

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

Appeal No. 60-04

DECISION

IN THE MATTER OF THE APPEAL OF:

VINCENT MACIEYOVSKI, Appellant,

vs.

**Department of Safety, Denver Sheriff's Department, Agency,
and the City and County of Denver, a municipal corporation.**

I. INTRODUCTION

The Appellant, Mr. Vincent Macieovski, appeals the Agency decision to select another job candidate rather than him. The date of the Agency action was April 24, 2004. A hearing concerning this appeal was conducted on June 27, 2005, before Bruce A. Plotkin, Hearings Officer. The Appellant represented himself. The Agency was represented by Christopher M.A. Lujan, Esq. Division Chief Ron Foos served as the Agency's advisory witness.

The Appellant testified on his own behalf. The Agency presented Chief Foos, Major Gary Wilson, and Director and Undersheriff Fred J. Oliva as its witnesses.

Appellant's exhibit A was admitted without objection. Agency exhibits 1-8, and 11-12 were admitted without objection. Agency Exhibits 9 and 10 were admitted over objection.

II. ISSUES

The following issues were presented for appeal:

1. whether the Appellant stated a claim upon which the Hearings Officer has jurisdiction to grant a remedy;
2. whether the Agency violated CSR 3-12, 3-31, 5-10, 15-10, 15-102, or 19-10;

3. whether, based upon the Appellant's age, the Agency unlawfully discriminated against the Appellant in its selection of a candidate for the position of Facilities Superintendent with the Denver Sheriff's Department on May 1, 2004.
4. If the Agency violated any of the above-reference rules or unlawfully discriminated against the Appellant, whether the Agency's selection should be nullified and whether the Appellant should be appointed, instead.

III. PREHEARING MATTERS

The Appellant originally claimed the Agency selection of a candidate to fill the opening for Facilities Superintendent was in violation of CSR 3-12, 3-31, 5-10, 15-10, 15-102 and 19-10. [Appellant Appeal]. In addition, he claimed the Agency discriminated against him in its selection based upon his age. Prior to Hearing, the Appellant's CSR 5-10 and 5-15 claims were dismissed. Order, July 26, 2004 (Hearings Officer McNaughton).

Immediately prior to hearing, the Agency raised three motions to dismiss based upon jurisdictional grounds not previously addressed. (1) and (2). The Agency posited the Career Service Rules (CSR) 3-12 and 3-31 are directed towards the Career Service Authority (CSA), and the Appellant failed to name the CSA as a party in this case. Since relief may be granted only against a party to the case, and CSA is not a party, then the Hearings Officer has no jurisdiction to grant any relief sought by the Appellant against the non-party CSA. Therefore, the Agency concluded, the case should be dismissed for lack of jurisdiction, (presumably personal jurisdiction over an essential party). That motion was denied for reasons stated below.

(3) The Appellant's appeal and pre-hearing statement requested the candidate selection made by the Agency be declared void, and also asked for "process revision and improvement." The Agency claimed such relief is in essence a request for a declaratory judgment in the Appellant's favor, something outside the purview of the Hearings Officer's jurisdiction within the Career Service Rules.

The Appellant replied only that CSR 3-12 and 3-31 are critical to his appeal. The Hearings Officer denied the Agency's motions.

1. Agency's motion to dismiss the Appellant's CSR 3-12 claim.

CSR 3-12 reads, in pertinent part: "Appointments shall be made solely upon merit and fitness to perform the work...3. No discrimination shall be made because of...age"

The Hearings Officer disagreed with the Agency's view that CSR 3-12 requires naming the CSA as a party. The Appellant's claims include that the Agency discriminated against him in its appointment, in violation of CSR 3-12. Since the Agency chooses who it will appoint pursuant to CSR 5-10, a discriminatory appointment would constitute a violation by the Agency, not by the CSA. Therefore, the CSA was not a necessary party, and Agency's motion to dismiss the Appellant's CSR 3-12 claim was denied.

2. Agency's motion to dismiss the Appellant's CSR 3-31 claim.

CSR 3-31 provides

Promotional Policy

It shall be the policy for the Career Service to fill vacant positions, whenever practicable, by promotion of employees who, on the basis of a competitive test designed to determine fitness and ability, are best qualified for advancement.

Similar to the analysis regarding CSR 3-12, this rule is applied by the Agency in that the Agency selects from the candidates certified by the CSA. If, as the Appellant claims, the best candidate was not selected, the claim concerns the Agency selection, not the CSA. For those reasons, the Agency's claim to dismiss the Appellant's CSR 3-31 claim was also denied.

3. Agency's motion to dismiss case based upon Appellant's request for relief.

The Agency claimed the Appellant's requests for relief are essentially motions for declaratory judgments, and as such, are outside the jurisdiction of the Hearings Officer. The Agency requested the case be dismissed in its entirety for failure of the Appellant to state a remedy within the Hearings Officer's jurisdiction. As the July 27, 2004 Order (Hearings Officer McNaughton) already found jurisdiction to reverse the Agency's decision not to promote the Appellant, then the Agency's motion to dismiss for failure to state a remedy within the Hearings Officer's jurisdiction was denied.

IV. BACKGROUND

The following facts are not in dispute. The Appellant applied and tested for the position of Facilities Superintendent with the Denver Sheriff's Department. The successful applicant would direct a 20-member crew in new construction projects and ongoing maintenance at the Denver County Jail. Pursuant to Career Service Rules, the Career Service Authority certified the eligibility of 13 candidates, including the Appellant, based on their test results and basic qualifying criteria.

On April 4, 2004, three members of the Agency, Director of Corrections/Undersheriff Frank Oliva (Oliva), Division Chief Ron Foos (Foos), and Major

Gary Anderson (Anderson), conducted interviews with 11 of the certified candidates, including the Appellant. Each candidate was told there would be a 30-minute limit to the interview, and each was asked only three questions: What qualifies you for this position? Why should we select you? Is there anything else you would like to add?

Another applicant, Michael Paul (Paul), scored a 189, while the Appellant scored 184 on his examination. [Exhibits 5-5, 10-5]. Paul already held the position of Acting Facilities Superintendent. Paul is older than the Appellant. Following the interviews, the interviewers unanimously selected Michael Paul from the candidates on May 1, 2004. [Exhibit 11]. The Appellant filed his appeal on May 3, 2004.

V. ANALYSIS

A. Burden of Proof.

There is a presumption of validity and regularity in administrative actions such as choosing among job applicants. Therefore, the Appellant bears burden of proving, by a preponderance of the evidence, that Agency's decision was arbitrary, capricious or contrary to rule or law. In re Bossert, CSA 170-03 (3/26/04).

B. Appellant's CSR 3-12 claim, and age discrimination claim

The Appellant's claim under CSR 3-12 is one of age discrimination. In order to establish a prima facie age discrimination claim the Appellant must show: (1) he was a member of the protected age group, over age 40; (2) he was capable of the job for which he applied; (3) a younger person was chosen; and (4) evidence exists from which a reasonable fact-finder might conclude the employer intended to discriminate in the choice of candidates. The burden then shifts to the Agency to provide a legitimate, non-discriminatory explanation for choosing the younger person. Carter v. Newman Mem. County Hosp., 49 Fed. Appx. 243 (10th Cir., 2002).

The Appellant's only proof of age discrimination was his belief that he had been a victim of discrimination. This is not evidence, See Haas v. Kelly Servs., 409 F.3d 1030 (8th Cir. 2005). The only evidence adduced at hearing suggests no discrimination. The applicant chosen was older than the Appellant. [Exhibit 11]. He was better qualified, according to all three interviewers, [Oliva testimony, Foos testimony, Anderson testimony], and tested higher than the Appellant. [Exhibit 10]. For these reasons, the Appellant's age discrimination claim fails.

C. Appellant's CSR 3-13 b) 2) claim.

Although not made prior to hearing, the Appellant claimed the Agency violated CSR 3-13 b) 2). The Agency objected to evidence on this CSR as not having been referenced prior to hearing. The Appellant responded 3-13 is the same rule as 3-12, a claim not supported by

evidence. Therefore, the Agency motion was granted, and the Appellant's CSR 3-13 claim was dismissed.

D. Appellant's CSR 3-31 claim.

The Appellant testified the Agency failed to observe this rule because it gave credit to candidate Paul for his four months of service as acting Facilities Superintendent at the Denver County Jail, and this credit was not reflective of a "competitive test" as stated in the rule. Nothing within CSR 3-31 prohibits the Agency from considering a candidates entire relevant experience. On the contrary, if the Agency failed to consider Paul's experience as acting Facilities Superintendent, it would be remiss in its obligation under CSR 3-11 to select the best-qualified employee. The Appellant's CSR 3-31 claim therefore fails.

VI. CONCLUSION AND ORDER

The Appellant failed to establish any of his claims by a preponderance of the evidence. He therefore failed to show how the Agency's decision to hire Michael Paul instead of him was arbitrary, capricious, or counter to law. Accordingly, the Appellant's appeal is DISMISSED WITH PREJUDICE.

DONE this 27th day of July, 2005.



Bruce A. Plotkin
Hearings Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this 28th day of July, 2005, addressed to:

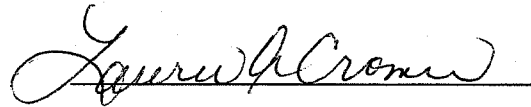
Mr. Vincent Macieyovski
4521 W. 41st Ave.
Denver, CO 80212

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION**, by depositing same in the interoffice mail, this 28th day of July, 2005, addressed to:

Christopher M.A. Lujan, Esq.
City Attorney's Office
Employment Law Section
201 West Colfax Avenue Dept 1108
Denver, CO 80202

Alvin J. LaCabe, Manager
Manager of Safety

Fred J. Oliva, Director and Undersheriff
Denver Sheriff's Department



AMENDED CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this ~~17th~~ day of August, 2005, addressed to:

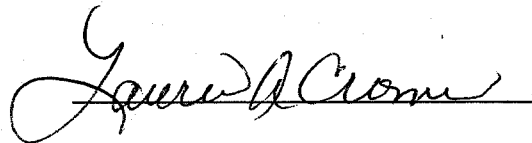
Mr. Vincent Macieyovski
5014 W. 36th Ave.
Denver, CO 80212

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Christopher M.A. Lujan, Esq.
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Alvin J. LaCabe, Manager
Manager of Safety

Fred J. Oliva, Director and Undersheriff
Denver Sheriff's Department

A handwritten signature in cursive script, reading "Laura A. Cromer", written over a horizontal line.