

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

Appeal Nos. 254-00 and 255-00

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEALS OF:

Appellants: **DIANE WENGER and DORTHY HARRIS,**

And

Agency: **DEPARTMENT OF AVIATION, DENVER INTERNATIONAL AIRPORT, and
the City and County of Denver, a municipal corporation.**

NATURE OF APPEAL

Ms. Diane Wenger and Ms. Dorothy Harris ("Appellants") appeal a decision by the Agency requiring them to refund a portion of a backpay award that resulted from a reclassification decision by Career Service. In the case of Ms. Wenger, the amount claimed to be owed to the Agency appears to be \$5,708.00. In the case of Ms. Harris, the amount claimed to be owed to the Agency appears to be \$6,551.00. [Exhibit 13]

The Appellants contend that the Agency decision to require them to pay back these portions of the original awards is in error, not otherwise supported by the rules, and would work a hardship on them. They have requested that the Hearing Officer review and either reverse or modify the action by the Agency. The Appellants also requested compensation for unnecessary stress. The Hearing Officer has advised the Appellants that he lacked jurisdiction or authority to award compensatory damages of this nature.

INTRODUCTION

The rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held on January 18, and 22nd 2001, before Michael L. Bieda, Hearing Officer for the Career Service Board. Appellants were present, and were pro se. The Agency and City were represented by Assistant City Attorney Richard A. Stubbs, Esq., with Mr. Jim Thomas serving as the advisory witness on behalf of the Agency and the City.

The following witnesses testified in this matter:

Mr. Bruce Baumgardner (by telephone)
Mr. Jerome Cooper
Mr. Jim Yearby
Mr. Tom Wolf
Mr. Don Mares
Mr. Jim Thomas
Ms. Mary Claussen
Ms. Sandy Klawonn
Ms. Dani Brown

The Appellants, through the use of opening and closing statements, also testified on their own behalf.

Exhibits 1-28 were offered and admitted into evidence by stipulation on behalf of the Agency and the City. Exhibits A, B, I, J, K, N, O, P, Q, and R were offered and admitted into evidence by stipulation on behalf of the Appellants. Exhibits E and F were determined not relevant and were not admitted. Other exhibits offered by Appellant were duplicative, and are reflected in the Agency's exhibits.

ISSUES ON APPEAL

1. Did the Agency error in determining that the Appellants owe a portion of previously awarded back pay?
2. If the Appellants do owe all or a portion of the backpay claimed, what is the correct amount?
3. If the Appellants do owe any backpay, what is an appropriate payback schedule?

JURISDICTION

The Appellants received a letter from Career Service Authority, dated October 25, 2000, advising them that due to an error by the Agency, they had received excess backpay. [Exhibits 11 & 12]. The letter does not specify the amount of the overage. Both Appellants filed first step grievances with their direct supervisor, Mr. Bruce Baumgartner, on November 6, 2000. On November 9, Mr. Baumgartner wrote a note on the bottom of the grievance directed to the Appellants, denying the grievance request. The response does not contain a certificate of delivery. However, the Appellants indicated that they received the denial on November 13. The Appellants did not file a "second step" grievance, but instead filed their appeals of the denial with the Career Service Authority Hearing Office on November 21, 2000.

In a pending Motion to Dismiss, the agency has challenged the jurisdiction of the Hearing Officer to grant the relief requested, i.e. to set the Appellants' salary at a level which is alleged to be higher than provided for under Career Service Rules. It has not, however, challenged the appeal procedure employed by the Appellants. Nor has it challenged the timeliness of Appellants' appeal.

Mr. Baumgartner is the Manager of the Department of Aviation, and as such is not only the Appellants' immediate supervisor, but also the Head of the Agency. Therefore, no second step grievance was possible as provided for by CSR §18-12. The Appellants exhausted their administrative remedies before filing their appeal with the Hearing Officer.

The Appellants received Mr. Baumgartner's denial on November 13, 2000. The Agency does not contest this date. Therefore, under CSR §19-22, their appeal to the Hearing Officer was due 10 days after November 13. Since their appeal was in fact filed on November 21, the Hearing Officer finds and concludes that the appeal was timely filed.

Based upon these facts the Hearing Officer finds and concludes that this appeal has been timely filed, and that under CSR §19-27, the Hearing Officer has jurisdiction and authority to affirm, reverse or modify the actions of the Agency giving rise to this proceeding.

FINDINGS OF FACT

Appellant Dorothy Harris is a Director of Aviation, Landside Operations/Parking at Denver International Airport (DIA). Diane Wenger is a Director of Aviation, Landside Operations, /Ground Transportation at DIA. The Appellants filed their audit requests on January 24, 1997. They requested that their positions be audited, that they be reclassified and that their positions be upgraded due to a permanent change in their duties. Over one year later on May 15, 1998 they were notified by Ms. Sandy Klawonn of Career Service that their audits were being put on hold. This was done ostensibly at Career Service Authority's request to the then Manager of Aviation, Jim DeLong, so that a citywide study of positions at that level could be completed.

Apparently the requested citywide audit never occurred. A year and a half later, in October of 1999, Appellants were advised that Career Service was again pursuing their individual audits. Appellants were requested to complete a new audit form and to include any additional duties that they may have been assigned since the original January 1997 submittal. Ms. Harris's audit paperwork was lost and she was required to resubmit all previous documents. Jim Thomas, Manager of Human Resources of the Agency, advised Appellants that he could have no involvement in their audits due to the fact that his wife was also in Operations and that the audit would effect her, also. Apparently he felt it might be a conflict of interest.

The results of the audit by Career Service, which recommended an upgrade in pay, were submitted to the Mayor and City Council on May 16, 2000. Appellants were not notified of the audit results, including the pay upgrade update, until three weeks later, on June 5, 2000. [Exhibits 9 & 10]. They were advised by memorandum that they could discuss the results with Jerome Cooper, the analyst who performed the audit. They were also advised that their pay grade changes would be effective retroactively to August 1, 1997.

Pay rates for Career Service Employees like the Appellants are established by a Classification Schedule, which is a grid that operates much like a tax table. There is a schedule for each of the various occupations, such as "General Administration," "Clerical," "Engineering and Sciences," and so forth. In the case of the Appellants, they are classified under "General Administrative." [See Exhibit 20]. The schedule for General Administrative provides for a "Pay Grade" along the left column and pay "Steps" along the top. An employee's salary is determined by matching the pay grade established by the Career Service Board and the City Council for the position with the employees' "step", which is determined by the employee's service record.

Appellants received their back pay in August 2000. Ms. Harris received \$13,455.00. Ms. Wenger received \$14,316.00. In both cases the back pay was calculated on the basis of a "step to step" approach. A "step to step" approach would allow the employee to remain in the same pay "step" while advancing to a higher pay grade level. Usually, though not always, when an employee is reclassified, she is placed in the "step" which most closely matches her current rate of pay, even if it means a loss of one or more "steps". However, the employee may not be "stepped down" so as to result in a loss of salary.

Three months later, on November 3, 2000, Appellants received written notification from Mr. Jim Yearby of Career Service that the City was claiming that the methodology for calculating the back pay was wrong and that the Appellants had received more back pay than they should have. The City also asserted in the letter that the audit had resulted in a "reallocation" rather than a "pay upgrade". The letter did not indicate the amount of the error. [Exhibits 11 & 12]. Shortly thereafter the Appellants perfected this appeal.

The Appellants are contending that the results of the position audits were pay upgrades, with back pay to August 1, 1997, not reallocations or reclassifications. They object to the City now applying a different method to calculate back pay.

The Career Service Board in fact approved and adopted as its own the classification reports upgrading the Appellants' classifications. [Exhibit 25, p.2, Paragraph B]. Those reports stated that the "Pay Rationale" for Parking (Appellant Harris) was:

The scope and depth of management responsibility, authority

and responsibility involved in the operation of the parking program and employee transportation system at DIA equals or exceeds some job classifications currently at a higher pay grade. The proposed pay grade change will remedy the pay inequity. [Exhibit 26].

For Ground Transportation (Appellant Wenger) the rationale was similar. [Exhibit 27]. In both reports, dated March 17, 2000, most notable was the following language under Budget Impact:

The pay grade change will increase the employee's pay by +2.25% per Career Service Rule 9-64. The employee will increase by \$266 per month. [Emphasis added].

The testimony at hearing clearly established that these reports were approved and adopted by the Career Service Board in its minutes of March 23, 2000. [Exhibits 25 & 26].

On May 30, 2000, the City Council for the City and County of Denver enacted Ordinance No. 407, which repealed and reenacted the Appellants' job codes, class titles and pay grades for the two positions at issue. [Exhibit 24]. The testimony established that the City Council based this Ordinance upon the classification reports and the classification approval of the Career Service Board.

The testimony also established that there was considerable discussion between Mr. Jim Yearby of Career Service, Mr. Bruce Baumgartner of the Department of Aviation, and Mr. Jim Thomas about "compensating" the Appellants for the considerable delay from the time their initial request for classification audit was made and the ultimate determination and notification of the results of the audit. It was never made clear exactly what form this "compensation" was to take. Through a series of miscommunications or misunderstandings, this "compensation" was understood by Mr. Thomas to mean a "step to step" pay increase. It appears that the Resolution of the Career Service Board and the City Council Ordinance may not have been adequately communicated to him prior to his requesting the back pay calculation on a "step to step" basis.

DISCUSSIONS AND CONCLUSIONS OF LAW

Applicable Rules, Executive Orders, Departmental Policies and Regulations

The following Career Service Rules, Ordinances, Executive Orders and Departmental Policies are applicable to this appeal:

CSR § 9-64 Reallocations

When a position is reallocated from a lower class to a higher class, the incumbent's pay shall be set in the higher salary range at a step that reflects at least a 2.25% increase in pay. In no event shall the employee receive less than the entry rate of the pay grade of the new class. [Exhibit R].

The Rule is not clear as to the date of implementation, however it does indicate "Page Issuance Date June 3, 1998." The parties stipulated that this is the rule in effect as of June 3, 1998, although the Appellants contend it is not applicable to them, since they believe their position was not the result of a "reallocation".

The version of Rule §19-64 in effect during the time that Appellants first requested the classification audit is as follows:

When a filled position is reallocated from one class to another class, the incumbent shall receive the same pay as before the reallocation. If there is no corresponding rate in the pay grade of the new class, the closest higher rate shall be paid. In no event shall the employee receive less than the entry rate of the pay grade of the new class.

CSR § 7-67 (c) provides:

Effect of Reallocation on Incumbent

* * *

c) Effective date:

1) If a position is to be reallocated and the employee occupying the position is eligible to remain in the position, the reallocation must become effective August 1 following the submission of the request for the review of the position.

Again, much like CSR §9-64, the rule does not clearly state an effective date. However, it shows a "page date" of June 3, 1998. Therefore, it appears to have been in effect when the Career Service Board and the City Council passed their respective Resolution and Ordinance concerning the Appellants' classification and pay increase some two years later in 2000.

Under the Denver City Charter, the City Council has the "power to appropriate all money necessary for the expenses of the city and county . . ." [City Charter, B1.12]. The Council also has been vested with:

All the legislative powers possessed by the City and County of Denver, conferred by Article XX of the constitution of the State of Colorado, or contained in the charter of the City and County of Denver, and otherwise existing by operation of law, except as otherwise provided by this amendment shall be vested in a board of councilmen . . ." [City Charter, B1.1].

Article XX of the Colorado Constitution is the Home Rule provision for Cities and Towns, including the City and County of Denver. It provides for a broad range of powers for the Home Rule City. Among other powers, Section 6 of the Home Rule provision grants the Home Rule City (and therefore the City Council) the authority to create "employments", to define and regulate the powers, duties, qualifications and terms or tenure of all employees, to levy and collect taxes, and to issue, refund and liquidate all kinds of municipal obligations. It also provides that "it is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters."

The City Charter and Career Service Rules vest authority in the Career Service Board to, among other things, "amend and repeal personnel rules concerning the Career Service, . . ." CSR §2-10 (b) (3)¹. They are also vested with the duty and authority to make annual recommendations to the City Council: "on classifications and pay plans for all positions in the Career Service." CSR §2-10 (c) (3)².

¹ CSR §2-10 (b)(3)

Duties and powers of the Career Service Board: The Career Service Board shall [sic]and shall have the following powers:

* * *

- 3) From time to time make, amend and repeal personnel rules governing the Career Service, providing for just and efficient personnel management and the creation and development of a merit system, providing for equal employment opportunities, and for the manner and means or methods in and by which the duties and powers bestowed upon it by this charter shall be carried out;

² CSR §2-10 (c)(3):

Classification and pay plans for Career Service and certain other employees: "The City Council annually shall by ordinance enact, after annual recommendations are made by the Career Service Authority, classification and pay plans for all positions in the Career Service and for the positions not in the Career Service, based upon the duties of the several positions; except those to which the provisions of Section C5.19 of this Charter apply, and except the ranks in the classified services of the fire and police departments to which the provisions of Sections C5.45 and C5.48 and the subsections thereunder of this Charter apply." (Section C5.26)

Analysis

The City and County of Denver, as a Home Rule City under the Colorado Constitution, has broad powers to govern itself. This has been held by the courts to mean that the power "should be as broad as possible within the scope of a republican form of government of the state." *City of Fort Collins v. Public Util. Comm'n.* 69 Colo. 554, 195 P. 1099 (1921). This broad power includes the power to determine its employees, *City & County of Denver v. Rinker*, 148 Colo. 441, 366 P.2d 548 (1961), and the power generally to levy taxes, *Berman v. City & County of Denver*, 156 Colo. 538, 400 P.2d 434 (1965).

Under the Colorado Constitution, Career Service Rules and the City Charter, the City Council, (based upon recommendations from the Career Service Board), without question has the full authority to make classification, salary and compensation determinations in relation to its employees. The Hearing Officer has been unable to find, and the Agency has not provided, any authority under Career Service Rules or the City Charter that would vest the Hearing Officer with jurisdiction or authority to override the Ordinances of the City Council on these issues. Indeed, it is hard to imagine such authority could exist, given that under the provisions of the Colorado Constitution and City Charter cited, the City Council, as the elected legislative body, is the final authority on all fiscal matters related to City business, including the compensation of its employees.

In this case, the Career Service Board adopted a classification report and made a recommendation to the City Council, which then adopted the recommendation in the form of an Ordinance. That report included compensation recommendations. The system worked exactly as it was intended. The Career Service Board and the City Council acted in unison to determine the compensation, past and future, for the Appellants. That report, recommendation, Resolution and Ordinance became the law of the City and County of Denver. It also became the law of this case. The Career Service Board Resolution and therefore, the City Council Ordinance, included a specific command that the classification change include a 2.25% pay increase, which was determined to be an increase of \$266 per month (Wenger) and \$260 per month (Harris). [Exhibits 26 & 27].

The only other question then, is the timing of this pay increase. The resolution of the Board simply states that the classification reports are adopted. But the report from Career Service upon which the resolution was based indicates under the section entitled "EMPLOYEE IMPACT", that: "**the pay grade change will be effective August 1, 1997.**" [Emphasis added]. The report further states that the proposed pay grade change will "boost employee morale and correct a perceived pay inequity relative to peer positions". [Exhibits 26 & 27]. Thus, the report and resolution themselves state a rational basis for the raise and the retroactive application.

Moreover, the Appellants' Requests for Classification Consideration [Exhibits 1 &

2] indicate that the new duties which form the basis of the reclassification request were assigned as early as February 1995. This assertion is never refuted in the audit process or in the Classification Report. This is a further basis for the decision.

The determination by the Board and Council to award a 2.25% increase from August 1, 1997 is also supported by Career Service Rules existing at the time of their respective actions. Both CSR §7-67 and the newer version of CSR §9-64 (allowing a 2.25% increase), had been in effect for some two years prior to the Resolution and Ordinance. The evidence establishes that the heads of both Career Service and the Department of Aviation agreed that the Appellants should be compensated in some fashion for the long wait they had to endure in order to obtain a decision on their audit request. This suggests that the Career Service recommendation upon which the resolution and Ordinance were based relied upon Career Service Rules as well as considerations of equity and fairness. Therefore, the action by the Board and the Council had a rational basis, cannot be found to be arbitrary or capricious, is supported by existing Rules in effect at the time and is not otherwise *Ultra Vires*.

The Hearing Officer finds and concludes that the Board and the Council have previously determined the rate of pay for the Appellants as a result of their reclassification to be 2.25% retroactive to August 1, 1997. There appears to be no authority for the Hearing Officer to modify this Ordinance of the Council or Resolution of the Board. The issue of the Hearing Officer's jurisdiction when the Council and Board adopt conflicting resolutions is not before the Hearing Officer and therefore not addressed.

The issues of "step to step" pay increase and whether the reclassification was a reallocation or reclassification are moot. Likewise, the past practices of the Career Service Authority in similar situations are also moot. However, the Hearing Officer notes that the Career Service Authority has in the recent past, on at least one occasion, calculated back pay awards on a "step to step" basis. In fact, a 2.25% increase to the Appellants is significantly less than a "step to step" approach and would therefore not be inconsistent with past practices.

Amount of Arrearages

The parties and counsel have previously stipulated as to the amount of arrearages for each respective Appellant, if the 2.25% increase is effective as of August 1, 1997. Therefore the Hearing Officer need not and will not recalculate those arrearages. In the case of Ms. Wenger, the parties have stipulated in advance that the application of the 2.25% increase as of August 1, 1997 results in an overpayment of ONE THOUSAND TWENTY SIX DOLLARS AND FIFTY CENTS (\$1,026.50). In the case of Ms. Harris, her overpayment is stipulated to be ONE THOUSAND SIX HUNDRED AND SIXTY FIVE DOLLARS AND NO CENTS (\$1,665.00). [Exhibit 28].

Payback schedule

The remaining issue is the determination of an appropriate payback schedule for the Appellants. Both testified that in reliance upon representations of the Agency they had already spent the pay adjustment money that they had received. The Hearing Officer finds that their reliance was not unreasonable. They had waited three years on their request for reclassification. They were told in writing that their classification request had been acted upon favorably. They received checks from the City, which was represented to be for this purpose. At that point they had every reason to believe they were entitled to the full amount. The Hearing Officer finds that fundamental fairness requires that any amounts they must pay back be done in such a way as to avoid a hardship on the Appellants.

Both Appellants testified that they could pay back \$50 per month without undue hardship. In the case of Ms. Wenger, this would require 21 months. In the case of Ms. Harris, it would require 34 months. Both pay back periods are less than the three years they waited for their reclassification and resulting back pay. The hearing officer finds the \$50 per month payback in both cases to be fair and reasonable under the circumstances.

AGENCY MOTION TO DISMISS

As to the Agency Motion to Dismiss, the Agency argues that the Appellants cannot be compensated for stress and financial hardship, citing CSR §19-27. The Hearing Officer has previously ruled that there are no provisions in the Career Service Rules for the award of compensatory damages such as stress and financial hardship. (See *In the Matter of the Appeal of Donnie D. Dollison*, CSA appeal No. 141-00.) Accordingly, as to the relief requested by the appellants for stress only, the Motion is GRANTED.

While the Appellants have not cited a "specific" rule violated by the Agency, the Hearing Officer notes that the dispute involves the Appellants' compensation. As such it is a fundamental part of the employer-employee relationship. Compensation is a fundamental property right requiring due process before denying the employee such a fundamental right. When as here, the Agency seeks a refund of money from an employee, the burden falls upon the Agency, not the Appellants, to prove it is entitled to such a refund. Therefore it is incumbent upon the Agency to establish its claim, by a preponderance of the evidence. To require the Appellants to cite a rule violation under these circumstances would be to require the Appellants to establish a negative.

Finally, the Hearing Officer notes that CSR §19-10 d) provides for, but does not require, dismissal for failure to cite a rule violation. The Agency's motion is therefore DENIED on this basis.

Next the Agency contends that the Hearing Officer "cannot set Appellants' salaries at levels different from those prescribed by the Career Service Rules". This assertion

begs the question by assuming that the Hearing Officer will be setting Appellant's compensation at a level different than allowed under the rules. The first issue is to determine what is the "prescribed" salary level for both Appellants. As the body of this decision indicates, that determination makes all other issues moot. Accordingly, the Agency's Motion to Dismiss with Prejudice is not well taken for the reasons set forth above and is hereby DENIED.

ORDER

As to Ms. Wenger, the action of the agency is MODIFIED, and she is ordered to REFUND the sum of ONE THOUSAND TWENTY-SIX DOLLARS AND FIFTY CENTS (\$1,026.50). This amount is to be refunded to the Agency at the rate of FIFTY DOLLARS per month (\$50) commencing April 1, 2001.

As to Ms. Harris, the action of the agency is MODIFIED, and she is ordered to REFUND the sum of ONE THOUSAND SIX HUNDRED AND SIXTY FIVE DOLLARS AND NO CENTS (\$1,665.00). This amount is to be refunded to the Agency at the rate of FIFTY DOLLARS per month (\$50) commencing April 1, 2001.

Dated this 5 day of
March, 2001.



Michael L. Bieda
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 OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 6 day of March, 2001, addressed to:

Diane Wenger
6650 E. Arizona Ave. #147
Denver, CO 80224

Dorothy Harris
9396 Desert Willow Rd.
Littleton, CO 80126

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** depositing same in interoffice mail, this 6 day of March, 2001, addressed to:

Richard A. Stubbs
Assistant City Attorney

James Thomas
Department of Aviation
Denver International Airport

V. Granada