

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

Appeal No. 51-03

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

JOHN JOHNSON, Appellant,

Agency: DENVER DEPARTMENT OF HUMAN SERVICES, and
THE CITY AND COUNTY OF DENVER, a municipal corporation.

This Order concerns Appellant's appeal filed with the Career Service Authority on April 14, 2003. The hearing officer entered an Order to Show Cause why this matter should not be dismissed for lack of jurisdiction on May 29, 2003.

Appellant filed a Response on June 12, 2003. Having now considered Appellant's Response to the Show-Cause Order, and being fully advised in the premises, the hearing officer now DISMISSES this case for the following reasons:

BACKGROUND

Appellant's complaint surrounds his supervisor's deleting messages in Appellant's voice mail box on February 19, 2003, during an extended leave of absence. Appellant alleges that upon his return to work on February 25 or 26, his supervisor notified him that the supervisor had received complaints that Appellant's mailbox was full, deleted several messages, and provided Appellant with a list of the deleted messages.

Appellant alleges that he had saved the messages in question for purposes of a CSA appeal (Appeal No. 30-03, filed separately from this appeal on February 28, 2003). Appellant charges that his supervisor's actions are in violation of the following CSA rules:

- 15-10 (policy statement of employee conduct stating that employees shall conscientiously fulfill their duties)
- 15-80 (reserving the use of electronic media by City employees for official business)

- 15-84 (setting forth that there is no expectation of privacy regarding messages stored in City communication systems, that such information may be accessed by authorized personnel)
- 15-101 (policy statement that City employees shall have the right to work in an environment free of unlawful discrimination and harassment due to membership in a protected class)
- 15-106 (prohibiting retaliation for reporting harassment or discrimination)

DISCUSSION AND CONCLUSIONS

1. Appellant has failed to state a violation of CSR 15-10, 15-80 or 15-84.

CSR 15-10 is a general policy statement about employee conduct which does not in itself give rise to Hearings Office jurisdiction. CSR 15-80 and 84, both of which Appellant alleged the Agency violated by deleting the messages in question, appear to permit the Agency's action in question. They both indicate that there is no expectation of privacy and that messages may be accessed. Nothing Appellant has alleged tends to suggest any violation of any of these rules. For these reasons, the charges that the Agency violated these rules are dismissed.

2. Appellant has failed to demonstrate Hearings Office jurisdiction over his claim under CSR 15-100 *et seq.*

Hearings Office jurisdiction over cases brought under CSR 15-100 *et seq.* arises under CSR 19-10 f), which creates jurisdiction over such cases only as follows:

Harassment or 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.*

(Emphasis added.) This section requires the exhaustion of the investigation procedures set forth in CSR 15-103 and 104 *before* the Hearings Office has jurisdiction to review any actions taken as a result of that investigation.

Appellant asserts in his Response to the Show-Cause Order that he did file a harassment claim with Rita Murphy of the Employee Relations Section of the Career Service. Appellant states that he was told the Employee Relations Section no longer handles "this type of investigation." Appellant states in his Response that he then filed a complaint with the Agency "during a pre-disciplinary meeting," and "is checking up on the status of the complaint."

Unless and until Appellant actually exhausts the investigative process set forth under CSR 15-100 *et seq.*, and presents evidence of the actual disposition of such process, the Hearings Office does not have jurisdiction over Appellant's harassment complaint under CSR 19-10 f). When that process has been exhausted and the outcome is unsatisfactory, the issue will then be ripe for an appeal to the Hearings Office, and Appellant may file such an appeal at that time.

In addition, in the event Appellant does exhaust his administrative remedies under CSR 15-100 *et seq.* and the outcome is unsatisfactory, in order to perfect his appeal Appellant must articulate some facts tending to suggest harassing or discriminatory treatment *because of his membership in a protected class*, such as race, gender, age, religion, or some other minority class, before the Hearings Office will assume jurisdiction over the case. See, CSR 15-102. Furthermore, the action complained of must be "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 (1992).

3. Appellant has failed to state a violation of CSR 15-106, prohibiting retaliation for reporting harassment or discrimination, sufficiently to warrant a separate appeal.

Appellant filed an appeal on February 28, 2003 in response to a suspension he received on February 25, 2003 (Appeal No. 30-03). Appellant alleges in his Response that "at least two" of the erased messages were evidence, presumably in that appeal. These allegations must be raised in that appeal, in which case the remedy would be whatever sanctions the hearing officer deems appropriate in that case for the alleged destruction of evidence.

4. Appellant has failed to request any remedy on which relief can be granted.

The remedy requested by Appellant is that the Agency's "disparate treatment" of Appellant, and actions creating a hostile work environment, cease. Appellant requested no additional remedy in his Response to the Show-Cause Order. Even if Appellant had articulated a violation of any of the above CSR rules, Hearings Office jurisdiction is limited to the powers it is granted under the CSR rules. Under CSR 19-27, the hearing officer can only affirm, modify or reverse an action by an agency. The Hearings Office cannot affirm, modify or reverse the action of deleting messages itself. Therefore, there is no apparent remedy the Hearings Office has the authority to grant independently from Appellant's companion case concerning his suspension.

5. Appellant's appeal is untimely.

In Appellant's Certificate of Delivery on his grievance, he asserts that he delivered the second-level grievance on March 15, 2003. This day was a Saturday. Even assuming that the Agency Head did not receive Appellant's second-level response until Monday, March 17, 2003, this would have made the Agency's response due ten days later, on March 27, 2003. CSR 18-12, governing the grievance process, states as follows in relevant part:

4. Filing with the Career Service Authority: If the employee still feels aggrieved after receipt of [the Agency's] decision, *or the agency head has not responded within ten (10) calendar days...* and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Office of the Career Service Board in accordance with the provision of **Rule 19 APPEALS**. The time period shall be computed in accordance with subparagraph 19-22 a) 2.

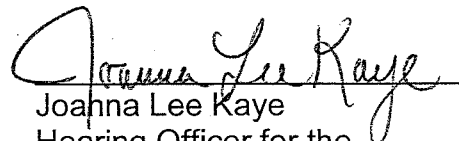
CSR 19-22 a) 2 in turn requires that the Appeal be filed within ten calendar days.

Under these rules, Appellant's appeal was due no later than ten days after the Agency's response was due on March 27, 2003. Appellant's appeal was therefore due by April 6, 2003. Appellant did not file his appeal until April 14, 2003. Appellant has offered no additional explanation for the lateness of his appeal. The hearing officer therefore finds the appeal to be eight days late. It is therefore untimely and must be dismissed.

ORDER

WHEREFORE, for all the foregoing reasons, this appeal is hereby DISMISSED WITH PREJUDICE.

Dated this 14th day of July, 2003.


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 OF DISMISSAL** by depositing same in the U.S. mail, postage prepaid, this 14 day of July, 2003, addressed to:

Cheryl Hutchison
AFSCME
3401 Quebec St. Suite 7500
Denver, CO 80207

John R. Johnson
P.O. Box 40751
Denver, CO 80204

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER OF DISMISSAL** by depositing same in interoffice mail, this 14 day of July, 2003, addressed to:

Niels Loechell
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