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

Appeal No. 23-05

ORDER DISMISSING APPEAL

IN THE MATTER OF THE APPEAL OF:

JOHN HERZOG, Appellant,

vs.

Department of Environmental Health, Agency, and
the City and County of Denver, a municipal corporation.

On May 6th, the Hearings Officer issued an Order to Show Cause for the Appellant to answer by May 16, 2005 why this appeal should not be dismissed for lack of jurisdiction, and for failure to state a claim for relief that the Hearings Officer has jurisdiction to grant. The Appellant and the Agency filed timely responses on May 16 and May 23, respectively. After consideration of the responses, the file, and being otherwise informed in this matter, the Hearings Officer finds and rules as follows.

The Order to Show cause first asked the Appellant to respond to his apparent failure to state a claim how the assignment of his work space was discriminatory based on his age.

The Appellant's first step grievance claimed only that decisions regarding allocation of workspace "have been unequal and prejudicial in the treatment of employees..." [first step grievance, p. 3]. The Appellant's Pre-Hearing Statement made no reference to a basis for his claim of age discrimination. The Appellant's response to the Order to Show Cause added the basis for his age discrimination claim is that his supervisor is younger than 40 years old, while he is older than 40 [Appellant's response, p.2 ¶4]. These averments fail to state a claim for age-based discrimination.

The next question was whether the Appellant stated a claim of discrimination based upon political affiliation. Appellant's Pre-hearing statement concluded, without more, "[e]nforcement of CSA rules is also based upon favoritism and discrimination not a reasonable impartial standard." His response to the Order to Show Cause failed to articulate the Appellant's political affiliation, that of his supervisor, and provided no basis from which to infer how political affiliation may have been a factor in an improper Agency action. The Appellant has failed to state a claim for discrimination based upon political affiliation.

Regarding discrimination based upon religious beliefs, the Appellant responded his supervisor and other supervisors are members of "an outside the City religious prayer group." He also states he is not part of the prayer group, wears religious symbols that establish he is not the same religion as his supervisor, and that his supervisor and a director were promoted without competition to interim positions due to their religious affiliation.

To establish a *prima facie* case for discrimination, the Appellant must show 1. he is a member of a protected class; 2. an adverse employment action was taken against him; 3. the action was taken under circumstances tending to give rise to an inference that the action was motivated by discrimination against the employee because of his membership in the protected class. In re Daniels, CSA 05-03. 5-6 (5/16/03), In re Crenshaw, CSA 156-02, 6 (3/11/03)(*citing* Colo. Civ. Rights Comm. V. Big O Tires, Inc, 940 P.2d 397(Colo.1997). *See also* In re Daneshpour, CSA 88-03, 8 (12/30/03).

The Appellant established the first prong of the foregoing test with his statement that he follows a different religion than his supervisor. However it is not established that an adverse employment action was taken against him. The adverse action the Appellant complains of is his supervisor's failure to award a certain window-seat assignment to him, however, even in the light most favorable to the Appellant, it is unclear how the assignment was an adverse Agency action, particularly since the Appellant does not contest he was offered the opportunity to be on the space assignment committee. In the Appellant's Appeal, he included a November 9, 2004 email sent to all affected employees, including him, which stated "Seating Assignments: We'd like staff to decide how to do this...if you want to influence this outcome, be on the committee." Other statements in his appeal indicate the Appellant declined to serve on that committee. Moreover, his appeal indicates he received a larger workspace than he had before, and he does not dispute that it serves his work needs, apart from status and seniority, neither of which forms the basis for an adverse Agency action affecting a legal right or legal status. Finally, aside from the fact of the difference in their religious backgrounds and practices, the Appellant fails to state any nexus between the seating assignments and religious affiliation of the assignees. The Appellant fails to state a claim for relief based upon religious affiliation.

The next claim states seating assignments were motivated by retaliation for the Appellant's refusal to violate City policies [Appeal] and for his identifying "harassing and hostile actions by another employee" [Appellant's Pre-hearing statement]. A *prima facie* case for retaliation is made by showing (1) protected employee action, (2) adverse action by an employer either after or contemporaneous with the employee's protected action, and (3) a causal connection between the employee's action and the employer's adverse action. Poe v. Shari's Mgmt. Corp., 188 F. 3d 519 (10th cir.1999), citing Morgan v. Hilti, Inc., 108 F. 3d 1319, 1324 (10th cir. 1997). In re Green, CSA 130-04, 4 (1/7/05).

The Appellant's response to the Order to Show Cause did not provide any more insight than before the Order to Show Cause, into what was harassing and hostile about the co-worker's actions from which alleged retaliation ensued. The Appellant's conclusory statements concerning "harassing and hostile actions by another employee" alone do not identify facts

from which a *prima facie* case for his seating assignment motivated by retaliation. The Appellant therefore fails to state a claim of retaliation upon which relief may be granted.

In addition, the remedies sought by the Appellant are 1. for the Agency to pay Appellant's costs and attorney fees [Appellant's Pre-hearing Statement]. The Appellant has failed to state any basis for authority to grant such relief, and the Hearings Office has previously found there is none.

The Appellant next requests that an appropriate remedy should be fashioned only after hearing, because "no where within the rules or the Pre-hearing form provided by the Hearing Office requiring Appellant to request a remedy for which the Hearing officer has jurisdiction and that the lack of jurisdiction is cause for dismissal." In response, the Appellant is referred to CSR 19-22 b) 1): "Every appeal...shall include...a statement of the remedy sought. This rule is jurisdictional, and is referred to in the Notice of Hearing and Pre-hearing Order @ B.2.

The remainder of the Appellant's claims and requests are either irrelevant e.g., request for the Hearings Officer to make certain findings *qua* remedies [Appellant's response to Order to Show Cause @ IV. 2. A., B.], or outside of the Hearings Officer's jurisdiction, e.g. "[a]n order requiring CSA conduct a through investigation regarding the practices and behaviors throughout DEH as identified in CSR 15-104." [IV. C.].

Finally, the Appellant misapprehends the plain meaning of CSR 19-10 f) as it modifies CSR 15-100 et seq. to require an employee to seek an investigation of harassment or discrimination as a condition precedent to appeal.

The Appellant has failed to state any claim upon which the Hearings Officer has jurisdiction to grant relief for reasons stated above. The Hearings Officer must find the Appellant has failed to show cause why this appeal should not be dismissed. Accordingly, the Appellant's Appeal is DISMISSED WITH PREJUDICE.

DONE this 26th day of May, 2005.

Bruce A. Plotkin
Hearing Officer
Career Service Board