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

Appeal No. 48-08

FINDINGS AND ORDER RE: INTERLOCUTORY APPEAL

IN THE MATTER OF THE APPEAL OF:

TIM MULLER,

Appellant/Respondent,

vs.

DEPARTMENT OF PARKS AND RECREATION, and the City and County of Denver, a municipal corporation,

Agency/Petitioner.

This matter is before the Career Service Board on the Agency's motion for interlocutory appeal under CSA Rule 19-61 E. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision, dated July 24, 2008, on the grounds outlined below.

FINDINGS

On July 2, 2008, Appellant sent an email to Scott Robson, Acting Manager of the Agency, alleging mismanagement of the Agency's water conservation program and "harassment" by his supervisor to work "out of class" to correct errors in the program's database. That same day, the Agency placed Appellant on investigatory leave and sent him home. Appellant filed a career service appeal under CSR 19-10 A. (1)(f) (appeal of a retaliatory adverse employment action, as defined by the City's Whistleblower Protection Ordinance.) On the Agency's motion to dismiss the appeal, the Hearing Officer determined that placing Appellant on investigatory leave was an adverse employment action and this interlocutory appeal follows.

The Whistleblower Protection Ordinance, § 2-108 of the Denver Revised Municipal Code, provides in part:

> a) except as provided in subsection (b) of this section, no supervisor shall impose or threaten to impose any adverse employment action upon an employee on account of the employee's disclosure of

information about any official misconduct to any person.

The ordinance defines an "adverse employment action" in § 2-107 (b) as:

> ...any direct or indirect form of employment discipline or penalty, including, but not limited to, dismissal, suspension, demotion, transfer, reassignment, official reprimand, adverse employment evaluation, withholding of work, denial of any compensation or benefit, layoff or threat of any such discipline or penalty.

The Agency argues that placing Appellant on investigatory leave under CSR 16-30 is not an adverse employment action for purposes of the Whistleblower Protection Ordinance. But this argument ignores the broad scope of the ordinance, which includes direct and indirect forms of discipline and threats of discipline, as well as the plain language of the ordinance, which specifically lists "withholding of work" as an adverse employment action. Appellant's written notice of investigatory leave (attached to his notice of appeal) directs him to remain available during normal work hours at his home address and phone number, commands him not to have any contact with coworkers or supervisors, and advises him that failure to comply with these requirements could result in disciplinary action up to and including dismissal.

The Board finds that the placement of an employee on investigatory leave is "withholding of work" in the context of the whistleblower ordinance. Although the employee is paid while on leave, he is not permitted to perform his normal job duties in the workplace. Moreover, when an agency tells an employee that it "takes [his] claim very seriously and needs to thoroughly investigate this matter," but nevertheless directs the employee to stay at home and have no contact -- professional or social -- with any of his coworkers (described by Appellant as being under "house arrest"), such agency action may also be viewed as an "indirect form of discipline or penalty" within the broad scope of the ordinance. [1]

The Board also agrees with the Hearing Officer that the cases cited by the Agency are inapplicable as they define an adverse employment action in the context of civil rights claims, not in the context of the broader language used by City Council in providing protection for whistleblowers. The Board's findings in this case are limited to an interpretation of the City's whistleblower ordinance and should not be read as implying that the placement of an employee on investigatory leave is an adverse employment action for any other kinds of appeals or for any other purposes under the career service rules.

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[1] The Agency contends that Appellant was placed on investigatory leave in conformance with CSR 16-30. Pursuant to this rule, an employee may be placed on investigatory leave with pay "pending an investigation of a possible rule violation or failure to meet standards of performance. . . ." The rule obviously contemplates the placement of the *target* of the investigation on leave, not the *whistleblower*. The fact that the Agency's actions were not in conformance with CSR 16-30 adds further support to the Board's finding of an adverse employment action.

ORDER

IT IS THEREFORE ORDERED that the Agency's Motion for Interlocutory Appeal is **DENIED,** and the Hearing Officer's Decision of July 24, 2008, is **AFFIRMED.**

SO ORDERED by the Board on October 16, 2008, and documented this 24th day of October, 2008.

BY THE BOARD:

Luis Toro, Co-Chair

Board Members Concurring:

Felicity O'Herron
Tom Bonner
Nita Henry

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **FINDINGS AND ORDER** on October 27, 2008, in the manner indicated below, to the following:

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