

**HEARING OFFICER, CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO**  
Appeal No. 23-09

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**ORDER DENYING AGENCY'S MOTION TO DISMISS**

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IN THE MATTER OF THE APPEAL OF:

**RICHARD FERNANDEZ**, Appellant,

vs.

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

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The Agency filed its motion to dismiss on April 20, 2009. Appellant responded in opposition on April 30, 2009, which was supported by good cause for Appellant's filing after hours on that date. The Agency replied to Appellant's response on May 4, 2009. I have considered the entire case file and pertinent authority, and now find and order as follows.

This is an appeal of the Agency's termination of Appellant's employment as an Information Technology Technician at Denver International Airport. The Agency moves for dismissal on these grounds: (1) the appeal does not state a claim upon which relief can be granted, and (2) after-acquired evidence of wrongdoing that would lead to termination makes reinstatement a waste of administrative resources.

**1. Failure to state a claim**

The Agency asserts that the requested remedy, reinstatement, is impossible to grant since Appellant does not possess a valid driver's license, which is a job requirement for Appellant's position. Thus, the Agency argues in its motion and its reply, Appellant fails to state a justiciable claim, as the Hearing Office has no jurisdiction to change work requirements. Appellant responded that there is jurisdiction over the termination challenge under CSR §19-10 A. 1. He also disputes that a driver's license is a job requirement, and alleges that he has performed his job duties satisfactorily for six years without one.

Two standards of review apply to the Agency's motion to dismiss. First, statements in the appeal must be viewed in the light most favorable to the appellant, and all assertions of material facts must be accepted as true. A motion to dismiss must be denied unless it appears beyond doubt that appellant

cannot prove that the facts alleged would entitle him to relief. In re Van Dyck, CSA 143-05, 1(2/16/06), *citing* Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996). In addition, dismissal may not be granted if the facts alleged would entitle Appellant to any relief within the jurisdiction of the hearing office. National Surety Corp. v. Citizen's State Bank, 593 P.2d 362, 364 (1978). Stated another way, the hearing officer must determine prior to ruling on dismissal whether any remedy under the Career Service Rules would provide relief if the claim is proven. In re Muller, CSA 48-08, 2 (7/24/08) *citing* In re Felix, CSA 82-07 (2/14/08), *affirmed on other grounds*, In re Felix, 82-07 (CSB 6/5/08).

Appellant presented an appeal within the jurisdiction of the hearing office by timely filing an appeal of his termination. CSR § 19-10 A.1.a. Nothing in the rules suggests that the existence of a factual dispute as to Appellant's eligibility for a specific kind of relief - here, reinstatement – acts to destroy jurisdiction over a direct appeal of a termination.

## **2. After-acquired evidence**

The Agency next argues that, after its initial investigation, it learned of “wrongdoing that would lead to termination”, making reinstatement a waste of time and resources. The Agency attached two affidavits attesting that a driver's license is a requirement for the IT position, and that the hiring committee assumed Appellant possessed one at the time of his hire. The Agency also attached a copy of both Appellant's job application showing that he stated he has been found guilty of “only traffic tickets”, and Appellant's Motor Vehicle History, showing that Appellant's driving privileges had been suspended a few months prior to his August 2000 hire date. [Agency's Motion to Dismiss, Atch 4-10.]

Appellant argues that his position did not require a valid driver's license. In support, he attached his job description and his PEPRs, both of which show no licensure requirements. [Appellant's Response, Atchs. E-4, F-1.] He also submitted a 2002 memo from the Agency informing him that it had learned during its quarterly review of employee driving records that Appellant had no license. [Exh. G.] Appellant also asserts that his failure to fill in the information related to a driver's license on his job application gave the Agency notice that he did not have one. Finally, Appellant challenges the veracity of the Agency's proffered affidavits, stating he was truthful in representing his record as containing only traffic tickets.

When matters outside the pleadings are presented to the hearing office on a motion to dismiss, the matter must be treated as a motion for summary judgment under C.R.C.P. 56. In re Steward, CSA 18-08, 2 (4/11/08), *citing* C.R.C.P. 12(b). As in a motion to dismiss, all doubts as to whether an issue of material fact exists must be resolved against the moving party. Jones v. Dressel, 623 P.2d 370 (Colo. 1981).

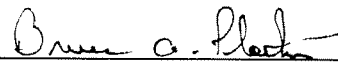
The record presents several genuine issues of material fact for hearing,

among them 1) whether the 2009 termination was in accordance with Career Service Rules, 2) whether the IT position required a driver's license, 3) whether Appellant lied at hire by not revealing his lack of a driver's license, and 4) whether the Agency would have refused to hire him if it had realized he had no license. These factual disputes cannot be resolved without a hearing of the conflicting evidence.

**Order**

Based on the foregoing, the Agency's motion to dismiss is DENIED.

Done May 5, 2009.



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Bruce A. Plotkin  
Career Service Hearing Officer