

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

Appeal No. 41-07

ORDER DENYING AGENCY'S MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

ROBERT WILLIAMS,
Appellant,

vs.

DEPARTMENT OF AVIATION,
and the City and County of Denver, a municipal corporation,
Agency.

On September 26, 2007, the Agency filed its "Motion to Dismiss." The Appellant did not file a direct response, but filed his "Appellant's Response to Question of Jurisdiction" on September 27, 2007. I have reviewed the pleadings, the file, and researched the questions raised by the pleadings and my prior Order regarding jurisdiction in this case. My findings and order follow.

In an agency motion to dismiss prior to hearing, the following principles apply: statements in the Appeal must be viewed in the light most favorable to the appellant; the appellant's assertions of material facts must be accepted as true; and the motion to dismiss must be denied unless it appears beyond doubt that the appellant cannot prove that the facts as he alleges them would entitle him to relief. Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996). The Agency raises the following arguments in support of its motion.

1. The action is not one of involuntary demotion. The facts of this case raise questions about which Career Service Rules are implicated by the Agency's actions. The Agency argues the Appellant has admitted this action is not one of involuntary demotion, as proven by the lack of disciplinary action, and therefore if the action questioned was a demotion, it was voluntary. While the Agency's statement, that no discipline was involved, is true as far as it goes, it does not necessarily follow that the demotion was voluntary. Under the CSA Rules demotion is allowed under the following circumstances: in lieu of lay-off; in lieu of separation for disqualification; in lieu of separation during probation; and voluntary demotion in lieu of lay-off. CSR 5-74 a). While the Agency alleges the demotion was voluntary, it does not claim there was an underlying lay-off action. In addition, voluntary demotion presumes the action was originated by the applicant, CSR 9-33 A, something the Appellant directly disputes. [Appellant's Response to Question of Jurisdiction, p.2].

Finally, the parties dispute the voluntariness of the Appellant's reassignment, thus raising a question of fact and raising an additional question whether the Appellant was coerced into a "voluntary" demotion, see CSR 5-74d)2), a finding that cannot be determined prior to hearing.

2. The Appellant failed to file a grievance, thus depriving the Hearing Officer of jurisdiction. The Agency's argument here is that the Appellant "seems to be complaining about" a flaw in the interactive process, and seeks to be returned to his prior position. The Agency reasons if the Appellant is complaining about the process, then he was required first to file a grievance, and not direct appeal. At this stage of the proceedings I may not assume the propriety of the Agency's assumption. The facts need to be developed further to determine whether this is a failed disqualification, a successful voluntary demotion, or something else.


3. The issue of the propriety of Appellant's being placed on interactive process leave was not raised timely. Here too, there is a question of what Career Service Rule applies and consequently, what facts are at issue. The Agency states the Appellant failed timely to appeal his being placed on interactive process leave on November 29, 2006, thus depriving the Hearing Officer of jurisdiction, presumably under CSR 19-20 A. That rule requires an appellant to perfect his appeal within 15 days of the date of notice of the action being appealed. If, as suggested by the Appellant, the Agency undertook, but did not complete, a Rule 14 disqualification there remains an open question as to what date triggers the 15 day clock, since there has been no disqualification per se. On the other hand, if the Agency's action was a reassignment under CSR 5-84 F. as indicated by the Agency's documents, that process began in November 2006, and culminated with a reassignment or demotional appointment start date of July 23, 2007. [Agency's proffered exhibit 16]. The Appellant filed his appeal on July 9, 2007. Thus, at least under one scenario, the appeal is timely.

As found above, the Agency's proffered exhibits state its action was a re-assignment. [See, e.g. Agency's proffered Exhibit 10]. Reassignment is governed by CSR 5-84 F. and preceding sections. Prior to reassignment, there must be an interactive process initiated either at the request of an employee seeking reasonable accommodation, or by an agency upon notice of the employee's disability. CSR 4-84 E. 1. The purpose of the interactive process is (1) to determine whether the employee is disabled within the meaning of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq* (ADA), and (2), if so, whether the disabled employee may be reasonably accommodated in his current position. *Id.*

Importantly, no matter whether the employee or the agency initiated the inquiry, the CSA or its designee is obligated to make a final determination whether the employee is disabled under the terms of the ADA. *Id.* It is not apparent from the filings to date that a final determination was made prior to reassigning the Appellant, and the Appellant does not appear to concede Agency compliance. Thus, no determination may be made at this stage of the proceedings whether the Agency complied with re-assignment requirements of the Career Service Rules.

It does not appear beyond doubt that the Appellant cannot prove the facts, as he alleges them, would entitle him to relief. Because there remains a question of fact surrounding the Appellant's demotion, reassignment, or disqualification, I find I have jurisdiction under CSR 19-10 A.1.c., 19-10 A.1.d., or both sections. For these reasons I DENY the Agency's motion to dismiss.

Done October 26, 2007.



Bruce A. Plotkin
Career Service Hearing Officer

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I certify that, on October ^{27th}, 2007, I forwarded a correct copy of the foregoing ORDER, in the manner indicated below, to the following:

Mr. Dan G. Brown
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