

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

Appeal No. 12-16A

ORDER ON AGENCY'S INTERLOCUTORY APPEAL

IN THE MATTER OF THE APPEAL OF:

KATHERINE MACKENZIE,

Appellant/Respondent

v.

DEPARTMENT OF LAW, and the City and County of Denver, a municipal corporation,
Agency/Petitioner.

Appellant, MacKenzie, was an Associate Level Assistant City Attorney in the Denver Department of Human Services, Legal Section. She applied for a position as a Senior Level Assistant City Attorney and was one of three candidates interviewed for two vacancies. The Agency ultimately selected the other two candidates to fill the vacancies.

As a result of the Agency's hiring decision, Appellant submitted a formal complaint alleging she was denied the promotion due to her age, gender, and sexual orientation. A formal investigation was conducted by the Agency, which concluded that Appellant's claims of discrimination were unfounded. The Agency further concluded that the other candidates were selected because they were more qualified and performed better in their interviews. Appellant then appealed the Agency's decision to the Career Service Hearing Office.

The Agency filed a Motion to Dismiss on the grounds that the Hearing Officer lacked the authority to grant Appellant's remedy of promotion, or any other remedy that might afford Appellant relief. After considering the parties' arguments, the Hearing Officer entered an order denying the Agency's Motion. Although Hearing Officer Plotkin agreed with the Agency that Appellant's requested relief of a promotion was not an available remedy under the Career Service Rules ("CSR"), he concluded, "[b]ecause the Career Service Rules permit relief from unlawful discrimination claims, a remedy may be available to Appellant."

Thereafter, the Agency filed an Interlocutory Appeal of the Hearing Officer's decision. The Agency argued that the Hearing Officer's decision should be vacated and the appeal should be dismissed due to a lack of jurisdiction. More particularly, the Agency argued that although CSR 19-10.2.A.2.a generally gives a Hearing Officer jurisdiction over appeals challenging the

disposition of a complaint of discrimination, jurisdiction is nevertheless lacking because the Hearing Officer lacks the authority to grant either the specific relief requested by Appellant or any other remedy that might grant Appellant relief.

In her response, Appellant argued that CSR Sections 19-10.A.2.a, 15-105 and 19-55 collectively provide the Hearing Officer with jurisdiction and the authority to fashion a remedy (of some sort) that could grant Appellant relief – even if the relief of promotion is unavailable to her. Appellant emphasized that she was not attempting to limit her relief to just promotion and that she would be open to other remedies for which the Hearing Officer would have authority.

As a threshold matter, both parties correctly state that CSR 19-10.A.2.a generally provides a Hearing Officer jurisdiction over appeals challenging the disposition of a complaint of discrimination when such complaint has not resulted in stopping or otherwise addressing the alleged discrimination, harassment or retaliation. Appellant also correctly points out that the orders cited by the Agency in its Appeal Brief are generally distinguishable.¹ In each of those matters, the Appellants sought specific relief which exceeded the authority of the Hearing Officer.

Nevertheless, each of the orders relied upon by the Agency are instructive in that they reached the conclusion that Hearing Officers do not possess authority to interfere with the agency's management of its personnel, whether by ordering a change in an appellant's position, status, chain of command or work assignment; or by ordering some action be taken with regard to an employee other than an appellant. See, e.g., *In re Sample* (hearing officer has no authority to order an appointing authority to pass an employee on promotional probation or to extend an offer of employment); *In re Macieyowski* (Officer cannot award a remedy of declaring the job selection process as void and invalid).

Pursuant to CSR 19-55, a Hearing Officer may only affirm, modify or reverse the action which gives rise to the appeal. CSR 19-55 does not provide the Hearing Officer with the authority to direct any specific remedy or otherwise grant any relief to Appellant due to her claim of discrimination. Thus, even if the Hearing Officer were to reverse the Agency's determination that there was no discrimination, it could not fashion any remedy or otherwise direct the Agency in regard to relief that might be afforded to Appellant – a conclusion consistent with each of the orders cited by the Agency.

Appellant also cites to Sections 15-101, Policy, and 15-105, Action, to support her argument that another remedy may be available to her. However, 15-101, provides that it is the policy of the City to strictly prohibit discrimination, and 15-105 provides that if a there is a

¹ *In Re Felix* held that the Hearing Officer did not have the authority to grant the relief requested, i.e., to change supervisors; *In Re Gallegos* held that the Hearing Officer did not have the authority to grant the relief of promotion, and lacked jurisdiction to un-promote another individual already chosen by the agency as better qualified for the position; *In Re Cooley* held that a Hearing Officer had no authority to 1) request a meeting or 2) counsel with superiors and request a written document; *In Re Van Dyck* held that a Hearing Officer does not have the power to grant the requested relief of transfer; *In Re Martinez* held that the Hearing Officer was without jurisdiction to grant a transfer to another agency, change a PEPR or to order alleged violence to stop; and *In Re Yardeny* held the Hearing Officer had no authority to impose discipline on another employee, remove the appellant's supervisor, transfer appellant, or establish an independent committee to act on behalf of an employee.

determination that discrimination has occurred the agency will take effective remedial action. Neither of these sections within Rule 15, Code of Conduct, provide the Hearing Officer with the authority to fashion a remedy or grant Appellant relief; the Hearing Officer may not choose or direct the "effective remedial action."

Even accepting all allegations as true, the Hearing Officer cannot order the Agency to undertake any action that would provide the Appellant relief as a result of the Agency's decision. The Hearing Officer is without authority to order: a promotion; an action against anyone who may have discriminated; a reversal of the hiring/promotion decision; a void of the promotion process; any type of declaratory order; or an award of damages or fees.

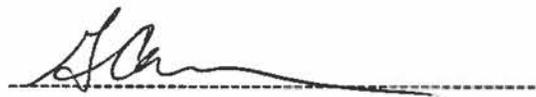
Put simply, there is nothing in the CSR that would grant the Hearing Officer the authority to fashion a remedy that would grant Appellant relief under the circumstances presented in this matter. Thus, the Board concludes that any remedy that would grant Appellant relief, pursuant to the CSR, is outside the authority of the Hearing Officer.

ORDER

IT IS THEREFORE ORDERED that the Agency's Interlocutory Appeal is GRANTED. The Hearing Officer's order denying the Agency's motion to dismiss is reversed, and Appellant's appeal of her claim of discrimination is dismissed, WITH PREJUDICE.

SO ORDERED by the Board on 15th, day of September, 2016

BY THE BOARD:



Gina Casias, Chair

Board Members Concurring:

Patti Klinge (Co-Chair)
Derrick Fuller
Neil Peck, Esq.