

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

Appeal No. 65-06

ORDER

IN THE MATTER OF THE APPEAL OF:

JOSEPH A. DIGREGORIO,
Appellant,

vs.

DEPARTMENT OF LAW, CITY ATTORNEY'S OFFICE,
and the City and County of Denver, a municipal corporation,
Agency.

The Agency has filed a motion to dismiss this appeal, and Appellant filed a timely response. Upon review of the pleadings and the parties' submissions, it is found and ordered as follows:

Background

Appellant, Senior Assistant City Attorney Joseph A. DiGregorio, applied for the position of Section Supervisor of the Child Support Enforcement Unit of the Denver City Attorney's Office in June 2006. On Aug. 1st, Appellant was informed that he had not been selected to fill the position. Appellant filed a timely grievance challenging the minimum qualifications of the selected applicant and a request for an investigation of his charges of age and disability discrimination. City Attorney Cole Finegan orally responded to the grievance on Aug. 25th by informing Appellant the hiring decision had been rescinded, and that he could compete for the position when it was re-opened. On Aug. 28, 2006, Appellant filed this appeal, which asserts jurisdiction under 1) CSR § 19-10 B.2 as an appeal of his grievance, and 2) CSR § 19-10 B.1., asserting claims of age and disability discrimination and retaliation for the filing of the grievance. The appeal was stayed pending investigation and disposition of the complaints of discrimination and retaliation. The appeal seeks an order prohibiting the reopening of the hiring process and instructing the Agency to promote Appellant to the Section Supervisor position. After the issuance of an order to show cause on the discrimination and retaliation claims, the Agency completed its internal investigation on those claims, and this appeal was set for hearing.

Analysis

The Agency argues that the Hearing Officer lacks jurisdiction over the grievance appeal because Appellant has not claimed the Agency action violated any Career Service Rule that applies to the Agency, and that the Hearing Officer has no power to award the kind of relief requested. Appellant responds that CSR § 3-12 applies to Agency actions with regard to the appointment of all Career Service employees, not just to the Career Service Authority's certification of the qualifications of applicants.

Jurisdiction of a grievance appeal requires that the challenged action "results in an alleged violation of the Career Service Rules ("Rules"), the City Charter, ordinances relating to the Career Service, executive orders, or written agency policies and negatively impacts the employee's pay, benefits or status." CSR § 19-10 B.2.a. Here, Appellant alleges that the failure to select him to the position of Section Supervisor was a violation of CSR § 3-12, which states that selections shall be based solely on merit and fitness for the position.

CSR § 3-12 recites the charter provisions relating to employment; in pertinent part, "[t]he personnel rules shall provide that: 1. Appointments shall be made solely upon merit and fitness to perform the work." Pursuant to that direction, Career Service Personnel Rules 3 and 4 set forth the means by which the city recruits, examines, certifies and selects candidates on the basis of merit and fitness. Selection for hire is based upon the qualifications needed to perform the essential functions of each position, as measured by the tests and other assessment tools developed by the Career Service Authority. CSR § 3-23 *et. seq.* The merit-based nature of the personnel system requires that the education, experience and other qualifications for each job classification shall be tied to the responsibilities of the position. Rule 7. In addition, the Career Service Board has adopted guidelines for determining minimum education and experience requirements and their equivalencies to afford employees "the broadest opportunity possible to demonstrate possession of the knowledge(s), skills and behaviors required . . . to assure successful performance of the essential duties and responsibilities of the job." Rule 3, CSA Education & Experience Requirements & Equivalencies Policies & Guidelines Approved by CS Board, effective June 26, 2002.

Under this personnel system, an appointing authority selects the candidate believed most likely to achieve job success by evaluating each candidate's merit and fitness to perform the responsibilities of the position. Rules 3 and 4 contain the various methods to enable a decision-maker to make such judgments. A violation of those rules may be the basis for an appeal under CSR § 19-10 B.2.a. However, § 3-12's pronouncement of merit selection as the guiding principle is not a rule that can serve as the basis for jurisdiction of an appeal. *In re Kanan*, CSA 09-02, 5 (3/18/02). Similarly, jurisdiction in the federal sector requires an allegation that "a law, rule or regulation implementing or directly concerning the [merit system] principles is violated." H. Conf. Report No. 1717, 95th Cong., 2nd Sess. 128 (1978), U.S.Code Cong. & Admin. News 1978, pp. 2723, 2861. See also *Newbold-Reese v. Dept. of Veterans Affairs*, 2006

MSPB LEXIS 6611 (Nov. 14, 2006); Wells v. Harris, 1 MSPR 208 (1979); and Saunders v. MSPB, 757 F.2d 1288 (Fed.Cir. 1985). Just as the merit system principles in federal public employment establish goals for public personnel management, merit selection under the Career Service Rules is not self-executing; i.e, the rule establishing the principle itself does not provide a jurisdictional basis for an appeal.

Appellant claims that the following events during the hiring process showed pre-selection of an unqualified candidate: 1) before the second interviews were held, Cheryl Sicotte, the candidate who was ultimately selected, informed him she had already been hired, 2) Mr. Mootz did not answer Appellant when he asked why he was not hired, and 3) Mr. Mootz did not call Appellant's references before making the hiring decision. Appellant has not alleged that these acts violated the charter, ordinances, policies, or specific Career Service rules.

In addition, Appellant does not claim that he has been denied the position sought. The offer to Ms. Sicotte was rescinded, the position remains vacant, and Appellant has been invited to reapply once it is reopened. Appellant asserts that he has been denied selection as the most qualified candidate after the disqualification of the top-ranked candidate. It is axiomatic that administrative jurisdiction is limited to that defined by the rules creating the administrative forum. The rules governing the jurisdiction of the Hearing Office do not grant it the power to select a specific candidate to an open position. For these reasons, there is no jurisdiction under CSR § 19-10 B.2. to support the appeal of the grievance.

2. Age and Disability Discrimination

Appellant next claims jurisdiction under CSR § 19-10 B.1. of the Agency's disposition of his discrimination complaints. Appellant is 51 years old and has diabetes, and Ms. Sicotte, the person initially selected, is alleged to be somewhat younger. Ms. Sicotte was later determined not to be qualified, and so the offer was rescinded and the position is still vacant. Appellant also cited other instances where Mr. Mootz made non-competitive appointments for open positions. Appellant does not allege that age or disability was a factor in those decisions, but argues instead that they demonstrate there is precedent for a non-competitive selection.

To prove jurisdiction over a claim of intentional discrimination, Appellant must allege that the action taken against him can be affected by the powers granted to the Hearing Office under the Career Service Rules. Appellant challenges the Agency's decision to reopen the position for competitive hire as an adverse action, and requests as relief an order to appoint him to the position without further competition. As to the decision to reopen, Appellant does not argue that the Career Service Rules protect a right to a non-competitive promotion. In fact, the rules' stated purpose to provide for merit-based appointments runs directly counter to such a right. Further, hearing officers are granted only the power to affirm, modify or reverse the action at issue. CSR § 19-55. The rules provide no authority for an order that an appointing authority hire a specific employee, and no other relief would be effective to reverse the challenged action.

Therefore, Appellant has not alleged that there is jurisdiction to award the requested relief in support of his claims of discrimination.

3. Retaliation

Finally, Appellant claims that the Agency retaliated against him for filing a grievance challenging the qualifications of the successful applicant by requiring him to reapply for the position once it is reopened. A retaliation appeal requires a showing of conduct that is "materially adverse to a reasonable employee or job applicant", which has been interpreted as meaning that it must be harmful enough that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Railway Co. v. White, 2006 U.S. LEXIS 4895, 8 (2006).

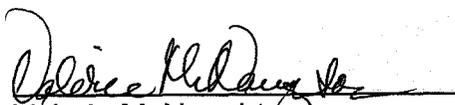
Thus, Appellant must show that the Agency's decision to reopen the position for competitive hiring rather than select Appellant for the position is materially adverse to a reasonable employee. The pleadings and exhibits do not demonstrate that adverse action has been taken against Appellant.

Order

Based on the foregoing findings, it is ordered as follows:

1. The appeal of the grievance is DISMISSED.
2. The appeals of the complaints of age and disability discrimination are DISMISSED.
3. The parties may submit briefs, affidavits and exhibits on the issue of the sufficiency of the retaliation claim on or before **January 29, 2007**.

Dated this 17th day of January, 2007.


Valerie McNaughton
Hearing Officer for the
Career Service Board