

**HEARING OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER,
STATE OF COLORADO**

Appeal No. 246-00

FINDINGS OF FACT AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **REYES H. VIGIL,**

And

Agency: **CAREER SERVICE AUTHORITY, and the City and County of Denver, a
municipal corporation.**

Ms. Reyes H. Vigil ("Appellant") filed an appeal of an Examination Review decision by the Career Service Authority ("Agency") for the position of Senior Community Relations Consultant. The Agency has filed a Motion to Dismiss, alleging a lack of jurisdiction. The Appellant opposes the motion. A Motion hearing was held on February 7, 2001 before Michael Bieda, Hearing Officer for the Career Service Board. The Appellant was present, pro se. The Agency was represented by Assistant City Attorney Mindy Wright, Esq. Ms. Jody Smith represented the Agency in the capacity of advisor.

FINDINGS OF FACT

The Agency announced the position on August 14, 2000. [Exhibit 5]. The Appellant submitted her application and was notified that she was not qualified on September 12, 2000. [Exhibit A]. The letter stated that the "information you provided on your application does not meet the announced minimum experience requirement for this job classification at this time." Appellant called and requested a meeting. She later met with the analyst John Hoffman on September 19, 2000. She then received a notice of examination results dated September 22, 2000 advising her that she had passed the exam and that she had received a final rating of "74.0". [Exhibit B]. She received another notice dated September 27, 2000 confirming that she had attained a rating of "74.0" and that a rating of 70.0 or higher was necessary to "gain eligibility" [Exhibit C]. Neither notice makes any mention of the Appellant's standing compared to the other candidates. No information is provided as to how those to be interviewed will be determined or as to the hiring criteria. The notices do not disclose the fact that even though the Appellant has been determined to be "eligible" that she must also rank in the top 15 scores in order to be eligible for an interview and subsequent hiring.

The Appellant, dissatisfied with her score, requested an administrative review on 10/16/00 [Exhibit D-1]. She was notified by letter on November 1, 2000 that since her

"disqualification" had already been reversed, and since she had received a passing score, that she did not have further appeal rights. The letter cited Career Service Rule §3-42, which generally limits an administrative review to a failure to pass or failure to meet qualifications. Since the Agency had previously determined that Appellant had "passed" by attaining a score over 70, the Agency did not do an administrative review of Appellant's score. The Appellant then filed her appeal with the Career Service Board Hearing Officer on November 13, 2000. She does not allege discrimination in her appeal. The Hearing Officer has previously determined that the appeal was filed timely in accordance with CSR §19-22 (a).

The Agency advised the Hearing Officer during the motion hearing, that in accordance with Career Service Rules, the top 15 scores are certified to the hiring authority for interviews and hiring. The hiring authority is provided with the applicant's application which includes their education, background and experience, but not their score or ranking on the initial "test" or screening. In Appellant's case, the Agency advised the Hearing Officer that for this particular position, the cutoff for the top 15 certified for interview and hiring was 74.3. The Appellant's score was 74.0.

The announcement indicates that the testing for the position is "100% EXPERIENCE & EDUCATION RATING". The Hearing Officer was advised that this meant that no written objective examination was administered, and that the "test" score was based entirely on the Agency's rating of the applicant's experience and education.

ANALYSIS & CONCLUSIONS OF LAW

Career Service Rule 3-40 is applicable here, and at the time the exam was announced, it provided as follows:

3-42 Petition for review of disqualification decision

An applicant for employment or promotion in the Career Service may, within ten (10) calendar days from the mailing of notice of the examination results, review these results and, within this period, may file an administrative review request protesting failure to pass or failure to meet qualifications with the Personnel Director. The Personnel Director or the Director's designee shall investigate the administrative review request and inform the applicant of the results of the review. An applicant who is not satisfied with this action of the Personnel Director, may appeal in accordance with Rule 19, APPEALS. The period of time for filing the appeal shall be computed in accordance with subparagraph 19-22 a) 2).

Issued April 9, 1997.

The rule was changed effective September 7, 2000. However, the only significant change was the time for requesting an administrative review was reduced from ten days to five. The other changes in the language of the rule would not, if applied, alter the outcome of this case. Thus, the issue of whether to apply the new rule 3-42 or old rule is academic.

It is clear that under Career Service Rules §3-42 then in effect, an applicant may only seek an administrative review by the personnel director of an exam result that results in a failure to meet minimum qualifications for a position or a disqualification. Conversely, an applicant may not seek an administrative review of a passing score.

The old rule 3-42 permits an appeal of the personnel director's action to the Hearing Officer and the Career Service Board. CSR §19-10 a) provides:

Section 19-10 Actions Subject to Appeal

The following administrative actions relating to personnel matters shall be subject to appeal:

- a) Actions of the Personnel Director: Actions of the Personnel Director or a designated representative, which meet all of the following criteria:
 - 1) The action results in an alleged violation of the Career Service provisions of the Denver City Charter, or Ordinances relating to the Career Service, or the Personnel Rules.
 - 2) The action arises out of:
 - (a) the examination and certification of an applicant as provided in Section 3-40 Review and Appeals, or
 - (b) the classification of a career service position, as provided in paragraph, 7-66 h) Request for review of classification decision.
 - 3) The action is one which the Personnel Director

is not required to perform, and over which personal discretion or judgement in its performance is permissible.

* * *

Effective Date: November 4, 1999.

This rule was later amended on August 24, 2000. Again, similarly to the new and old rule 3-42, the changes would not alter the outcome here, and therefore, the issue of applying the new rule 19-10 or the old 19-10 is academic.

Under rule 19-10 a (2) (a), only an administrative action taken by the Director of Personnel pursuant to 3-40 is appealable. Section 3-40 is a heading only, with no text, entitled: "Employment and Promotional Tests". However, a plain reading of rule 3-42 reveals that it is intended as a subparagraph of the 3-40 Heading. Thus the reference in rule 19-10 to 3-40 is intended to include 3-42. Read together, rule 3-42 and 19-10 clearly limit the appeal of examination results to scores that fail to meet minimum qualifications.

In this case, the Agency determined the minimum qualification score to be 70. The Appellant's score of 74 was above that. Therefore, her result is not appealable under Career Service Rules.

The Appellant demonstrated that she was provided misinformation throughout the exam process. She indicated that this caused her a great deal of frustration. While this is undoubtedly true, her frustration does not create a right to relief under the scheme of Career Service Rules.

For example, the Appellant was not advised of her right to request an administrative review of the Agency's determination that she was not qualified for the position. Nevertheless, she did request a review by the analyst, which resulted in her score being reviewed and changed to a passing score.

She was given a form from the office of the Employee Relations of the Career Service, which indicated that she did have a right to appeal her final rating, whether or not it was a "passing" score. [Exhibit D-3].

The Appellant, not a city employee, was frustrated with this misinformation. However, the Hearing Officer can find no evidence that it adversely affected the outcome in any way. While Appellant may have been misled into thinking that she did have a right to an administrative review and appeal, that misinformation simply caused her to pursue an appeal that was otherwise not appealable. It caused her needless inconvenience and frustration. But it did not affect the outcome.

The Appellant also claims that the rule's prohibition from having her score reviewed violated her due process rights. In order to make such a finding, the Hearing Officer would have to determine that the Career Service Rules, particularly 3-42 and 19-10, are unconstitutional on their face.

It is a well established principal that a statute, or in this case a Career Service Rule, is presumed to be constitutional unless the party challenging the statute's constitutionality can prove the statute unconstitutional beyond a reasonable doubt. See *Anderson v. Colorado Dept of Personnel*, 756 P.2d 969, 975 (Colo. 1988). More importantly, under Career Service Rules, the authority of the Hearing Officer is limited to that which is given under Career Service Rules and the City Charter.

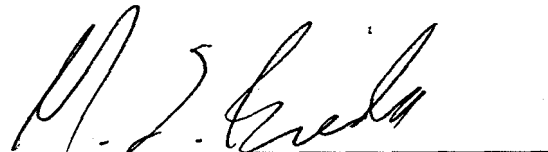
Under CSR 19-27 the Hearings Officer has the authority to affirm modify or reverse the Agency action that gave rise to the appeal. Thus, the Hearing Officer has the same duties and authority as the agency taking the action. Nowhere in the rules is authority granted to the agencies, the Career Service Board, or the Hearing Officer to declare a Career Service Rule unconstitutional. Accordingly, the Hearing Officer does not have jurisdiction to entertain Appellant's constitutional attack. Only a District Court with general jurisdiction could entertain such an issue.

The Hearing Officer concludes that the Director of Personnel, and therefore the Hearing Officer, do not have jurisdiction or authority under Career Service Rules, to review the exam scores of an applicant, once the applicant has been determined to meet the minimum qualifications for the position. While the fairness of such a limitation can be debated, especially under the circumstances of this appeal, the rules are nevertheless clear. By enacting such a rule, the Career Service Board has made a decision balancing the applicant's interest in such a review, against the efficient and expedient administration of the hiring process.

ORDER

The Agency's Motion to Dismiss is hereby GRANTED. This Appeal is DISMISSED, with prejudice.

Dated this 9th day of
February 2001.



Michael L. Bieda
Hearing Officer for the
Career Service Board