

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

Appeal No. 134-08

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MARK GERGANOFF,

Appellant/Petitioner,

vs.

DEPARTMENT OF LAW, MUNICIPAL OPERATIONS SECTION, and the City
and County of Denver, a municipal corporation,

Agency/Respondent.

This matter is before the Career Service Board (“Board”) on the Appellant’s Petition for Board Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer’s Order Dismissing Appeal dated January 30, 2009, on the grounds outlined below.

I. FINDINGS

Appellant was employed by the Agency as an Assistant City Attorney whose primary responsibilities involved representing the Assessor’s Office and other City agencies on tax matters. He was terminated by the Agency on December 12, 2008, at which time he was a probationary employee.

When he was hired, Appellant disclosed to the Agency that he and his wife were appealing the valuation of their home in Jefferson County to the State Board of Assessment Appeals (“BAA”). The hearing on the appeal was held shortly after Appellant began his employment with the City. Appellant and his wife prevailed and, over Jefferson County’s objection, moved the BAA for an award of costs pursuant to C.R.S. § 39-9-108, which Appellant interprets as requiring the BAA to award costs to him and his wife as prevailing parties. After the BAA denied their motion for costs, Appellant and his wife appealed that decision to the Colorado Court of Appeals. Appellant did not disclose the filing of his appeal to the Agency.

The Agency apparently learned of the appeal by e-mail from the Jefferson County Attorney's office. Appellant was advised that his appeal constituted a conflict of interest because the Assessor's Office opposed the position he was taking before the Court of Appeals and because the City might be asked to prepare an amicus brief in support of Jefferson County. Appellant proposed that the City erect an ethical wall or permit him to withdraw from the appeal as a condition of remaining employed with the City.

On December 12, 2008, the Agency terminated Appellant's employment. In its official notification of termination, the Agency advised Appellant of the City's "longstanding practice" of taking the position that each party to a BAA appeal must bear his, her or its own costs. The Agency acknowledged Appellant's request for an ethical wall and offer to withdraw from the appeal, but also advised Appellant that his "failure to provide advance notice in a timely manner when you should have been aware that your actions presented a conflict of interest demonstrates a breach of trust and poor judgment."

Appellant's appeal of his dismissal was dismissed for lack of jurisdiction. The issues presented here are whether Appellant should have been permitted to proceed under Rule 19-10 B.1 and the Whistleblower Protection Ordinance, D.R.M.C. §§ 2-106 – 110.

Rule 19-10 B.1.

Appellant argues that CSR 19-10 B.1, which permits probationary employees to appeal adverse employment decisions that are "discriminatory," incorporates C.R.S. § 24-34-402.5, which makes it a "discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours" subject to certain exceptions. Appellant recognizes that the Board interpreted an older version of CSR 19-10 B.1 as not incorporating C.R.S. § 34-34-402.5 in *In re White and Watson*, CSB 63-06, 64-06 (2007), but argues that a later amendment to the Rule effectively overruled *White and Watson*.

At the time of *White and Watson*, the Rule allowed Career Service employees who do not hold career status to appeal adverse actions that were allegedly taken "because of . . . any other status protected by federal, state or local law." In 2007, the Rule was amended to allow an appeal when an employment decision "is discriminatory or when they allege a violation of the 'Whistleblower Protection' ordinance." Contrary to Appellant's argument, the 2007 amendment was intended only to add violations of the Whistleblower Protection ordinance as a ground for appeals by Career Service employees who do not hold career status. The deletion of the word "status" from the amended rule does not change the rationale of *White and Watson* that alleged violations of C.R.S. § 24-34-402.5 are not considered "discrimination" under the CSA Rules because violations of the statute are "more aptly described as an unfair labor practice" and because the statute itself does not create a protected class of persons who could suffer discrimination.

The Board also finds that even if C.R.S. § 24-34-402.5 were incorporated into the CSA Rules, Appellant failed to state a claim for violation of the statute. First, the

Agency did not terminate Appellant for appealing the BAA's order, it terminated him for failing to disclose his intention to appeal, and his failure to recognize the potential conflict of interest that his appeal created. See C.R.P.C. 1.7(a)(2) (a conflict of interest exists when "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer"); *see also id.*, Comment 24 (a conflict exists when a position successfully taken in one case "will create a precedent likely to seriously weaken the position taken on behalf of the other client").

Second, the statute allows an employer to terminate an employee for the employee's lawful off-duty conduct when the employer's action when the termination "[i]s necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest." C.R.S. § 24-34-402.5(a)(2). The Board finds that any restriction by the Agency on Appellant's appeal was necessary to avoid the appearance of a conflict of interest because the position taken by Appellant in his case in Jefferson County is directly contrary to the longstanding position taken by the City regarding awards of costs in BAA cases, and because Appellant's primary job responsibilities involved representing the Assessor's Office in tax matters.

For all these reasons, the Board agrees that the Hearing Officer did not have jurisdiction over Appellant's claim under CSR 19-10 B.1.

Whistleblower Protection

The Whistleblower Ordinance generally protects employees from adverse employment actions, or the threat of such actions, in retaliation for "the employee's disclosure of information about any official misconduct to any person." D.R.M.C. § 2-108(a). The definition of "official misconduct" is limited to conduct of officers and employees of the City. D.R.M.C. § 2-107(d). To the extent Appellant's whistleblower claim is based on alleged misconduct by Jefferson County or the BAA, it fails under the plain language of § 2-107(d). While Appellant attempts to argue that the City's practice of asserting an interpretation of § 39-9-108 is also "official misconduct," the Board finds that the City's assertion of a non-frivolous legal position is not "official misconduct" as defined in the Whistleblower Protection Ordinance. Thus, Appellant failed to allege that he suffered retaliation for disclosing information about "official misconduct" and the Hearing Officer correctly ruled that he lacked jurisdiction over Appellant's claim.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Order Dismissing Appeal dated January 30, 2009 is **AFFIRMED**.

SO ORDERED by the Board on June 4, 2009 and documented this
22nd day of June, 2009.

BY THE BOARD:


Luis Toro, Co-Chair

Board members concurring:

Tom Bonner
Felicity O'Herron
Patti Klinge

CERTIFICATE OF DELIVERY

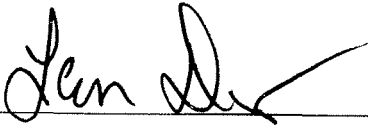
I certify that I delivered a copy of the foregoing **FINDINGS AND ORDER** on
June 23, 2009, in the manner indicated below, to the following:

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