, it only raises a question as to jurisdiction. This is the reason for a Show-Cause Order requiring the appellant to provide such clarification. By determining 1) whether during the grievance process the agency had notice and an opportunity to respond to the allegations on appeal, and 2) whether those allegations constitute a violation of the CSR Rules, the Hearings Office can establish whether or not the case must be dismissed for lack of jurisdiction. If the agency has not had notice and an opportunity to respond in the grievance process, or if the allegations in the appeal do not constitute a CSR Rules violation, then dismissal is warranted. However, the hearing officer has the discretion to assume jurisdiction if the appeal states the violation of a CSR Rule with sufficient specificity to clearly identify the alleged violation, whether or not the precise number for an otherwise clearly identified Rule is included. Thus, the language in CSR Rule 19-10 d) tolerates the absence of a specific citation in the appeal, depending on how "specifically stated" the alleged violation in the appeal language is.⁶

The hearing officer therefore holds that for CSR Rule 19-10 d) to be satisfied, two conditions must be met. First, the appeal must allege the CSR Rule violation with sufficient specificity to clearly identify the Rule in question. Second, the same allegations forming the basis of the alleged CSR Rule violation must be included in the substance of the underlying grievance, sufficiently for a reasonable person in the supervisor's position to clearly recognize the nature of the allegations, and thereby have a meaningful opportunity to respond during the grievance process.

In the present case, Appellant clearly stated there was "no just cause" for the written reprimand in her *grievance*. While her Response to the Show-Cause Order cites Rule 15 violations and focuses on allegations of harassment, discrimination and workplace violence, a careful reading of the Response reveals several statements clearly challenging the just cause and reasonableness of the written reprimand.

On the first page, Appellant states that her supervisor "did not make any attempts to validate the accusations or find out if she could make things better in benefits. It did not matter to her that the employees saying negative things about me were disgruntled employees who did not like me." On the second page, Appellant states: "As a result of my attempts to get the Benefits unit in better shape, I get reprimanded..." On the third page, Appellant states: "The first

⁶ The violation alleged is less apparent in some grievances (i.e. management decisions) than in others (i.e. written reprimands). Thus, to establish jurisdiction over the grievance, it makes sense that a *citation* (i.e., CSR Rule number) may be required in some cases in order for the appeal to "state" with sufficient "specificity" what the employee is alleging. However, if it is clear from the face of the appeal that a violation of that Rule is being alleged, the Hearings Office may in its discretion find that a CSR Rule violation has been "stated with specificity" sufficiently to satisfy the requirements of CSR Rule 19-10 d).

reprimand was removed from my file... due to a Mediation process. However, she brought the reprimand back... due to her alleging that I violated items in the first reprimand along with other assumed misconduct. The following summary will cite... abuse of authority regarding the items in the reprimand." Appellant continues on the third page that "... most of the issues were personal not too much to do with my performance and treatment of staff. It was obvious that (the complaints) were coming from two disgruntled employees and (the supervisor)..." On the fourth page Appellant states that "when I tried to let her know I was not guilty (of making disparaging remarks about another employee) and how I can correct this, she replied abruptly 'Stay out of it' and immediately dropped it without another word until the reprimand." Appellant continues that "if I am accused of something I should be given the courtesy of defending myself rather than issuing a reprimand." On the fifth page Appellant states that an employee told the supervisor that Appellant "was rude and abrupt. I do not know a time I was rude and abrupt with (the employee)." There are several additional statements which generally illustrate Appellant's allegation that the written reprimand was issued because her supervisor does not like her.

When these statements are taken together, it is clear that Appellant alleges the written reprimand was issued without just cause and is not reasonably related to the severity of the alleged offenses. She has articulated potential violations CSR Rules 5-62 1) and 16-10 with sufficient specificity to identify the nature of the alleged violations. Further, those violations are substantially relayed in the grievance language sufficiently for a reasonable person in the supervisor's position to clearly identify Appellant's allegation of a lack of just cause. Therefore, Appellant has preserved this issue for purposes of this appeal.⁷

2. Burden of proof in written reprimands.

The Agency asserts in its Response Brief that it is "well settled" in grievance cases that the burden of proof rests on the Appellant. The Agency further asserts that "the City is unaware of previous Career Service Cases where the burden of proof (in written reprimand cases) was so shifted" to the agency.

The Agency's assertions are not supported by prior case law. It is true that in appeals of other types of grievances, the burden of proof is typically on Appellant as the party initiating the complaint. But this has not consistently been the case where grievances of written reprimands are concerned. In all but two of the six written reprimand cases heard in the last five years, the burden was on the Agency to show just cause for the reprimand. *See, Shafer (above); Canales (above); Prater (above); In the Matter of the Appeal of Betty Martinez, Appeal No. 52-97 (1/28/98).* The reason for this is clearly because a grievance of a written reprimand concerns an underlying action *by the Agency against Appellant* constituting a "disciplinary action" within a progressive scheme under CSR Rule 16-20. Such an action can be taken only "for cause" under CSR Rule 5-62 1). *But see, Montoya (above); Richardson (above).* In those cases, the hearing officer placed the burden on the appellants to show that the reprimands were arbitrary and capricious, since they were appealing grievances.

⁷ By Appellant's persistent focus on a misapprehension of CSR Rule 15 and her imbedding the above arguments in claims of harassment and discrimination, she has come perilously close to a ruling that she abandoned her challenge of the written reprimand. However, it is sufficiently clear from these statements that Appellant's challenge includes a lack of just cause.

The hearing officer declines to follow the reasoning in these two cases for the following reasons. The CSR Rules governing disciplinary actions are as follows. CSR Rule 5-62 states:

An employee in career status:

- 1) may be disciplined or dismissed *only for cause*, in accordance with Rule 16, DISCIPLINE...

(Italics added.) CSR Rule 16-10 states:

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline *shall be reasonably related to the seriousness of the offense*, and take into consideration the employee's past record...

(Italics added.) These regulations address all disciplinary actions, which include written reprimands:

CSR Rule 16-20 Progressive Discipline

- 1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules...include:
 - ...b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority.

Thus, the written reprimand will be present in the employee's personnel file. It can be used in support of future disciplinary actions, and may discourage other agencies from considering the employee for a transfer or promotion. Because there is a potential, and perhaps likely, future impact on the employee's employment status from disciplinary actions, including written reprimands, grievances thereon are distinct from other types of grievances. In grievances of written reprimands, the underlying issue is an action taken by the Agency against the employee, not vice versa as with virtually all other types of grievances. Finally, the standards for issuing all types disciplinary actions under CSR Rules 5-62 1) and 16-10, including written reprimands, are the same.

Based on all the foregoing, the hearing officer concludes that the burden of proof in this matter shall be on the Agency to demonstrate, by a preponderance of the evidence, that it had just cause to issue the written reprimand as a disciplinary action, and that the degree of the discipline is reasonably related to the severity of the offense. *See, Taplan, above.*

3. Appellant's claims of harassment, discrimination and workplace violence.

In her Response to the hearing officer's Order to articulate the CSR Rules allegedly violated in this case, Appellant alleges multiple violations of CSR Rules 15-101 and 15-102

referencing "harassment and discrimination," and 15-110 A. and C. referencing "workplace violence."

The Agency argues that Appellant did not timely raise these allegations. The terms "harassment and discrimination" did not appear before they turned up in Appellant's prehearing statement filed September 19, 2001. Furthermore, Appellant did not reference "workplace violence" until her Response to the hearing officer's Order.

Pursuant to CSR Rule 15-100, the kinds of harassment and discrimination over which the hearing officer has jurisdiction are enumerated as follows:

15-102 Types of Harassment

Unlawful harassment because of *race, national origin, sexual orientation, physical or mental disability, age, gender, marital status, military status, religion, political affiliation*, or any other basis *protected* by federal, state, or local law or regulation...

(Emphasis added). *See also*, CSR Rule 19-10 c).

As the Agency correctly argues, Appellant cannot be heard to raise allegations of harassment and discrimination, workplace violence, or any other allegations for the first time in her appeal, when the appeal is of an underlying grievance. As set forth above, a grievance must be shown to have given the agency meaningful notice and an opportunity to respond to the allegations before those issues are ripe for appeal to the Hearings Office. It is well established that the Hearings Office will dismiss a case based solely on allegations of discrimination where such allegations were not implied in any way in the grievance process giving rise to the appeal, and thus have not been timely raised and preserved. *See, In the Matter of the Appeal of James L. Prater*, Appeal No. 156-98 (9/23/99).

The hearing officer does not find that the substance of the allegations in Appellant's grievance would have led a reasonable person in the supervisor's position to clearly recognize that Appellant was alleging harassment or discrimination because of her membership in one of the protected classes set forth under CSR Rules 15-102. Nor would a reasonable person conclude that Appellant alleged violations of prohibitions against violence in the workplace under CSR Rule 15-110. The hearing officer finds that the Agency was not given meaningful notice and an opportunity to respond to these allegations in the grievance process. Therefore, these claims have not been preserved for purposes of this appeal.

4. Appellant's harassment and discrimination case under CSR Rule 15-100, et seq.

During the oral arguments on January 25, 2002, the parties informed the hearing officer that Appellant had filed an harassment and discrimination claim against the Agency with the Employee Relations Section of the Career Service Authority, and that the actions forming the basis of Appellant's harassment and discrimination claims were the same as in this case.

An employee may not invoke jurisdiction under CSR Rule 19-10 f) to hear a claim of workplace harassment and discrimination under CSR Rule 15-100, *et seq.* without first

exhausting the investigative remedies set forth in that Rule. In addition, if the investigation reveals no probable cause for a finding of harassment and discrimination, the employee appealing that outcome must articulate facts tending to support a colorable claim of harassment and discrimination sufficiently for the Hearings Office to assume jurisdiction over the case. *See, In the Matter of the Appeal of Debra Franklin*, Appeal No. 03-00 (3/2/00) (dismissal for failure to articulate facts tending to make a colorable claim of discrimination).

For the reasons set forth below, the hearing officer finds that the Appellant properly exhausted the investigation remedy and timely appealed thereafter, but she has failed to articulate a colorable claim for harassment or discrimination.

a. Appellant has exhausted the remedies set forth under CSR Rule 15-100 *et seq.*

The procedures for pursuing a claim of harassment and discrimination are set forth under CSR Rule 15-100 *et seq.*, Harassment and Discrimination, as follows in relevant part:

15-103 Action of Individual Experiencing Unlawful Harassment

Individuals who experience unlawful harassment are urged to:

- A. make it clear that such behavior is offensive to them and request that such behavior be discontinued;
- B. report such conduct to their supervisor... If the complaint involves the employee's supervisor...the employee may go to...the Career Service Authority Employee Relations Section.

15-104 Investigation

The ...Career Service Authority will immediately undertake effective, thorough, and objective steps concerning the allegation of harassment or discrimination. If an investigation is deemed necessary, it will be completed and a determination regarding alleged harassment will be made and communicated to the employee as soon as practicable...

15-105 Action

If it is determined that unlawful harassment or discrimination has occurred, the agency will take effective remedial action commensurate with the severity of the offense. Appropriate action will be taken to deter any future harassment.

Furthermore, the basis for Hearings Office jurisdiction over this procedure is set forth under CSR Rule 19-10 as follows:

- f) Harassment and discrimination: The disposition by a supervisor or other appropriate official of a complaint of harassment or discrimination may be appealed if such disposition has not resulted in stopping the prohibited behavior.

This Rule makes it clear that the action being appealed is the "disposition" of the harassment claim. The Rule clearly presumes some "disposition" must have occurred under CSR Rule 15-100, *et seq.* to give rise to jurisdiction over the case. The rules governing the appeal of grievances suggest a completely separate process from this one. The hearing officer therefore concludes that the disposition of Appellant's harassment and discrimination investigation constitutes a separate action than the grievance appeal, and is therefore a separate basis for jurisdiction.⁸

Appellant was ordered to request a hearing within ten days of receipt of notice of the disposition of the 15-100 investigation. The investigative report has since been completed. Appellant and the Agency both state in their Responses that Appellant received this report on February 8, 2002. However, Appellant states that she never received notification of the Agency's decision respecting that investigative report, and there is no evidence that Appellant received any such notice other than the Agency's Response filed on February 20, 2002.

The hearing officer concludes the Appellant interpreted the Agency's arguments in its Response Brief filed February 20 to constitute notice of its decision to take no action as a result of the investigative report. Five days later, on February 25, Appellant filed a Motion to Set a Hearing Date. While this is not the preferred method of timely preserving an appeal to the Career Service Board, this is precisely what the hearing officer ordered her to do within ten days of receipt of notice of the disposition of the investigation.⁹ This request is therefore considered a separate, timely appeal of the disposition of that investigation pursuant to CSR Rule 19-22 and the hearing officer's Order. The hearing officer hereby consolidates that separate appeal with this case for purposes of this Order.

b. Appellant failed to articulate a colorable claim of harassment and discrimination.

"Harassment and discrimination" are legal terms of art having specific definitions and requirements that are different than the typical dictionary definitions. First, CSR Rule 15-102 (above) clearly sets forth that "harassment and discrimination" is prohibited only when it is directed at an individual because of her membership in one of the protected groups.¹⁰

⁸ The Hearings Office does not have jurisdiction over a violation of CSR Rule 15-100, *et seq.* until the remedies set forth there have been exhausted. *See*, CSR Rule 19-10 f). However, employees can raise discrimination claims in the appeal process under CSR Rule 19-10 c), which lists the same protected classes as CSR Rule 15-102, without seeking the remedies under 15-100 *et seq.* Discrimination claims are typically brought under CSR Rule 19-10 c) as a challenge to an underlying adverse employment action by the agency; e.g. failure to hire or promote. *See*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). These cases are governed by a separate set of standards than those challenging "harassment and discrimination" in the sense of a "hostile work environment." *See, e.g., Meritor, below.*

⁹ There are currently no CSR Rules directly governing notice of disposition and appeal rights in the process set forth under CSR Rule 15-100. In the absence of such notice, the hearing officer finds Appellant's actions in accordance with the hearing officer's Order are sufficient to timely preserve her appeal of the disposition of the 15-100 investigation.

¹⁰ It can be reasonably inferred from Appellant's Response to the Show-Cause Order that she claims harassment and discrimination because she is an African American.

The United States Supreme Court has held that workplace harassment and discrimination cases may be advanced under two theories. The first is harassment that involves actual economic impact on the employee (*e.g.*, the conditioning of economic benefits on sexual favors). Appellant has made no claim of such economic impact here.

In the absence of economic impact, the employee can show conditions in the workplace which create a "hostile or offensive work environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). "Hostile work environment" is the legal theory used to refer to extreme, ongoing patterns of hostile discrimination against an individual in the workplace. Such cases are distinguished by graphic, overtly racist or sexist patterns of verbal or physical abuse. "... (H)arassment is actionable under a hostile work environment theory when the harassing conduct is sufficiently severe or pervasive to alter the conditions [of the victim's] employment and create an abusive working environment." Pizza Hut v. Lockard, 162 F.3d 1062, 1071 (10th Cir. 1998) quoting Meritor, 477 U.S. at 67. Some factors to be weighed include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23; Smith v. N.W. Fin. Acceptance Corp., 129 F.3d 1408, 1413 (10th Cir. 1997) (conduct must be "sufficiently pervasive or sufficiently severe"). The harassing conduct must be "both objectively and subjectively abusive." Lockard, 162 F.3d at 1071.

In order to preserve her claims of harassment and discrimination, Appellant needed to articulate some facts which tend to suggest that she was experiencing such severity of harassment, and that "under the totality of the circumstances... the harassment was racial or stemmed from racial animus." Bolden PRC Inc., 43 F.3d 545, 551 (10th Cir. 1994), *citing* Meritor, 477 U.S. at 67. A few isolated incidents of racial enmity are insufficient to survive summary judgment. Bolden, at 551. Appellant describes numerous personality clashes, unfriendly, unkind, manipulative and rude treatment by her supervisor, management decisions which Appellant felt reflected negatively on her, removal of Appellant's supervisory duties, an offer to voluntarily demote, and general ongoing conflicts between herself and the supervisor. She has alleged in these ways she is treated differently from White employees.

However, the facts Appellant has articulated, if taken as true, do not rise anywhere near the pervasive or severe pattern of harassment and discrimination against her *stemming from racial animus* as set forth above. Her allegations as much are conclusory and insufficiently supported by specific factual explanations. The types of personality conflict and rude treatment she describes do not rise to the level of "hostile work environment." She has therefore failed to state a colorable claim of harassment and discrimination, and her appeal of the disposition of the 15-100 investigation must fail.

ORDER

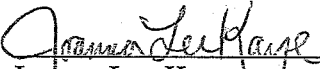
Appellant has articulated alleged violations of CSR Rules 5-62 1) and 16-10 with sufficient specificity to preserve her challenge of the written reprimands in this appeal under CSR Rule 19-10 d). This matter will PROCEED TO HEARING on these claims. The burden of proof shall lie with the Agency to show just cause and reasonable relatedness of the degree of discipline to the severity of the offense.

Appellant failed to timely raise claims of discrimination and workplace violence during the grievance process. Those allegations are therefore not preserved in this appeal and are hereby DISMISSED from these proceedings.

Appellant has failed to make a colorable claim of harassment and discrimination in her separate appeal of the 15-100 investigation. That matter is therefore DISMISSED WITH PREJUDICE.

To the extent that prior opinions of this Office are inconsistent with this decision on issues of jurisdiction over the appeal of grievances under CSR Rule 19-10 d), and burden of proof in written reprimand grievance appeals, those opinions are OVERRULED.

Dated this 20th day of March, 2002.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **ORDER** depositing same in the U.S. mail, postage prepaid, this 27th day of March, 2002, addressed to:

Martha Douglas
4491 Abilene
Denver, CO 80239

Murray K. Douglas
Appellants Representative
4491 Abilene
Denver, CO 80239

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER** depositing same in interoffice mail, this 27th day of March, 2002, addressed to:

Robert D. Nespor
Assistant City Attorney

Jim Yearby
Career Service Authority

Virginia Gracido