

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

Appeal No. 333-01

DISMISSAL ORDER

IN THE MATTER OF THE APPEAL OF:

DONNIE L. DOLLISON, Appellant,

v.

Agency: Denver Health and Hospital Authority, Community Health Services.

This appeal is before the Hearing Officer for consideration of an Order to Show Cause dated October 11, 2001. The Appellant filed his response on October 19. Denver Health and Hospital Authority ("Hospital") chose not to file a response. The Hearing Officer has considered the arguments presented by the Appellant, including the exhibits attached thereto, all the documents previously submitted in this appeal, and the applicable rules.

The issue before the Hearing Officer is whether this appeal should not be dismissed as being untimely pursuant to CSR §§ 18-12 4 and 19-22 a).

Relevant CSR Provisions

CSR §18-12 provides as follows:

Section 18-12 Grievance procedure

If a work related dispute was not resolved through alternative dispute resolution or if alternative dispute resolution was not previously attempted and a career service employee has a grievance as defined in Section 18-10 (a) of this rule, the employee may file a grievance according to the following procedures:

1. **Form:** The grievance shall be presented in writing and shall be dated. It shall include the name and address of the grievant, the action which is the subject of the grievance, the date of the action, and a statement of the remedy sought. The grievance form shall have a certificate of mailing or certificate of hand delivery which indicated the date the grievance was placed in the mail or was hand delivered to the immediate supervisor.
2. **Filing with Supervisor:** The employee shall present a grievance to the immediate supervisor within ten (10) calendar days after notification of the action which gives rise to the grievance. The supervisor shall consider the grievance and within ten (10) calendar days give the employee dated, written notice of a decision. The immediate supervisor's written decision shall contain a certificate of mailing or a certificate of hand delivery which

indicates the date the supervisor's decision was mailed or hand delivered to the employee. The period of time shall be computed in accordance with subparagraph 19-22 a) 2).

3. Filing with Agency Head: If the response of the immediate supervisor does not resolve the grievance and the employee wishes to pursue the grievance further, the employee shall present the grievance to the head of the agency, or designee, in writing within ten (10) calendar days after receiving the decision of the immediate supervisor. The grievance form filed with the head of the agency or designee must contain a certificate of mailing or certificate of hand delivery.

If the immediate supervisor has not responded to the grievance within ten (10) calendar days and the employee desires to pursue the grievance further, the employee must present the grievance in writing to the head of the agency or designee no later than ten (10) calendar days after the supervisor's response was due. The grievance form filed with the head of the agency or designee must contain a certificate of mailing or certificate of had delivery.

The head of the agency, or designee, shall consider the grievance and shall give the employee dated, written notice of a decision within ten (10) calendar days from the date contained on the certificate of mailing or certificate of hand delivery. The written decision from the head of the agency or designee shall contain a certificate of mailing or certificate of hand delivery. The period of time shall be computed in accordance with subparagraph 19-22 a) 2).

4. Filing with the Career Service Authority: If the employee still feels aggrieved after receipt of this decision, or the agency head has not responded within ten (10) calendar days, and the grievance concerns an alleged violation of Charter provisions relating to the Career Service, ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of Rule 19 APPEALS. The period of time shall be computed in accordance with subparagraph 19-22 a) 2.

A copy of the grievance and the replies from the immediate supervisor and the agency head or designee shall be attached to the appeal to the Hearings Officer.

CSR § 19-22 a) provides as follows:

19-22 Time Limitation and Form of Appeal

- a) Time Limitation

- 1) Every appeal **shall** be filed at the office of the Career Service Authority within ten (10) calendar days from the date of notice of the action which is the subject of the appeal.
- 2) The computation of the ten (10) calendar days shall be as follows:
 - (a) **The date of notice of the action shall be** the date of the delivery of a notice if handed to the appellant, or **the date of mailing of the notice if sent by U.S. Mail or interoffice mail.**
 - (b) The period of time for filing the appeal **starts on the day following the date of notice of action** or the date of inaction.
 - (c) Unless otherwise specified, all time periods are calendar days.
 - (d) If the final date of the appeal period falls on a day the Career Service Authority office is not open for business, the day for appeal shall be construed to be the next working day.
 - (e) **The appeal period ends at 5:00 p.m. (close of business) on the final date for appeal.**

(emphasis added)

History of the Case

Appellant alleges that the date of the action that underlies this grievance occurred on August 1, 2001. He served the first step in his grievance with his direct supervisor, LaVerne McQueary, on August 10. In the original grievance, Appellant requested that all negative written reprimands dealing with Rick Hunt and Jim Garcia be removed from his file. He also requested a transfer from his current department. The grievance was denied at the first step in on August 24. Ms. McQueary stated that the written reprimand was dated September 1, 2000 (almost a year earlier) and that the time to appeal the written reprimand had passed. Therefore, it would remain in Appellant's file. The denial of the grievance went on to say that Appellant was free to pursue employment opportunities with the Hospital, within the CSA system or with any outside agency he felt would be appropriate.

Appellant filed the second step grievance with Dr. Patricia Gabow on August 24, 2001. Dr. Richard Wright, Director, Community Health Services, and Dr. Gabow's designee for the purposes of this grievance, denied the grievance on September 4, 2001. A copy of the denial of the grievance was mailed to Appellant on September 4.

Appellant then filed his appeal of the denial of the grievance with the CSA Hearing Office. It was received at the Hearing Office at 4:48 p.m. on September 17, 2001.

Discussion

It is well established that the timely filing of a notice of appeal is a jurisdictional requirement. *Widener v. District Court*, 200 Colo. 398, 615 P.2d 33 (1980). If the notice of appeal is not filed within the time limits, the tribunal loses jurisdiction over the matter. Further, as the Colorado Supreme Court stated in *Brock v. Nyland*, 955 P.2d 1037 (1998), a jurisdictional prerequisite can be raised as a defect at any time. It can even be raised *sua sponte* by the court because it must first determine that it has subject matter jurisdiction over a case before it can exercise power over the matter. See also, *Triebelhorn v. Turzanski*, 149 Colo. 558, 561, 370 P.2d 757, 759 (1962) ("[T]he defense of lack of jurisdiction over the subject matter can be raised at any time, even for the first time in this Court, and [] a trial court which in fact lacks jurisdiction over the subject matter cannot acquire jurisdiction over the subject matter even though the parties expressly or impliedly consent thereto.").

In the instant case, Rule 19-22 requires that the notice of appeal be filed at the CSA office by 5:00 p.m. (the close of business) of the tenth calendar day after the notice of the action that is the subject of the appeal. The only reason to extend the time provided by the Rule is if the tenth calendar day falls on a weekend or any other day the CSA office is not open for business.

That is not the case here. It is very clear that September 14, 2001, the tenth day after Dr. Wright mailed the denial of the grievance to Appellant through the interoffice mail, was a Friday. It was also a day the CSA Hearing Office was open for business.

The Appellant's argument that his appeal is timely because he placed it in the mail on September 6 is legally insufficient to confer jurisdiction upon the Hearing Officer. CSR §19-22 requires that the "filing at" be completed within the time allotted. While Appellant might have mailed his notice of appeal from the U.S. Post Office within ten days after the issuance of the denial, the date of mailing is not relevant. The date of receipt of the appeal at the CSA office is the controlling date. *In the Matter of the Appeal of Gary Aguirre*, CSA Appeal No. 134-99 (Case dismissed because, although the appellant placed his appeal in the interoffice mail before the ten days had run, the appeal was not received in the Hearing Office by the close of business on the tenth day.) The notice of appeal was filed at 4:48 p.m. on September 17, 2001. The appeal was three days late. Therefore, it is untimely pursuant to CSR § 19-22 a).

Appellant's other arguments as to why his failure to comply with the CSR must be excused are likewise legally deficient.

The Appellant claims that the August 24, 2001, letter from Ms. McQueary refers to an incident that would not happen for another week. The Hearing Officer doubts that Ms. McQueary is psychic and can predict future events. In any case, the letter refers to a written reprimand that was issued almost a year earlier, not a week into the future. As stated by Ms. McQueary, the time to grieve that written reprimand had long since passed when Appellant filed the grievance on August 10, 2001. If the Hearing Officer did not have jurisdiction over this matter because the notice of appeal was filed late, the Hearing Officer would have entertained a motion to dismiss based upon the untimeliness of the grievance itself. See CSR §18-12 2 (requirement that grievance be filed within ten calendar days of the action which is the subject of the grievance).

The fact that Appellant was "out-of-state from September 7" does not excuse his failure to file the appeal before September 14. First, his presence in the State is not necessary to make an appeal timely; only the filing of the appeal by the close of the tenth business day following the notice of the denial of the grievance is required. Second, he admits he mailed the appeal on September 6. He could have hand delivered or faxed it to the Hearing Office on the same day to ensure its timely delivery.

His next argument is that the United States Post Office is at fault rather than he. While the Post Office may have delivered the Order to Show Cause to Appellant within two days of its mailing, or whether it may actually "verify" time of delivery between two Denver addresses to be two days, the fact that the delivery of the notice of appeal took longer this time not an excuse. Appellant chose to use the United States Post Office instead of hand delivery, fax, or even the notoriously slow interoffice mail. He assumed the risk of slow delivery by the Post Office.

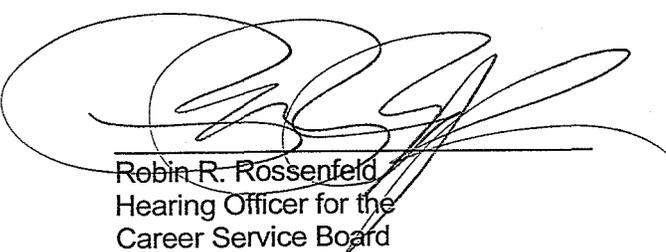
Finally, Appellant seems to allude to the fact that Ms. McQueary did not comply with the requirements of CSR §18-12 2 and responded to the grievance late. Appellant seems to assume that Ms. McQueary's failure to comply with the ten-day requirement at an intervening step means that this Hearing Officer has jurisdiction. Unfortunately for Appellant, this is not the case.

Ms. McQueary's failure to comply with the ten day requirements of CSR §18-12 2 has no real effect on the jurisdictional question since Appellant filed at the second step with Dr. Gabow within ten days of the day Ms. McQueary's response was actually due (August 20, not August 24). (There might have been a question about the admissibility of the August 24 letter had this matter gone on to hearing, but that question, given the Hearing Officer's decision in this Order is moot.)

The issue here is this Hearing Officer's ability to hear the case, not a possible waiver or error below. The use of the word "shall" in CSR §19-22 a) refers to and constrains the tribunal's jurisdictional time limits. Possible waivers by the parties of time limits in the intervening steps under CSR Rule 18 are not relevant to this tribunal's jurisdiction.

The Hearing Officer therefore concludes, due to the reasons stated herein, and pursuant to CSR §§ 18-12 4 and 19-22 a), that this office lacks jurisdiction to consider this appeal since it is untimely. Accordingly, this appeal is hereby DISMISSED with prejudice.

Dated this 1st day of November 2001.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board