

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 64-08

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

JOSEPH GONZALES, Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS,
and the City and County of Denver, a municipal corporation, Agency.

The Agency filed its motion to dismiss this appeal on Sept. 29, 2008. Pursuant to the pre-hearing order, Appellant's response was due on Oct. 6th. No response was received by the hearing office. Based on a review of the pleadings in this appeal, the following findings and order are entered herein:

Procedural Background

This appeal challenges Appellant's dismissal, and raises a claim that the dismissal was based on disability discrimination. Prehearing statements were due on Sept. 9, 2008. Appellant requested and was granted over Agency objection an extension until Sept. 19th. When that day passed without his filing of the required pleading, Appellant was ordered to file his pre-hearing statement by Sept. 26th, or the appeal would be dismissed as abandoned.

On Sept. 26th, Appellant filed his letter of resignation, and a letter to the Hearing Officer stating that Assistant City Attorney Christopher Lujan agreed to accept his resignation. Three days later, Appellant submitted a request to accept his resignation and remove the termination from his personnel file. The Agency argues in its motion to dismiss that the Career Service Rules do not permit the Hearing Officer to grant that remedy. CRS § 19-55. The Agency also contends that Appellant's failure to produce his medical records deprives the Agency of the opportunity to defend against the disability discrimination claim. Finally, the Agency argues that, without those records, Appellant cannot prove his discrimination claim.

Findings of Fact

Appellant has failed to file a pre-hearing statement in the Hearing Office after what has amounted to two extensions to do so. Instead, Appellant requests

that the appeal should be deemed settled based on the Assistant City Attorney's oral offer to accept his resignation. Appellant has not produced a written settlement agreement. Thus, the issue of settlement remains a question of fact.

Appellant's unilateral filing of his resignation did not constitute an acceptance of a settlement offer, since 1) the offer itself is in dispute, and 2) Appellant presented no evidence that the offer contemplated a unilateral contract accepted by action rather than by agreement. Appellant failed to rebut the allegations made in the motion to dismiss. The Hearing Office will not enforce the terms of a disputed settlement.

The motion to dismiss on the merits must be denied. A termination is appealable under CSR § 19-10 A. 1.a. The Agency admits that Appellant bears the burden to prove his discrimination claim at hearing. Thus, there are questions of fact raised by the discrimination claim. Based on the allegations made in the appeal, which must be assumed as true for purposes of the motion to dismiss, the Agency is not entitled to dismissal under C.R.C.P. 12 b. Strout Realty, Inc. v. Snead, 530 P.2d 969 (Colo. App. 1975).

In addition, the Agency failed to submit affidavits or testimony under C.R.C.P. 56, and thus has not established the absence of genuine issues of material fact for hearing. Even in the absence of medical records, the existence of a disability may be proven by testimony of a medical diagnosis of an impairment substantially limiting a major life activity, a record of such impairment, or being regarded as so impaired. Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12102(1).

Order

Based on the foregoing findings of fact and conclusions of law, it is ordered that:

1. This appeal is dismissed as abandoned for Appellant's failure to file a pre-hearing statement.
2. The motion to dismiss the appeal on the merits is denied.

Dated this 10th day of October, 2008.


Valerie McNaughton
Career Service Hearing Officer