HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 03-08

ORDER DISMISSING APPEAL

IN THE MATTER OF THE APPEAL OF:

MARK ROMERO
Appellant,

vs.

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

In response to my Order to Show Cause, dated January 16, 2008, the Appellant filed a timely response on January 18, 2008. The Agency's response was due on January 28, 2008. On January 29, 2008 the Agency filed its responsive pleading and also filed a "Motion for Leave to File Reply to Appellant's Response to Order to Show Cause Out of Time." I have considered the various filings, am informed in this matter, and now find and order as follows.

1. Agency's motion for leave to extend. As cause for requesting leave to file its response late, the Agency states there were unforeseen circumstances. I do not find sufficient cause stated and DENY the Agency's motion. Consequently, I do not consider the Agency's responsive filing.

2. Appellant's response to Order to Show Cause. The Appellant makes two claims that jurisdiction over his appeal is proper: due process, and equal protection.

a. Appellant's due process claim. The Appellant claims that he is aware other probationary employees were afforded a pre-disciplinary hearing while he was not. There are several problems with Appellant's argument. First, there is, *a priori*, no property interest in public employment. Kingsford v. Salt Lake City Sch. Dist., 247 F.3d 1123, 1129 (10th Cir. 2001), Board. of Regents v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). A public employee such as the Appellant must have a "legitimate claim of entitlement" to continued public employment for a property interest to arise. A unilateral expectation of continued public employment is not sufficient to create a property interest. Roth, 408 U.S. at 577. Only once a property right is established, will the question arise what process is due under the federal Constitution. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-45, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).

Property interests may be created by ordinance or implied contract. Bishop v. Wood, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976). The sufficiency of an employee's claim of entitlement is determined by reference to state law. *Id.* "The hallmark of property... is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982).

The Career Service Rules or Agency regulations may supply the basis for a public employee's assertion that he has a legitimate claim of an entitlement in the form of continued employment. Whether the Career Service Authority or the Agency established "rules or mutually explicit understandings" which allow the Appellant to state a claim for deprivation of property without due process of law depends on whether the circumstances of his employment gave him a legitimate claim of entitlement. Adams County School Dist. No. 50 v. Dickey, 791 P.2d 688, 694 (Colo. 1990). The next finding to address, then, is the circumstances of the Appellant's employment. For purposes of the Order to Show Cause, I take the Appellant's averments to be true.

The Appellant does not dispute he was hired as a probationary employee. He does not dispute that the Career Service Rules regarding probationary employment, CSR 5-50 *et seq.*, apply to him. Neither the Career Service Rules nor Agency regulation restricts termination of probationary employees to termination "for cause," nor do they create a contractual right to continued employment. Under these circumstances, neither the Appellant, who did not have a pre-disciplinary meeting, nor other probationary deputies, who allegedly did, had a property right to such hearing. Said another way, the Appellant seeks the same non-right as other probationary employees. Consequently, even assuming the Appellant's claim to be true - that he was not afforded a pre-disciplinary meeting while other probationary employees were - he has no property interest in his continued employment that would entitle him to pre-termination protection.

b. Appellant's equal protection claim. Here the Appellant claims he qualifies as a class of one to bring his discrimination claim against the Agency, citing, most pertinently Bartell v. Aurora Public Schools, 263 F. 3d 1143, 1149 (10th Cir. 2001). I do not disagree with that claim as far as it goes; however the Appellant must make a nominal showing of circumstances tending to show he was injured by intentional or purposeful discrimination. Since the only "injury" claimed is the failure to grant his "right" to a pre-disciplinary meeting – a right that does not exist for a probationary employee – then the Appellant, as a probationary employee, has not made a claim for which there is jurisdiction under the jurisdictional rules for the Career Service Hearing Office, CSR 19-10.[1]

[1] While not dispositive of the present case, the Career Service Rules which provide for the correct procedure when an Agency terminates an employee from probation offer conflicting readings. CSR 5-53 D. appears to offer a right without a remedy. That rule requires the Agency to provide certain procedural due process rights to probationary employees who are about to be terminated, including a two-day notice, hearing, and representation for all probationary employees. However, it seems even if the Agency failed to comply with this mandatory procedure, the only remedy would be procedural and not substantive, i.e. the Agency would be required to send a two-day notice, and permit representation, but would not be

For reasons stated above, the Appellant's appeal is DISMISSED WITH PREJUDICE.

Bruce A. Plotkin
Career Service Hearing Officer

I certify that on 2/4, 2008, I forwarded a correct copy of the foregoing Order to the following in the manner indicated:

Mr. Mark Romero, 9545 Newton Street, Westminster, CO 80031 (via U.S. mail);
Reid Elkus, Esq., Relkus@elkusandsisson.com (via email);
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required to recognize a property interest in a probationary employee's continued employment. Thus the earlier arises whether this rule provides a right without a remedy?

In contrast, CSR 16-75 A. requires written notice of dismissal, but not in advance, and does not require a hearing or representation. CSR 16-75 B. does not require any notice at all if dismissal is immediate, in apparent contradiction to CSR 5-53 D, and perhaps 16-75 A. (since the last day of probation appears to fall under both 16-75 A. and B.). Then again, the non-binding title of 16-75 B is confusing, since "employees dismissed after employment probation" (emphasis added) would have become Career Status employees, entitled to pre-termination rights, but the reading of "after" as "at the end of probation" means those employees dismissed on the last day (immediate) are due no notice under this reading, while CSR 5-33 D. seems to say otherwise.