

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

Appeal No. 02-02

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**ORDER OF DISMISSAL**

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IN THE MATTER OF THE APPEAL OF:

**GRANT CHAPPELL**, Appellant,

Agency: ASPEN Project, and THE CITY AND COUNTY OF DENVER,  
a municipal corporation.

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This Order concerns the hearing officer's Order to Show Cause ("Show-Cause Order") issued on January 25, 2002, and the parties' responses thereto. The Show-Cause Order was entered for Appellant's failure to state a CSR Rules violation, or otherwise describe actions by the Agency tending to suggest such a violation in the appeal of his grievance, as required pursuant to CSR Rule 19-10 d). Appellant filed a Response on February 11, 2002, and the Agency filed a Response on February 12, 2002. Upon consideration of those Responses, the hearing officer finds and concludes as follows.

**BACKGROUND**

Appellant's grievance challenged certain management actions by his supervisor affecting Appellant's job assignment and the general working environment. Appellant's allegations are as follows. Appellant complained of his supervisor's management ethic and general failure to supervise. Some of his supervisor's actions prejudiced Appellant, and another employee (the project director), in the eyes of his fellow employees, causing morale problems between Appellant and these employees. Appellant's supervisor sent an e-mail to the staff alleging problems with a sector of the Agency's project that was Appellant's responsibility. Appellant asserted that those complications arose from the supervisor's own performance failures. Finally, Appellant alleged that his supervisor's takeover of technical meetings he previously ran was in retaliation for a personal e-mail about the supervisor's actions that Appellant intended to send to his wife, but inadvertently sent to the supervisor. Appellant asserted that his supervisor's decisions and actions resulted in a "hostile work environment."

Appellant's grievance was denied. He appealed his grievance denial, requesting as a remedy that his supervisor be removed from her position for lack of management ethics and management decisions with which Appellant disagreed.

In Appellant's Response to the Show-Cause Order, Appellant cites CSR Rule 16-51 A. 6), "Carelessness in performance of duties." He also directly quotes the language from CSR

Rule 16-51 A. 4), "Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public," although he does not include the citation for this Rule. In support of these alleged CSR Rule violations, Appellant reiterates the supervisor's alleged poor management actions and decisions which appear in the underlying grievance. He apparently asserts that his appeal is based on his supervisor's violation of these CSR Rules.

Appellant further alleges "harassment and discrimination" because of his gender, because other employees did not like an assignment he received from the project director, another male employee, in lieu of them. Appellant asserts that his supervisor "told everyone" about this assignment to Appellant, and now his fellow employees perceive Appellant as favored in the eyes of the director. Appellant offers no CSR Rule citation for this alleged violation. However, CSR Rule 15-100, Harassment and/or Discrimination, specifically defines and prohibits unlawful "harassment and discrimination" in the workplace.

The Agency responded, arguing that the following principles have already been established through prior case law. First, the hearing officer lacks jurisdiction over a grievance against the management style of a supervisor, unless a clear CSR Rule violation results and was articulated in the original grievance. *See*, CSR Rule 19-10 d); In the Matter of the Appeal of Darrel D. Delimont, Appeal No. 315-01 (Dismissal entered 9/26/01; Attachment E to Agency's Response). The Agency argued that Appellant's grievance raised no such CSR Rules violations. The Agency posited that, therefore, any CSR rules violations described in Appellant's Response to the Show Cause Order have not been preserved because they were not articulated in Appellant's original grievance.

The Agency also argued that CSR Rule 16 defines the grounds upon which an employee may be disciplined, but does "not create an affirmative basis for an employee grievance." In the Matter of the Appeal of Byron West, Appeal No. 327-00 (Dismissal entered 12/26/01 by Robin R. Rossenfeld; Attachment F to Agency's Response). In that case, as in this one, the appellant sought the imposition of discipline upon his supervisor for alleged violations of CSR Rule 16.

The Agency further asserts that Appellant has failed to articulate any facts which tend to support a claim of harassment or discrimination, because he has not described any action by the Agency tending to show it has taken any actions against him because of his membership in one of the protected classes enumerated under CSR Rule 15-102.

Finally, the Agency asserts that Appellant has described no adverse employment action the Agency has taken against Appellant to establish a colorable claim of "retaliation."

### **DISCUSSION AND CONCLUSIONS**

The hearing officer's jurisdiction is a creature of statute. She has only so much authority as permitted under the CSR Rules. For the following reasons, the hearing officer concurs with the Agency's assertion that Appellant has not articulated any actions against him over which the hearing officer has jurisdiction.

The appeal of a grievance is generally permitted under CSR Rule 19-10 d). However, while an employee may grieve virtually any agency action, only certain agency actions are subject to appeal. Therefore, the appeal of a grievance is not in itself sufficient to establish jurisdiction over such appeal. First, CSR Rule 19-10 d) requires the appellant to state with specificity a CSR Rule violation as a *condition precedent* to jurisdiction over the appeal of a grievance. *See, In the Matter of the Appeal of Patricia Beer and Jan L. Obert*, Appeals Nos. 318-01 and 319-01 (Dismissal entered 12/18/01; Attachment G to Agency's Response); *In the Matter of the Appeal of Martha Douglas*, Appeal No. 317-01 (Order entered 3/22/02).

Furthermore, even an alleged violation of a CSR Rule is not necessarily sufficient to create jurisdiction. The employee must allege a violation over which the hearing officer has jurisdiction to hear the case and grant relief. *See, Beer*, above; *Delimont*, above; *In the Matter of the Appeal of Charlesetta Crutchfield*, Appeal No. 13-01 (Dismissal entered 4/13/01).

Finally, the substance of the appeal must be essentially the same as the substance of the grievance. The purpose for the grievance process is to provide an agency the opportunity to respond to the issue(s) in the grievance process *before* they are appealed. An appellant's failure to timely raise any issues in the grievance process results in a failure to preserve those issues on appeal. *See, Douglas*, above; *In the Matter of the Appeal of Michelle Felix*, Appeal No. 106-99 (Dismissal entered 9/30/99 by Hearing Officer Michael L. Bieda).

### ***1. Hearing officer's jurisdiction over alleged violations of CSR Rule 16.***

CSR Rule 16 provides an agency with the authority to impose discipline on an employee. *Only a city agency has such discretion.* The hearing officer's jurisdiction only arises when the disciplined employee challenges such disciplinary action. The hearing officer only has jurisdiction to affirm, reverse, or modify an agency's disciplinary action, *see*, CSR Rule 19-27, and then only insofar as such disciplinary action is against the appellant in a case.<sup>1</sup> The hearing officer has no jurisdictional authority to impose a disciplinary action demanded by one employee against another, such as the removal of Appellant's supervisor, which is the remedy he seeks. *See, Crutchfield*, above; *West*, above.

In addition, even if the hearing officer had jurisdiction over Appellant's requested remedy, she lacks jurisdiction over the management style and decisions of an Agency employee, unless and until 1) those decisions result in an alleged violation of Appellant's rights as they are set forth under the CSR Rules, and 2) the hearing officer is granted jurisdiction over the actions complained of in the CSR Rules. *See, Delimont*, above.

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<sup>1</sup>It is a well-established principle of law that the individual bringing suit must be the party aggrieved by the action complained of in order for "standing" to exist. Every action must be brought in the name of the real party in interest. C.R.C.P. 17(a). The "real party in interest" is the party who, by virtue of the substantive law, has the right to invoke the aid of the court to vindicate the legal interest in question. *Ogunwo v. American National Insurance Co.* 936 P.2d 606 (Colo. App. 1997). An employee who has not been the subject of a disciplinary action therefore does not have standing to appeal the disciplinary action on behalf of another.

**2. Appellant failed to articulate a colorable claim of harassment and discrimination.**

Appellant did not specifically allege "harassment" or "discrimination" in his grievance. He did, however, briefly reference "hostile work environment" in his grievance. While "hostile work environment" does not specifically appear in the CSR Rules, this theory can be marshaled to demonstrate a violation of prohibitions against "harassment and discrimination" as protected under CSR Rule 15-102.

However, "harassment and discrimination" and "hostile work environment" are legal terms of art having specific definitions and requirements that are different than the typical dictionary definitions. CSR Rule 15-102 clearly sets forth that "harassment and discrimination" is prohibited when it is directed at an individual "*because of race, national origin, sexual orientation, physical or mental disability, age, gender, marital status, military status, religion, political affiliation, or any other basis protected by federal, state, or local law or regulation.*" (Emphasis added.) Therefore, the hearing officer only has jurisdiction over such a claim only if it sufficiently alleges action against Appellant because of his membership in one of these protected groups.<sup>2</sup>

The category referenced by Appellant in his claim of harassment and discrimination in his Response to the Show-Cause Order is his gender. The basis for his claim is that others think of him as favored because of his assignments by another male. The hearing officer is familiar with no precedent in which an individual has successfully asserted a claim of discrimination because *others believe he is favored* as a result of his protected status.

The United States Supreme Court has set forth that harassment and discrimination cases may be advanced under two theories. First is harassment that involves actual economic impact on the employee (*e.g.*, the conditioning of economic benefits on sexual favors). Appellant has made no claim of such economic impact here.

In the absence of economic element, the employee can show conditions in the workplace which create a "hostile or offensive work environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, (1986). "Hostile work environment" is a legal theory used to refer to extreme, ongoing patterns of hostile discrimination against an individual in the workplace because of his or her status as a member of a protected class. Such cases are distinguished by graphic, overtly racist or sexist patterns of verbal or physical abuse. "... (H)arassment is actionable under a hostile work environment theory when the harassing conduct is 'sufficiently severe or pervasive to alter the conditions [of the victim's] employment and create an abusive working environment.'" Pizza Hut v. Lockard, 162 F.3d 1062, 1071, quoting Meritor, above, at 67. Some factors to be weighed include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23; Smith v. N.W. Fin. Acceptance Corp., 129 F.3d 1408, 1413 (conduct must be "sufficiently pervasive *or* sufficiently severe"). The harassing conduct must be "both objectively and subjectively abusive." Lockard, 162 F.3d at 1071.

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<sup>2</sup> Furthermore, the burden of proving such an allegation is typically on the appellant in the first instance. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The types of conflict Appellant has described do not rise to the level of "hostile work environment" constituting a theory of "harassment and discrimination" as set forth above. As matter of common sense, the hearing officer does not have the actual ability to make others stop engaging in the alleged "harassing" activities when they amount to nothing more than personality disputes and mere rudeness. Nor does she have the jurisdictional authority to impose a disciplinary action in the first instance. *See, Crutchfield, above.*

### **3. Ripeness of harassment and discrimination claim under CSR Rule 15-100.**

Further, even if Appellant had alleged a colorable claim of harassment and discrimination under CSR Rule 15-100, *et seq.*, such a claim cannot be initiated by filing a grievance. It must first be pursued by seeking the administrative remedies set forth in CSR Rule 15-100, *et seq.* before the claim is ripe for the hearing officer's review.<sup>3</sup> CSR Rule 15-103 requires the employee to:

- A. make it clear that such behavior is offensive to them and request that such behavior be discontinued, *and*
- B. report such conduct to their supervisor... If the complaint involves an employee's supervisor... the employee may go to another supervisor, to his or her agency human resource representative or directly to the Career Service Authority Employee Relations Section.

(Emphasis added.) Under CSR Rule 15-104, the agency or the Career Service Authority is then mandated to

immediately undertake effective, thorough, and objective steps concerning the allegation of harassment or discrimination. If an investigation is deemed necessary, it will be completed and a determination regarding alleged harassment will be made and communicated to the employees as soon as practicable...

Further, CSR Rule 15-105 places the onus of taking remedial action upon a determination of harassment or discrimination on the agency:

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<sup>3</sup> If Appellant were alternatively asserting a claim of discrimination under CSR Rule 19-10 c), his grievance had to sufficiently articulate the basis for this claim in order for it to be preserved on appeal before the Hearings Office. *See, In the Matter of the Appeal of Terri Sapp-Jones*, Appeal No. 97-99 (Dismissal entered 12/7/99 by Hearing Officer Michael L. Bieda). As Hearing Officer Bieda said in that case, to allow an appellant to "raise the spectre of discrimination for the first time on appeal... would undermine the clear intent of the rules to allow the agency the opportunity to fully address all issues raised at the grievance level before allowing and appeal..." Appellant did not articulate such an allegation in his grievance. Instead, he described numerous personality conflicts between himself and others resulting from the supervisor's alleged poor management style and ethic, and allegations of favoritism toward Appellant himself after being assigned a certain project. These allegations therefore have not been preserved on appeal. *See, Felix, above.*

If it is determined that unlawful harassment or discrimination has occurred, the *agency* will take effective remedial action commensurate with the severity of the offense. Appropriate action will be taken to deter any future harassment.

(Emphasis added.) Finally, CSR Rule 19-10 f) makes clear that the Hearings Office does not have jurisdiction over such a case until the process described above is completed:

- f) Harassment and Discrimination: The disposition *by a supervisor or other appropriate official of a complaint of harassment or discrimination* may be appealed if such disposition has not resulted in stopping the prohibited behavior.

(Emphasis added.) The remedies set forth here are clearly distinct from the grievance process set forth under CSR Rule 18. Only when these administrative actions have been taken does the hearing officer have jurisdiction to reverse, affirm or modify the actions taken by the agency.<sup>4</sup>

#### ***4. Appellant's allegations of retaliation.***

Appellant described his supervisor's takeover of a meeting schedule he initiated as the act of alleged "retaliation." "Retaliation," as it is prohibited under CSR Rule 15-106, specifically refers to actions taken against an individual because he has reported "harassment and discrimination." Appellant in this case has not demonstrated that he has ever made a report of "harassment and discrimination," let alone that the "retaliation" he describes could in any way be related to such a report. He has therefore failed to articulate a violation of this CSR Rule.

### **ORDER**

As to Appellant's grievance appeal, Appellant has not made any claim over which the hearing officer has jurisdiction, and has failed to state any claim upon which relief can be granted.

WHEREFORE, in light of the above analysis and conclusions, Appellant's appeal of the grievance is hereby DISMISSED WITH PREJUDICE.

As to Appellant's separate claim of harassment and discrimination, Appellant has failed to exhaust his administrative remedies. That claim is DISMISSED WITHOUT PREJUDICE. If Appellant seeks an investigation of harassment and discrimination under CSR Rule 15-100, *et seq.*, then the Agency is ORDERED to notify Appellant of the disposition of the investigation

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<sup>4</sup> Conversely, allegations of discrimination have historically been brought before the Hearings Office on appeal under CSR Rule 19-10 c). Typically, cases of discrimination brought under this subsection allege discrimination as the motivation of some other action by the agency adversely affecting an individual's employment status, in violation of the CSR Rules governing that action. In those cases, the hearing officer otherwise has the jurisdictional power to grant relief based on the underlying action. *See, e.g., In the Matter of Robert Stone*, Appeal No. 12-01 (entered 4/12/01) (Appellant regarded as disabled during failure to transfer and termination in alleged violation of CSR Rules); *In the Matter of the Appeal of Anthony Gallegos*, Appeal No. 99-98 (entered 10/12/99) (Agency failed to promote qualified Hispanic male Appellant in lieu of White male applicant).

within ten (10) calendar days of receipt of notice as calculated under CSR Rule 19-22. The Agency must provide such notice in writing. Such written notification shall include notice of Appellant's right to appeal the disposition within ten (10) calendar days under CSR Rules 19-10 f) and 19-22.

Dated this 2nd day of March, 2002.

  
Joanna Lee Kaye  
Hearing Officer for the  
Career Service Board