HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Consolidated Appeals 103-09, 21-10

ORDER RE AGENCY MOTION TO DISMISS, AND AGENCY'S SUGGESTED CORRECTIONS TO LIST OF ISSUES

IN THE MATTER OF THE APPEAL OF:

KEYONNA MOORE, Appellant

vs.

DEPARTMENT OF AVIATION,
and the City and County of Denver, a municipal corporation, Agency.

The Agency filed a motion to dismiss the Appellant's appeal of her 15-day suspension, one of the two cases consolidated for appeal. The Appellant did not respond. Having reviewed the Agency's motion, the file, and being otherwise apprised, I find and order as follows.

It is not clear from the structure of Agency's motion, but it appears the Agency advances three claims in support of its motion to dismiss: failure to state a claim under the Whistleblower Protection Ordinance; failure to file a timely appeal; and Agency's objection "to proceeding on issues other than the alleged violation of the Whistleblower Protection Ordinance in the second appeal."

1. **Failure to state whistleblower claim**. Although appearing in "Factual Background," the Agency appears to claim the Appellant failed to state a claim for relief under the Whistleblower Protection Ordinance. Denver Revised Municipal Code (DRMC) 2-100 et. seq. The Agency is correct in stating there must be some nominal allegation of wrongdoing under the Whistleblower Ordinance in order to sustain a claim under that law. A claim under the whistleblower ordinance is raised by allegations that 1) a supervisor imposed or threatened to impose 2) an adverse employment action upon an employee 3) on account of the employee's disclosure of information about any official misconduct to any person. In re Wehmhoefer, CSA 02-08, 4 (2/14/08); D.R.M.C. § 2-106 et. seq. There is no question the Agency imposed a 15-day suspension on the Appellant. What remains is to determine whether the appellant cited, in the light most favorable to her, any official misconduct. Official misconduct under the Whistleblower Protection Ordinance means any act or omission by any officer or employee that constitutes 1) a violation of law, 2) a violation of any

applicable rule, regulation or executive order, 3) a violation of the code of ethics or any other applicable ethical rules and standards, 4) the misuse, misallocation, mismanagement, or waste of any city funds or other city assets, or 5) an abuse of official authority. In re Wehmhoefer, CSA 02-08, 4-5 (2/14/08); D.R.M.C. § 2-107 (d). On her appeal form, in response to the question "identify the official misconduct you reported," the Appellant's appeal document cites Career Service Rule (CSR) 6 [the rule on employee training and organizational development]; 13 [Pay for Performance]; 15-80 [electronic communications policy]; 15-106 [retaliation prohibited]; 15-110 [preventing violence in the workplace]. The Appellant also claimed "etc." [Appeal]; and, finally, DRMC 2-106, the Whistleblower Ordinance itself. Those claims, mere citation to rules, are insufficient to establish a basis for jurisdiction under the Whistleblower Ordinance.

Attached to her appeal, Appellant filed a document titled "Keyonna Moore, Written Statement for pre-dis 2/19/10." Therein, the Appellant cites the following claims: lack of respect by her supervisor; continuing to reprimand the Appellant; disagreement over the Agency's claims underlying its basis for discipline; Appellant's supervisor "will always hold me suspect to doing something wrong;" Appellant's supervisor "accuses me of altering documents, proving she continually comes down harder on me th[a]n she does other staff;" supervisor "made a bigger issue out of this than needed;" supervisor is "actively trying to upset me and creating an issue without any foundation or basis;" supervisor told Appellant not to bother a co-worker. None of these allegations, even in the light most favorable to the Appellant, constitutes a claim of official misconduct. No other response was provided by the Appellant. Consequently, the Agency's motion to dismiss Appellant's Whistleblower claim is GRANTED. The dismissal of Appellant's whistleblower claim leaves a knotty jurisdictional issue regarding timeliness.

2. **Timeliness of appeal**. The Appellant's appeal was filed more than 15 days after the notice of the 15-day suspension. At the same time, her appeal was timely under Whistleblower claim, i.e. the Appellant filed her whistleblower claim within 30 days after she received notice of her suspension. The nub of the problem, as observed by the Agency, is that an appellant who filed a non-whistleblower appeal late, should not be allowed to cure that jurisdictional defect by making a subsequent whistleblower claim.[1] In other words, an appellant may not bootstrap an otherwise untimely appeal into a timely one by making a whistleblower claim, unless the whistleblower claim contains some nominal basis, i.e., basic facts which, if proven would state a claim under the Ordinance. Here, the Appellant failed to make a nominal claim under the

[1] The Appellant replied to my earlier Order to Show Cause concerning her apparent late filing by stating she was making a whistleblower claim. Appellant Response to Order to Show Cause.

Whistleblower Protection Ordinance. Consequently, her appeal of the 15-day suspension was untimely, and her appeal, #21-10, must be DISMISSED WITH PREJUDICE.

As a corollary matter, the Agency filed its Agency's Suggested Corrections to List of Issues. On April 12, 2010. In that filing, the Agency alleges where an appellant files a single appeal which contains claims subject to differing filing deadlines, each deadline must be met separately. To grant such request would eviscerate the mandate of the Whistleblower ordinance, to allow 30 days in which to file such claim, as is evident in the following example. If an appellant claimed she was suspended in retaliation for disclosing her supervisor's official misconduct under the Whistleblower Protection Ordinance, the Agency's suggestion would require the suspension claim to be filed within 15 days and the whistleblowing claim within 30 days, an outcome clearly not intended by the Whistleblower Protection Ordinance, and contrary to the Career Service Rules directive for hearing officers to "maintain a fair and efficient process for appeals." CSR 19-30 A. Insofar as the Agency's "suggestion" is a motion, the motion is DENIED.

3. **Agency's objection to "other issues"**. In various places, the Agency objects to my having determined this appeal could proceed on what the Agency variously describes as "the other four claims," [Agency's Suggested Corrections to List of Issues], "issues other than the alleged violation of the whistleblower Protection Ordinance in the second appeal," [Agency's Motion to Dismiss Appeal of 15-Day Suspension], or "Hearing Officer subsequently entered an Order listing issues in addition to the Whistleblower Protection Ordinance claim as issues in the appeal." [*Id*]. First, it is not clear to which claims the Agency is referring. In her appeal, the Appellant claimed race-based discrimination, [Appeal], so that claim could not be considered as having been added later. Second, the issue is rendered moot by the dismissal of Appellant's appeal of her suspension. Third, *pro se* appellants[2] should not be held to exacting pleading standard, and hearing officers must determine the legal causes of action particularly in pro se appeals. *See* In re Felix, CSA 82-07 (Order 2/14/08) ("In an appropriate case, where an Appellant seeks one remedy for which the hearing officer has no jurisdiction, but another remedy, while not sought by the Appellant, but for which there is jurisdiction would afford relief under the Career Service Rules, the Hearing Officer may not dismiss the appeal for lack of jurisdiction. Rather the hearing officer must assess the possible causes of action and possible avenues of relief to afford the appellant the broadest possible relief under the Career Service Rules"). Insofar as the Agency's objection is a motion to dismiss claims, the motion is (1) moot; and (2), if the motion were not moot it would be DENIED.

[2] While the Appellant is currently represented by legal counsel, she filed her appeal pro se.

ORDER

1. Agency' s motion to dismiss Appellant's Appeal #21-10 based upon Appellant's failure to state a claim for which relief may be granted is GRANTED.

2. Agency's motion to dismiss Appellant's Appeal #21-10 based upon Appellant's failure to file timely is GRANTED.

3. Agency's request to limit the issues in Appeal #21-10 is DENIED.

4. Appellant's Appeal #21-10 is DISMISSED WITH PREJUDICE.

5. Appellant's Appeal #103-09 of her performance review remains, and will be heard, as presently scheduled, on June 8, 2010

DONE this 26th day of May, 2010.

Bruce A. Plotkin
Career Service Hearing Officer

I certify that, on May 26, 2010, I delivered a correct copy of this order to the following in the manner indicated:

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