

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

Appeal No. 72-07a

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

GLENN SAMPLE
Appellant-Respondent

vs.

DEPARTMENT OF HUMAN SERVICES, and the City and County of Denver, a
municipal corporation,
Agency-Petitioner

This matter is currently before the Career Service Board ("Board") on the Agency's Petition for Review. Having reviewed and considered the record on appeal, the Board **REVERSES** the Hearings Officer's Decision dated June 12, 2008 on the grounds outlined below.

I. PROCEDURAL AND FACTUAL BACKGROUND

Appellant was hired by the Agency as a Youth Worker on October 30, 2006. On that date, the Career Service Rules required that new employees must complete training on six different topics during their employment probation: (1) new employee orientation; (2) the City's drug and alcohol policy; (3) diversity; (4) ethics and accountability; (5) customer service; and (6) preventing harassment, workplace violence and bullying. CSR 6-20 A. (eff. 4/1/06). This rule was revised effective January 12, 2007 to require probationary employees to complete training on the following topics: (1) new employee orientation; (2) ethics and accountability; (3) preventing harassment, workplace violence and bullying; and (4) any other training required by the DRMC and applicable Executive Orders. CSR 6-20 A. (eff. 1/12/07).

Appellant completed the new employee orientation program on November 17, 2006. On February 26, 2007, while still on employment probation, Appellant was promoted to Staff Social Caseworker. As a result of this promotion, Appellant began reporting to different supervisors in a different work location with a different e-mail address. On April 25, 2007, Appellant received an End of Probation Notification (EOPN) form indicating that he had successfully completed employment probation for his Youth Worker position effective April 29, 2007. The EOPN was signed by Appellant's Youth

Worker supervisor, another Agency official and Appellant, and processed through Career Service Authority (“CSA”). Several weeks later, Appellant was notified that he had failed promotional probation as a Staff Social Caseworker and was being returned to the position of Youth Worker.

Due to a series of mistakes, failed e-mail communications and unmet responsibilities by both Appellant and the Agency, Appellant did not complete any of the remaining mandatory training courses needed in order to pass employment probation. On October 9, 2007, personnel in the Controller’s Office notified the Agency that Appellant had failed to complete the mandatory training required under CSR 6-20 A. and, as a result, that his employment probation was being extended until December 31, 2007. The Agency, which was at that time considering disciplinary action against Appellant for reasons unrelated to his failure to complete mandatory training, rescinded a scheduled pre-disciplinary meeting and instead dismissed Appellant during employment probation under CSR 14-30 on October 10, 2007.

Appellant filed an appeal of his dismissal. Prior to the hearing the parties stipulated that the sole issue to be decided was whether Appellant had attained career service status prior to his dismissal. If career service status was attained, Appellant could only be dismissed for cause, which the parties agreed did not exist; whereas employees on probationary status are subject to dismissal at any time, with or without cause.

After conducting a hearing, the Hearing Officer held that, notwithstanding his failure to complete mandatory training, Appellant had attained career status when he completed six months of employment probation without timely action being taken by the Agency to either extend his probation or provide the required notice that he was not going to pass probation. Therefore, the Hearing Officer reversed the dismissal.

The Agency petitions for review of the Hearing Officer’s Decision under CSR 19-61 B., erroneous rules interpretation; CSR 19-61 C., policy-setting precedent; CSR 19-61 D., insufficient evidence; and CSR 19-61 E., lack of jurisdiction.

II. FINDINGS

This appeal presents the singular issue of whether the applicable Career Service Rules mandate an automatic extension of employment probation when and if a probationary employee is determined to have failed to complete mandatory training by the end of his or her probationary period, even if the employee has been certified as having successfully completed probation.

The Career Service Rules provide that every person when first appointed to a Career Service position must hold employment probationary status for the applicable probationary period. CSR 5-42 A. The minimum period of probation (with limited exceptions) is six months. CSR 5-52 A. That period can be extended for up to six additional months with the approval of the Personnel Director. CSR 5-52 B.1.

Probationary periods are regarded as “integral parts of the examination process” and are utilized to “closely observ[e] the employee’s work, assist[] the employee to adjust to the duties and responsibilities of the position, and to separate [] an employee whose performance does not meet required standards...” CSR 5-51.

While on employment probationary status, employees are subject to termination or demotion at any time, have limited appeal rights and are subject to other restrictions. CSR 5-61, Employees in Employment Probationary Status. Career status gives the employee valuable rights, including the right to be disciplined or dismissed only for cause, the right to file grievances and appeals, the right to earn merit increases, the right to some protection against lay-offs, and the right to full leave benefits. CSR 5-62 Employees in Career Status.

Employees attain career status only through “successful completion of the probationary period, and the training programs required by Rule 6 EMPLOYEE TRAINING AND ORGANIZATIONAL DEVELOPMENT, or through reinstatement after a layoff.” CSR 5-42 B. (emphasis added)

Prior to the end of the probationary period, the agency is required to provide written notification to the employee and CSA indicating that the employee has passed or failed to pass probation. CSR 5-53 End of Probation Notification. If an agency fails to timely file the end of probation notification letter or form and the employee “has completed the required probationary period and the training programs required,” the employee is deemed to have attained career status. CSR 5-53 C. Thus, an employee can be deemed to have passed employment probation by default, but only if both the minimum probationary period and the mandatory training have been successfully completed.

If an employee fails to complete the required training courses, the rules mandate that such failure “shall result in the extension of probation until the course work has been completed, in accordance with Rule 5 APPOINTMENTS AND STATUS.” CSR 6-20 C. (emphasis added)

The Board concurs with the Hearing Officer’s conclusion that the responsibility to ensure that a probationary employee completes the mandatory training set forth in CSR 6-20 A. is shared equally among the employee, the Agency and CSA.

The Board also concludes, however, that the Hearing Officer erroneously interpreted the applicable personnel rules, particularly CSR 5-42 B., CSR 5-52 B., CSR 5-53 C. and CSR 6-20 C., in concluding that a probationary employee can attain career status by default without having completed the mandatory training programs if the employing agency fails to timely request an extension of the probationary period and/or erroneously certifies that the employee has successfully completed employment probation. The language of these rules compels the conclusion that failure to complete the mandatory training programs

does in fact serve to automatically extend an employee's probationary period until such training is completed.

To the extent that the Hearing Officer relied on CSR 5-42 B.2 as the basis for holding that completion of all mandatory training is not a necessary prerequisite for passing employment probation, this interpretation was erroneous. CSR 5-42 B. provides as follows:

B. Career

1. General: Employees attain career status through:
 - a. Successful completion of the probationary period, and the training programs required by Rule 6 EMPLOYEE TRAINING AND ORGANIZATIONAL DEVELOPMENT; or
 - b. Re-instatement after layoff.
2. Promotion while on employment probation: An employee promoted while on employment probation shall attain career status in the former class upon satisfactory completion of the number of months required in that former class. In order to achieve career status in the class to which promoted, the employee shall serve the remaining probationary period required for that class in promotional probationary status.

The Hearing Officer concluded that the omission in CSR 5-42 B.2 of any reference to the completion of mandatory training by employees who are promoted while still on employment probation demonstrates that the drafters of the rule did not intend for the failure to complete such training to operate as an automatic extension of the employee's probation. The Board disagrees. While it is true that CSR 5-42 B.2 only refers to the satisfactory completion of the minimum number of months of employment probation and not to the completion of mandatory training, the Hearing Officer's interpretation of that rule conflicts with the preceding subparagraph 1.a, CSR 6-20 C., CSR 5-53 C. and CSR 5-52 B, all of which clearly require that both standards be met in order to attain career status. When two or more rule or statutory provisions appear to be in conflict, the reviewing agency must attempt to construe those provisions in harmony. *See, e.g., Smith v. Zufelt*, 880 P.2d 1178, 1183 (Colo. 1994).

The intent behind CSR 5-42 B.2 was to establish how the minimum periods of employment probation and promotional probation are calculated when an employee who is still on employment probationary status is promoted into a higher classification. As it pertains to this matter, the method set forth allows the number of successfully completed months of service in both classifications to be combined in order to satisfy the minimum

six month period (or other applicable minimum period) of employment probation and is simply silent about the separate requirement of completing mandatory training. This interpretation of CSR 5-42 B.2 harmonizes with the other rule provisions that require the successful completion of both a minimum period of employment and mandatory training before an employee attains career status.

Having found that the Hearing Officer's Decision must be reversed on the above stated grounds, the Board does not consider the other grounds for appeal raised by the Agency.

III. ORDER

IT IS THEREFORE ORDERED that the Agency's Petition for Review is **GRANTED** and the Hearing Officer's Decision dated February 14, 2008 is hereby **REVERSED**.

SO ORDERED by the Board on September 18, 2008, and documented this 16th day of October, 2008.

BY THE BOARD:


Co-Chairperson

Board Members Concurring:

Tom Bonner
Nita Henry
Luis Toro
Felicity O'Herron

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **FINDINGS AND ORDER** was sent to the following this 16th day of October, 2008:


Nora Nye, Esq., nora@nyelawfirm.com (via e-mail)

Glenn Sample, 1581 S. Iola St. #208, Aurora, CO 80012 (via U.S. mail)

Niels Loechell, Esq., Niels.Loechell@denvergov.org (via e-mail)

Jennifer Fairweather, Jennifer.Fairweather@denvergov.org (via e-mail)

BY:



Leon Duran