

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

Appeal No. 204-02

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

ROBERT D. PEREZ, Appellant,

Agency: Department of General Services, Public Office Buildings, and the City and County of Denver, a municipal corporation.

Pre-hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on March 4, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, and Denver, Colorado 80202. Appellant, Robert D. Perez, appeared and was represented by N. Nora Nye, Esq. The Agency was represented by Assistant City Attorney, Linda Davison. Dan Barbee, Director of Public Office Buildings was the Agency's advisory witness at the pre-hearing. On the date scheduled for hearing, the Agency moved for dismissal of this appeal due to lack of jurisdiction, based on Appellant's alleged failure to timely file his second-level grievance. The Hearing Officer considered the Agency's motion and Appellant's response as a pre-hearing matter.

Within this Order, the Hearing Officer refers to Robert D. Perez as "Appellant"; the Department of General Services, Public Office Buildings as the Agency; Dan Barbee as the Agency's "Director" or the "head of the agency" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set for the below, Appellant's Appeal is **DISMISSED** for lack of jurisdiction.

PRELIMINARY MATTERS

The Agency's Exhibits 2, 3, 4 and 9 were accepted into evidence without objection.

ISSUE

Whether Appellant's second-level grievance was timely filed.

BURDEN OF PROOF

The burden of proof is upon the Agency, the proponent of the motion, to show, by a preponderance of the evidence, that Appellant's second-level grievance was not timely filed.

FINDINGS OF FACT

Based on the evidence presented at the pre-hearing, the Hearing Officer finds the following to be fact:

1. Appellant is a Custodian for the Agency. On November 15, 2002, Appellant timely filed a first-level grievance with his supervisor, Steve Pacheco. (Pacheco). On November 19, 2002, Appellant received Pacheco's response denying the grievance.

2. Pursuant to Career Service Rules, Appellant's second-level grievance was due to be filed with the Director, or the Director's designee, on or before November 29, 2002, a Friday.

3. Appellant thought the second-level grievance was supposed to be filed with Pacheco. When he discovered that the second-level grievance was to be filed with the Director, Appellant "whited-out" Pacheco's name and wrote "Mr. Dan Barbee" over the dry Liquid Paper/White Out.

4. On November 26, 2002, Appellant took his Grievance Form to the Agency's offices at 201 West Colfax, 9th Floor, Denver, Colorado and attempted to file his second-level grievance in this matter. When he arrived at the Agency's offices, there was no one at the reception desk. However, "a man" in the Agency's offices told Appellant to leave the grievance at Lavita's desk and directed Appellant to Lavita's cubicle. Lavita was not at her desk and no one else was around. Appellant dated and signed the certification of hand delivery (or mail) for a second-level grievance and left the grievance on Lavita's chair. Appellant did not circle either the words "hand delivery" or "mail" on the certification.

5. Between November 19, 2002 and December 4, 2002, there were no male employees working in the Agency's offices. At that time, Lavita was often out of the office on sick leave.

6. The Director did not come into his office on Monday or Tuesday, December 2 and 3, 2002.

7. When the Director came into work on December 4, 2002, Appellant's second-level grievance was on the Director's desk. The certification of hand delivery (or mail) was signed by Appellant and indicated that the completed Grievance Form had been delivered to "Mr. Dan Barbee" on November 26, 2002.

8. The usual procedure for receipt of completed Grievance Forms is for the Director's designated staff person to date stamp the form(s). Grievances are then forwarded to the Director's Administrative Assistant. The Administrative Assistant places the grievances in a red folder and places the red folder on the Director's desk.

9. On December 4, 2002, when the Director found Appellant's grievance on his desk, it was not in a red folder. The grievance was not date-stamped or marked with a receipt date. Therefore, the Director asked his Administrative Assistant if she had put the grievance on his desk. The Administrative Assistant stated that she had never seen the grievance. The Director does not know how the grievance got on his desk.

10. As of the date of pre-hearing in this matter, Appellant's grievance is the only grievance found on the Director's desk that did not go through the red-folder process. (See paragraph 8, above.) Because there was no date-stamp the Director was unsure whether Appellant's second-level grievance was timely filed. Therefore, he prepared and issued a response.

11. On a prior occasion, Appellant filed a second-level grievance by handing it to the Director. The grievance was not date stamped by the Director. Nonetheless, the Director accepted the prior grievance and responded to it.

12. In order to get to Lavita's cubicle, Appellant walked by the Director's office. At that time, there was no sign on the Director's office indicating it was the Director's office.

DISCUSSION

1. Authority to consider Jurisdiction: On its face, Appellant's completed Grievance Form indicates that the second-level grievance was timely filed. (See the Agency's Exhibit 2.) However, on the scheduled day for hearing, the Agency's counsel became aware of certain facts that brought jurisdiction into question. (See Findings of Fact, paragraphs 7 through 10.) Jurisdiction is the authority, capacity, power or right to act. (Black's Law Dictionary, Rev. 4th Ed.) It cannot be stipulated or waived by the parties. Therefore, jurisdiction is at issue

anytime before, during or after hearing. This matter was set for hearing regarding a grievance filed by Appellant. The Hearing Officer has authority to hear appeals of grievances (CSR 19-10 d.) and, in order to do so, must consider jurisdiction. The Hearing Officer concludes that, by necessity, she has the authority to determine jurisdiction and to make and issue findings, conclusions, and an Order in this matter. CSR 19-10 d) and 18-12.

2. Timeliness: Regarding the filing of a second-level grievance, Career Service Rules require, in pertinent part: “[T]he employee shall present the grievance to the head of the agency, or designee, in writing within ten (10) calendar days after receiving the decision of the immediate supervisor.” CSR 18-12, 3. In this case, Appellant’s second-level grievance was due to be filed with the Director on November 29, 2002. At the pre-hearing, Appellant testified that he hand-delivered his grievance on November 26, 2002 by leaving it on Lavita’s chair. However, Appellant’s grievance was never date stamped. Perhaps it was because Lavita was out of the office on sick leave for a few days and she placed it on the Director’s desk upon her return. Perhaps Appellant left the grievance at someone else’s desk, believing it to be Lavita’s desk, or perhaps Appellant left it on the Director’s desk on November 29th or December 2nd or 3rd.

The rules do not require the filing to be date stamped and, in this case, the Hearing Officer concludes that it is immaterial whether Appellant’s grievance was date-stamped. That is, a date-stamp may be proof that a document was timely filed but the lack of a date-stamp is not necessarily evidence of an untimely filing. There being no competent evidence to the contrary, the Hearing Officer concludes that Appellant left his grievance on a chair or desk in the Agency’s offices on November 26, 2002.

3. Presentation by hand-delivery: Career Service Rules provide, in pertinent part: “[T]he employee shall present the grievance to the head of the agency, or designee”. The rules do not require evidence of *receipt* of the document by the agency head or designee and they do not define what is meant by “shall *present* the grievance”. (CSR 18-12, 3. Emphasis added.) Nonetheless, it is unreasonable to assume that the rules allow an employee to simply leave a grievance on a desk or chair in the offices of the Agency or the agency head because, if such was allowed, grievances might languish for weeks or months before discovery, at which time the only evidence of timely filing would be the employees’ statement. The Hearing Officer concludes that a grievance must be timely handed (or mailed) to a human being, “the head of the agency, or designee”, rather than being left on a chair or a desk.

Further, it is the responsibility of the employee (The “*employee shall present*”. Emphasis added.) to insure that the grievance gets to the agency head or designee. In this case, by his own testimony, Appellant simply left his grievance on a chair or desk with no one else around. Therefore, the Hearing Officer concludes that the rules require the employee to present a grievance to a

human being, specifically the agency head or designee, and, in this case, Appellant did not fulfill his duty to present the grievance to the Director or designee. Therefore, Appellant's second level grievance was not appropriately or timely filed.

CONCLUSIONS OF LAW


1. The Hearing Officer has the authority to determine jurisdiction and to make and issue findings, conclusions, and an Order in this matter. CSR 19-10 d) and 18-12.

2. Appellant did not appropriately or timely file his second-level grievance in this matter. Therefore, the Hearing Officer does not have jurisdiction to hear the above-captioned appeal.

ORDER

Therefore, for the reasons stated above, the above-captioned Appeal is DISMISSED for lack of jurisdiction.

Dated this 28th day of April 2003



Michael S. Gallegos
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 **FINDINGS AND ORDER** by depositing same in the United States Mail, postage prepaid, on the 29th day of April 2003, addressed to:

Robert D. Perez
1671 S. Garfield Street
Denver, CO 80210

N. Nora Nye, Esq.
C/O AFSME
3401 Quebec Street, #7500
Denver, CO 80207

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in interoffice mail, on the 29th day of April 2003, addressed to:

Linda Davison, Esq.
Assistance City Attorney

Tom Migaki
Department of General Services

Dan Barbee
Public Office Buildings

V. Granada