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

Appeal No. 129-05

DECISION

IN THE MATTER OF THE APPEAL OF:

DARNELL MALLARD,
Appellant,

vs.

PUBLIC OFFICE BUILDINGS, DEPARTMENT OF GENERAL SERVICES,
Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Darnell Mallard, appeals the denial of his second-step grievance, served on him November 2, 2005. The Appellant timely filed his appeal on November 10, 2005, pursuant to the Career Service Rules (CSR). A hearing concerning this appeal was conducted on February 16, 2006, by Bruce A. Plotkin, Hearings Officer. The Appellant was represented by Mr. Greg Kirschenman, from the Appellant's employee union, while the Agency was represented by Robert D. Nespor, Assistant City Attorney. Dan Barbee, Agency Manager, was present throughout the hearing as the Agency's advisory witness. Agency Exhibits 1-4 were admitted by stipulation. Appellant's Exhibit A was admitted without objection. The Appellant testified on his own behalf, and offered the testimony of Mr. Gary Martinez, while the Agency presented Dan Barbee as its only witness.

II. ISSUES

The following issues were presented for appeal:

A. whether, under Career Service Rule, City Ordinance, or City Charter, the Appellant proved the Agency's choice to pay him at step 1 rather than step 7 was arbitrary, capricious or contrary to rule or law;

B. whether, in setting his promotional pay at step 1 rather than step 7, the Agency unlawfully discriminated against the Appellant based upon his race, color, or age;

C. whether, in setting his promotional pay at step 1, rather than step 7, the Agency engaged in unlawful retaliation against the Appellant;

D. whether, in setting his promotional pay at step 1, rather than step 7, the Agency engaged in unlawful harassment against the Appellant.

III. FINDINGS AND ANALYSIS

From October 16, 2000 through October 21, 2005, the Appellant held the position of Facilities Maintenance Technician or Facility and Ground Maintenance Crew Supervisor at the Agency. During 2004, due to city-wide budget problems, the Agency set out to abolish several positions including that of the Appellant. The Appellant's immediate supervisor encouraged him to apply for a promotional position that was not subject to abolishment, rather than face a demotion or lay-off. On August 24, 2005, the Appellant applied for a promotion to the Master Trades Worker position. During his interview, the Appellant's first-level supervisor, Gary Martinez, affirmed the starting salary for the Appellant's position would be set at step 7. Martinez based his offer on upon consultation with Barbee, the appointing authority for the Agency. [Exhibit A].

On October 20, 2005, Martinez offered the Master Trades Worker position to the Appellant, to begin November 1, 2005, and to be paid at step 7. The Appellant accepted. About one week later, but prior to his first day in the new position, Martinez withdrew his earlier salary offer, and instead offered the Appellant pay at step 1 in the same pay range. [Exhibit 2, Appellant testimony]. The Appellant began working at pay-step 1, which represented a $605.00, or 19.5% increase in pay over his prior position. He filed his grievance the following day, November 2, 2005. [Exhibit 1]. Martinez rejected the first-step grievance the same day, [Exhibit 2], and the Appellant submitted his second-step grievance to Barbee the same day. On November 4, 2005, Barbee rejected the Appellant's second-step grievance. This timely appeal followed on November 8, 2005.

At the close of the Appellant's evidence, the Agency moved to dismiss each of the Appellant's claims. In a motion to dismiss prior to hearing all the evidence, the following principles apply: statements in the Appeal must be viewed in the light most favorable to the Appellant; all Appellant's assertions of material facts must be accepted as true; and the Motion to Dismiss must be denied unless it appears beyond doubt the Appellant cannot prove that the facts, as he alleges them, would entitle him to relief. Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996), In re Martinez, CSA 176-03 (6/28/04). For reasons stated next, the Agency's motion was granted.

CSR 9-61, 9-51, and 9-52. The Appellant did not cite any Career Service Rule, City Ordinance, or Charter provision under which he brought his appeal, however it appears the evidence raised a potential issue whether the Agency complied with CSR

appears the evidence raised a potential issue whether the Agency complied with CSR 9-61 and CSR 15-52 in promoting the Appellant. The Appellant agreed his change in class was a promotion under CSR 9-61. That rule requires the promoted employee to be paid at least a 6.9% increase. The general rule for promotional appointments is that the employee be paid at the entry rate, step 1, "unless necessary to obtain the services of an unusually well-qualified person." CSR 9-51. There was no dispute that the Appellant readily agreed to an almost 20% increase in pay when he accepted his promotion, so there was no need for the Agency to entice him further. [Barbee testimony]. His only dispute was over the withdrawal of the Agency's offer to pay him at step 7; however the Appellant suffered no harm under any Career Service Rule, city Ordinance or Charter, when he accepted his promotion. Therefore there was no violation under which the Appellant established a basis for his claim, and the Agency's motion to dismiss was granted.

Discrimination. A prima facie case for discrimination requires some adverse Agency action. In re Stewart, CSA 41-03 (6/6/03). When asked what was the discriminatory act committed by the Agency, the Appellant stated "they tried to disqualify me as an applicant," but admitted he was hired into the position, therefore there was no adverse Agency action. In addition the Appellant claimed he complained directly to the Mayor about his grievance, but never mentioned discrimination. [Appellant testimony]. For these reasons, the Agency's motion to dismiss the Appellant's discrimination claims was granted.

Harassment. When the appeal is of a grievance, the Appellant may not raise harassment for the first time on appeal. The grievance must have given the agency meaningful notice and an opportunity, under CSR 15-100 *et seq.,* to respond to the allegations before those issues are ripe for appeal. In re Douglas, CSA 317-01, 12 (interlocutory order 3/22/02), *citing* In re Prater, CSA 156-98 (9/23/99). There was no dispute that the Appellant failed to give notice to the Agency of his harassment grievance, either directly or through his complaint to the Mayor. Therefore, the Agency's motion to dismiss the Appellant's harassment claim was granted.

Retaliation. As with harassment, the Appellant's grievance must have given the Agency meaningful notice and an opportunity, under CSR 15-100 *et seq.,* to respond to the retaliation allegations before those issues are ripe for appeal. For reasons as stated above, the Appellant did not allege he provided any notice, either to the Agency directly or to the Mayor, about his retaliation claim, and therefore, the Agency motion to dismiss the Appellant's retaliation claim was also granted.

The only remaining claims potentially raised by the evidence, breach of contract and promissory estoppel, were not established by the Appellant. The Appellant appeared to set forth some indicia of these claims when he claimed the Agency made a promise to pay him at step 7 (the contract claim) and therefore should not be allowed to change its offer (the estoppel claim). [Appellant testimony]. With respect to his contract allegations, the Appellant provided no consideration before the Agency revoked its offer, and with respect to the estoppel allegations, the Appellant suffered no detriment

upon which the Agency might be estopped to revoke its offer.

IV. CONCLUSION AND ORDER

The Appellant failed to establish a prima facie case for any of his claims, therefore the Agency's Motion to Dismiss was granted in its entirety. For that, and such other reasons as stated above, the Appellant failed to establish that the Agency's decision, to set his promotional pay rate at step 1 rather than step 7, was arbitrary, capricious, or contrary to rule or law. The Appellant's appeal is therefore DISMISSED WITH PREJUDICE.

Done this 23rd day of February, 2006.

Bruce A. Plotkin
Hearings Officer
Career Service Board

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