

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 35-09

ORDER

IN THE MATTER OF THE APPEAL OF:

KEVIN NESS, Appellant,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT
and the City and County of Denver, a municipal corporation, Agency.

Appellant has been ordered to show cause why this appeal should not be dismissed as untimely filed. Appellant and the Agency both filed responses on May 18, 2009.

This is an appeal by a probationary Deputy Sheriff of his separation dated March 25, 2009. The appeal alleges three bases for jurisdiction: 1) direct appeal of a discriminatory termination of a non-career status employee under CSR § 19-10 B.1; 2) claims of political affiliation discrimination and retaliation under § 19-10 A.2.a.; and 3) appeal of the disposition of his grievance under § 19-10 A.2.b.i. The order to show cause ordered Appellant to address the issue of whether the appeal filed May 11, 2009, was timely.

1. Direct appeal

Former employees who do not hold career status positions may file direct appeals of a dismissal if they allege discrimination or violation of the whistleblower ordinance. § 19-10 B.1. Direct appeals must be filed within fifteen calendar days after the notice of the action appealed. § 19-20 A.1.b. Appellant demonstrated he had actual notice of the action taken by March 25th by virtue of his filing of a District Court complaint challenging the action on that date. [Agency Response to Show Cause Order, Exh. B.] Thus, a direct appeal under this rule should have been filed by April 9, 2009, fifteen days after March 25th. This direct appeal was not filed until May 11th, forty-seven days after the notice of action, and is therefore untimely.

2. Grievance appeal

On April 9, 2009, Appellant filed a timely grievance of his termination, asserting that it violated CSR § 5-51 in that it was not justified by any failure to meet

performance standards. [Appeal Attachments, pp. 6 – 10.] The Agency denied the grievance on April 17, 2009, and served the response on Appellant, although not on his attorney, by certified mail on April 20th. [Agency's Response, Exh. 6.] An appeal of the grievance denial should have been filed on or before May 5, 2009, fifteen days after the grievance denial was mailed to Appellant. This appeal was not filed until May 11th.

Appellant admits that the grievance appeal was not filed timely. He argues however that that the delay should be deemed excusable neglect in that Appellant failed to recognize the response as such, and thus failed to forward it to his attorney.

Compliance with the deadline for filing an appeal is a jurisdictional requirement unless excused by equitable tolling. In re Delgado, CSA 182-04 (3/9/05); Widener v. District Court, 615 P.2d 33 (Colo. 1980). Cause sufficient to permit equitable tolling of the deadline for filing an appeal requires proof that appellant "was actively misled or lulled into inaction by the [agency]". In re Delgado, supra; Montoya v. Chao, 296 F.3d 952 (10th Cir. 2002). Appellant does not assert in this case that Agency action caused the delay. The Agency response was served by certified mail, clearly labeled "CSA Grievance and CSA Complaint", and identified as a response in the certificate of service. Appellant demonstrated a working knowledge of the Career Service Rules by filing a timely grievance and complaint, both of which cited applicable provisions under those rules. Appellant has not made a sufficient showing of facts that would support a finding of equitable tolling. Thus, the grievance appeal is untimely.

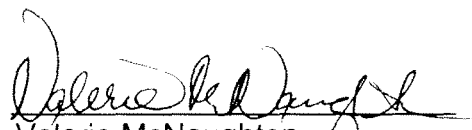
3. Discrimination and retaliation appeals

Appellant also filed a complaint of discrimination and retaliation on April 9, 2009, alleging that the termination was in retaliation for the employee organization's exercise of its right to decline a collective bargaining order. [Appeal Attachments, pp. 1 – 5.] The Agency's response to that complaint was made in its April 17th response to the grievance, served on April 20th by certified mail. The response denied the complaint on the basis that it made no claim of discrimination. [Agency's Response, Exh. C.] Under § 19-20 A.1.b., an appeal of that response should have been filed on or before May 5, 2009. Since the appeal of the response was not filed until May 11th, the discrimination and retaliation appeals are likewise untimely.

Order

Based on the foregoing findings of fact and conclusions of law, all claims in this appeal, including the asserted direct appeal, grievance appeal, and claims of discrimination and retaliation, are dismissed.

DONE this 19th day of May, 2009.


Valerie McNaughton
Career Service Hearing Officer