

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

Appeal No. 30-05

FINDINGS AND ORDER

CAREER SERVICE
HEARING OFFICE

IN THE MATTER OF THE APPEAL OF:

AUG 24 2006

RACHEL ESPINOZA,

RECEIVED

APPELLANT/Respondent,

vs.

DENVER SHERIFF DEPARTMENT, and the CITY AND COUNTY OF DENVER, a
municipal Corporation,

AGENCY / Petitioner,

Introduction

The Career Service Board ("the Board") considered the above-captioned action on July 6, 2006, upon the Agency/Petitioner's ("Agency") Petition for Review of the Hearing Officer's Decision of January 11, 2006 (mailed January 12, 2006), reversing the suspension of the Appellant/Respondent, Rachel Espinoza ("Appellant"). The Agency seeks review pursuant the Career Service Board Personnel Rules ("CSR") Section 19-61 B, C, D and E.

CSR 19-61 provides, in part, as follows:

A party may petition that the Board review a Hearing Officer's decision only on the following grounds . . .

- B. Erroneous rules interpretation: the Hearing Officer's decision involves an erroneous interpretation of the Rules;
- C. Policy-setting precedent: the Hearing Officer's decision is of a precedential nature involving policy considerations that may have effect beyond the appeal at hand;

- D. Insufficient evidence: the Hearing Officer's decision is not supported by the evidence. The Board may only reverse a decision on this ground if the Hearing Officer's decision is clearly erroneous; or
- E. Lack of jurisdiction: the Hearing Officer does not have jurisdiction over the appeal

Findings and Analysis

The Agency argues that the Hearing Officer erroneously interpreted the disciplinary rules contained at CSR 16-50 A (13) and 16-51 (A)(3) and (5). The Board disagrees with the Agency and finds that the Hearing Officer correctly interpreted the applicable rules. The Board affirms the Hearing Officer's decision that the Agency failed to prove Appellant violated CSR 16-50 A (13), and CSR 16-51 A (3) and (5).

The Agency asserts that the Hearing Officer's ruling is of precedential nature and will adversely affect other agencies that have similar sick leave policies. The Board notes that, whether or not this may be true, the rigid requirements of the Agency's sick leave policy in this case clearly conflict with the Career Service Board Personnel Rules by leaving no room for the legitimate application of CSR 11-32. The Board believes that the attempt by the Agency to reduce absenteeism and manage costs is admirable. The Board also recognizes the authority of agencies to regulate the use of sick leave. However, agencies may not adopt policies, regulations, orders or directives that conflict with the Career Service Board Personnel Rules. The Board finds that the Hearing Officer's Decision is consistent with current policies as expressed in the Career Service Board Personnel Rules.

The Agency maintains that the evidence does not support the Hearing Officer's decision that the Appellant was not afforded due process under the 14th Amendment to the U.S. Constitution. Although neither party has raised the issue of whether the Hearing Officer (or this Board) has jurisdiction to decide a constitutional claim, subject matter jurisdiction cannot be waived. *Mesa County Valley School District No. 51 v. Kelsey*, 8 P. 3d 1200, 1206 (Colo. 2000). The Board notes that it is questionable whether such jurisdiction exists. See, *Industrial Commission of Colorado v. Board of County Commissioners*, 690 P.2d 839, 844 (Colo.1984) ("Even though Adams County raised its constitutional arguments at the earliest administrative review, it is doubtful that the Commission has authority to decide constitutional questions."); *Downen v. Warner*, 481 F.2d 642 (9th Cir. 1973) (a claim founded solely upon a constitutional right is suited only to a judicial forum and is clearly inappropriate to an administrative board.) Therefore, the Board finds that it need not address the due process claim as it has already determined that the Departmental Order is in conflict with CSR 11-32.

Finally, the Agency contends that the Hearing Officer did not have jurisdiction to determine that the Agency's regulation violates the collective bargaining agreement between the City and County of Denver and the Denver Sheriff Department. The Board agrees. However, the Board finds that the Hearing Officer's comment on this issue did

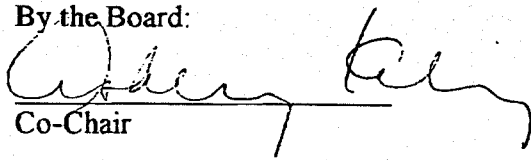
not affect his analysis in other respects. The Hearing Officer was within his jurisdiction to rule on the issues of whether the Appellant breached the Career Service Board Personnel Rules, and whether the Agency's application of discipline violated the Career Service Board Personnel Rules.

Order

IT IS THEREFORE ORDERED that the Agency's Petition for Review is **DENIED**, and that the Hearing Officer's decision is affirmed, with the exception of any assumption by the Hearing Officer of jurisdiction over the collective bargaining agreement and due process claim.

SO ORDERED by the Board on July 6, 2006 and documented this 23rd day of August, 2006.

By the Board:


Co-Chair

Board Members Concurring:

Ashley Rea Kilroy
Tom Bonner
Nita Henry
Luis Toro

CERTIFICATE OF MAILING

I certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER**, by depositing same in the United States Mail, postage prepaid for first class delivery this 24th day of August, 2006, addressed to:

Daniel S. Foster, Esq.
1226 Bannock St.
Denver, CO 80204

Ms. Rachel Espinoza
4899 S. Dudley, #G19
Littleton, CO 80123

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER**, by depositing the same in interoffice mail this 24th day of August, 2006, addressed to:

Joseph A. Digregorio
City Attorney's Office
Litigation Section
201 West Colfax Avenue Dept. 1108
Denver, CO 80202

Alvin J. LaCabe, Jr., Esq.
Department of Safety

William Lovinger, Undersheriff
Denver Sheriff's Department

Hearings Office ✓

Career Service Authority

Deborah Saraceno 8/24/06