

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

Appeal No. 204-00

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

CARMEN GALLEGOS, Appellant

Agency: DEPARTMENT OF PARKS AND RECREATION, DENVER ZOOLOGICAL
GARDENS, and THE CITY AND COUNTY OF DENVER, a municipal
corporation

A Prehearing Conference was held in this appeal on January 9, 2001. The Agency appeared through counsel, Ms. Mindy Wright, and advisory witness Mr. Charles Robinson. Appellant failed to appear but was contacted and participated by telephone. Hearing Officer Michael R. Bieda presided over the proceedings.

At the Prehearing Conference, the Agency raised the issue of whether the hearing officer had jurisdiction over Appellant's requested remedy of promotion. The hearing officer issued a Prehearing Order of January 9, 2001 ordering the parties to brief this issue before proceeding with hearing this appeal on the merits. The Order required the briefs on this issue to be filed no later than January 26, 2001.

On January 26, 2001, the Agency filed its Opening Brief and Motion to Dismiss. As of February 1, 2001, no brief or other response had been filed by Appellant. On that date, the hearing officer issued an Order to Show Cause why this matter should not be dismissed for Appellant's apparent abandonment of the appeal. The hearing officer specifically stated in the February 1 Order to Show Cause that Appellant was to file a response no later than February 9, 2001, and that her failure to comply "may result in the appeal being dismissed with prejudice for abandonment." To the date of this present Order, Appellant has not filed a brief, a response to the hearing officer's Order to Show Cause, or any other pleading or communication in her appeal.

In its Opening Brief and Motion to Dismiss filed January 26, 2001, the Agency first argued that Appellant did not timely raise allegations of sex discrimination in her appeal pursuant to CSR. Rule 19. Appellant is appealing the denial of her grievance filed August 11, 2000. The basis of that grievance was that she had been passed over for a promotion to a supervisory position because of unsubstantiated rumors affecting the judgment of the officials responsible for the promotion decision. Appellant's right to challenge the Agency's decision

tolled on August 3, 2000, the date of the Agency's decision to place another individual in the supervisory position she sought. Therefore, the grievance itself was within ten days of the action in question and was timely pursuant to CSR Rule 18-10. However, Appellant did not allege sex discrimination as an issue in this grievance, nor did she file a separate appeal based on sex discrimination directly to the Career Service Board within that time (*See*, CSR Rule 19-22). The first time she raised this issue was in her Notice of Appeal filed on September 14, 2000, appealing the denial of her original grievance.

As the Agency correctly states, it is well established that the Appellant must raise all issues within the required timeframe in order to preserve tribunal jurisdiction. Pursuant to CSR Rule 19-22 a), Appellant had to raise her challenge of sex discrimination at the same time as her grievance, within ten days of notice of that decision, for her appeal rights to have been preserved. Her failure to do so is a fatal jurisdictional flaw. *See, Widener v. District Court*, 200 Colo. 398, 615 P.2d 33 (1980).

Furthermore, even if it had been proper for Appellant to have included a discrimination claim in her grievance, which the Agency posits it was not, CSR Rule 19-10 c) limits discrimination claims to actions taken against an employee because of "race, color, creed, national origin, sex, age, political affiliation, sexual orientation, or disability." Appellant alleged none of these things within ten days of the Agency's decision not to promote her. She alleged that that she was being passed over due to rumors among the Agency supervisors. The new argument of sex discrimination was raised as an apparent afterthought on September 14, 2000 at the time of her appeal, well after the ten-day time limit.

Appellant's failure to set forth all challenges at the time of the initial grievance deprives the Agency of a meaningful opportunity to respond and remedy the situation at the previous levels. Such issues have therefore not been preserved on appeal and are not ripe for the hearing officer's consideration. *See, In Re the Appeal of Michelle Felix*, Appeal No. 106-99. Appellant cannot be allowed to switch her arguments midstream without providing the Agency the opportunity to meaningfully respond to those charges at the previous levels. *See, In the Matter of Terri Sapp-Jones*, Appeal No. 97-99 (attached to the Agency's Opening Brief as Attachment D). The issue of sex discrimination has not been properly preserved and is not ripe for review by the hearing officer. In the absence of the actions required to give rise to the hearing officer's jurisdiction, the issue of sex discrimination must therefore be dismissed.

The Agency further argued in its Opening Brief that the hearing officer lacks jurisdiction over Appellant's remaining requested remedy, that of being granted the promotion she sought. Appellant grieved the Agency's decision to promote another person in lieu of her. CSR Rule 18-10 A defines a grievance as employee challenges involving the "rights, benefits or conditions" of their employment. Appellant does not have a property right to a promotion nor can it be considered an automatic benefit, no matter how much she thinks she is so entitled. *See, Goad*, above. The conditions of her current employment are not affected by the Agency's choice of another individual. There has been no showing to the Agency or to the hearing officer that the individual was chosen over the Appellant for some reason other than being equally or better qualified. The Agency provides authority supporting its contention that in the absence of such a showing, the hearing officer lacks jurisdiction to un-promote another individual already chosen by the Agency as better qualified for the position. *See, In the Matter of Jeffrey Warren Goad*, Appeal No. 88-99 (attached to Agency's Opening Brief as Attachment A).

The hearing officer is only granted jurisdiction to consider actions of the Personnel Director or an appointing authority resulting in a violation of the Denver City Charter, Ordinances, or Rules of the Career Service Authority, discriminatory actions, or grievances resulting in rules violations. *See*, CSR Rule 19, Section 19-10. Appellant has failed to state a grievance arising from a violation of the CSR Rules, Charter Amendment, or Ordinances. She has failed to respond to the Prehearing Order and Order to Show Cause and demonstrate such a violation occurred and was adequately represented in her original grievance. In the absence of such a showing, the hearing officer lacks jurisdiction over Appellant's remaining requested remedy. This issue must also therefore be dismissed.

WHEREFORE, in light of the Agency's unrefuted arguments set forth in its Opening Brief and Motion to Dismiss demonstrating that the hearing officer lacks jurisdiction over the issues raised in this appeal, and in the absence Appellant's responses to the hearing officer's Prehearing Order issued January 9, 2001 and to the Order to Show Cause issued February 1, 2001 demonstrating otherwise, the appeal is hereby DISMISSED WITH PREJUDICE.

Dated this 19th day of March, 2001.



Joanna L. Wilkerson
Hearing Officer for the
Career Service Board