

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

Consolidated Appeal Nos. 63-06 and 64-06

FINDINGS AND ORDER

RECEIVED

IN THE MATTER OF THE APPEALS OF:

CAREER SERVICE
HEARING OFFICE

HERMAN WHITE and MIKOYAN WATSON,

MAY 18 2007

Appellants/Petitioners,

RECEIVED

vs.

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

Agency/Respondent.

This matter is before the Career Service Board on Appellants' Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision dated January 19, 2007, which incorporates his Decision of October 3, 2006, on the grounds outlined below.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellants were both hired by the Agency as on-call employees. Watson began his employment in 2001 and worked as a Recreation Instructor. White worked two on-call positions: Recreation Aide and Recreation Instructor, beginning in 1990 and 1992 respectively. The Agency terminated their employment on August 11, 2006. Both filed appeals with the Career Service Hearing Office.

On September 18, 2006, the Agency filed motions to dismiss these appeals on the grounds that Career Service Board Personnel Rule ("CSR") 5-64 (2) only permits on-call employees to appeal employment decisions on the basis of discrimination and neither Appellant had alleged discrimination in his appeal. Thereafter, Appellants were permitted to file amended appeal forms and amended pre-hearing statements disputing their status as on-call employees and alleging discrimination in violation of C.R.S. § 24-34-402.5.

On October 3, 2006, the Hearing Officer granted in part the Agency's motion to dismiss, finding that he did not have jurisdiction over discrimination claims brought

under C.R.S. § 24-34-402.5. In that same Order, the Hearing Officer instructed the parties to set up an evidentiary hearing to determine "Appellants' status while employed at the Agency, i.e. whether on-call or career status." Record, p. 267. That hearing was held on November 8, 2006. In his Order of January 19, 2007, the Hearing Officer found that Appellants were on-call, non-career status employees, and, incorporating his earlier dismissal of their discrimination claims, found that Appellants had no remaining grounds to appeal their terminations and affirmed the Agency's dismissal.

II. FINDINGS

A. Employment Status

Appellants' rights to appeal their terminations derive from their employment status under the career service rules. CSR 5-62 provides, in pertinent part:

An employee in career status

- 1) may be disciplined or dismissed only for cause, in accordance with Rule 16, DISCIPLINE.
- 2) may file a grievance or appeal for any reason specified in Rule 18, GRIEVANCE PROCEDURE or Rule 19, APPEALS.

Conversely, an employee who holds non-career status:

1. May be terminated at any time;
2. May not appeal any employment decision, except on the grounds of discrimination.

CSR 5-64 (1) and (2). An on-call employee holds non-career status. CSR 5-42 D. The Hearing Officer correctly recognized that, unlike a career status employee, an on-call employee is employed at will and has limited appeal rights. Thus, the purpose of the November 8, 2006 hearing was to determine the scope of Appellants' rights to appeal their terminations by determining their employment status.

Although they were hired into on-call positions, Appellants argue that they were really part-time career status employees, having attained this *de facto* status by the length of their employment, by the regularity of their work schedules, and by receiving, on occasion, certain benefits attributable to career status employees. The Board will address all of these claims.

First, Appellants contend that there is insufficient evidence to support the Hearing Officer's decision. Under CSR 19-61 D., however, the Board may only reverse on the grounds of insufficient evidence if the Hearing Officer's decision is "clearly erroneous."

The Board finds that when the record is viewed as a whole, the Hearing Officer's decision not clearly erroneous.

At the time of their hire and throughout their employment, all personnel action forms contained in Appellants' personnel files classified them as on-call, non-career status employees. Record, pp. 432, 437-467, 475, 481, 483, 490, 492, 497, 498, 500-506, 514, 516, 522-524, 572-576, 585-587, 590. The record contains numerous evaluations entitled, "Performance Evaluation, On-Call or Temporary Employees, Denver Parks and Recreation Department," and Appellants' written notices of termination bear the same title. Record, pp. 135, 541-551, 615. Similarly, each Appellant initialed in May 2005 a document entitled, "Parks & Recreation, On-Going, On-Call Employee Checklist." Record, pp. 471, 598. Not only were Appellants classified as on-call employees throughout their employment, but they were aware of their classification.

Nevertheless, Appellants claim that on several occasions they were given holiday or vacation pay and this benefit demonstrates that they were not on-call employees. Appellants, however, disregard the fact that this claim was disputed by the Agency's witnesses and the Hearing Officer made the following findings:

... I do not find the testimony of one side more credible than the other, and the exhibits alone are inconclusive as to whether the Appellants were paid for non-working hours. Therefore the Appellants fail to meet their burden to prove by a preponderance of evidence that they received benefits.

Assuming, arguendo, the Appellants were paid for time off as they described above, there are additional reasons for denying their claim. First, it is apparent they never received the package of benefits normally attributed to a career status employee. Second, assuming they received payment for time off as claimed, the evidence indicates it was an exceptional occurrence, and not approved by the Agency head. [Barney, Betts testimony].

Hearing Officer's Decision, p. 6. Given the disputed evidence on the pay issue and the lack of evidence that Appellants received the other benefits granted to career status employees (CSR 5-62; Transcript, Barney testimony, 132:2-25, 133:1-20, 135:16-25, 136:1-25, 137:1-23), the Hearing Officer's findings are not clearly erroneous.

Next, Appellants contend that based on their length of service and regular work schedules, they did not fit within the definitions of "on call" found in CSR 1 and CSR 5-33 B., and this somehow converted them to career status employees. However, Appellants' arguments implicate more than these two rules, and the Board believes that all career service rules must be read together to give effect to each provision.

As a starting point, CSR 5-41 provides that every employee in the Career Service shall hold one of the following employee statuses: A.) employment probationary status;

B.) career status; C.) promotional probationary status; D.) non-career status; or E.) trainee or intern probationary status. Since Appellants were not in any sort of probationary employment at the time of their termination, the only status they could have had was either career or non-career status.

In order to attain career status, an employee must enter into and successfully complete a period of probation, as well as any required training programs. CSR 5-42 A. and B. There is no evidence in the record that Appellants ever successfully completed a period of probation necessary to achieve career status. On the other hand, CSR 42-D specifically provides:

D. Non-career: Every person who is appointed to an on-call position **shall hold non-career status for the duration of the appointment** and shall not serve a probationary period.

(emphasis added). The Hearing Officer correctly relied upon these rule provisions in his decision but Appellants fail to address them and provide no explanation as to how they could be transformed from on-call employees into career status employees when doing so would violate these specific rule requirements.

Instead, they focus their argument on a narrow interpretation of the term “on-call.” CSR 5-33 B. 3. defines that term as follows:

3. On call: An on call position is one in which the employee works as needed, and does not have an established work schedule. Ushers are an example.

CSR 1 defines that term slightly differently, and, as the Hearing Officer noted, more broadly as to work hours:

On-call position: A position which may have routine or variable work patterns and is normally only filled to accommodate seasonal or short-term activities in various city agencies.

Appellants contend they did not work as needed, and had regular, established work schedules. But CSR 1 recognizes that an on-call employee may work either routine or variable hours, and Appellants’ timecard reports for the period 8/1/2005 through 8/31/2006 (Record, 626-636; 397-398) show their weekly hours varying anywhere from 4 to 28 hours/week, from which, coupled with the testimony of witnesses, the Hearing Officer could not conclude that either Appellant had “an established work schedule” pursuant to CSR 5-33 B. 3. Hearing Officer’s Decision, p. 5. This finding, based on the evidence, is not clearly erroneous.

Appellants also contend, based on the number of years they worked for the Agency, that their positions could not be on-call because they were not seasonal or short-

term. Here however, Appellants disregard the word “normally” used as a qualifier in CSR 1. While normally an on-call position may be used to accommodate seasonal or short-term activities, there is nothing in the language of CSR 1 or in CSR 5-33 B. 3. that would prohibit an agency from using on-call positions for longer periods of time. Moreover, CSR 5-42 D. – which provides that on-call employees shall hold non-career status for the duration of their appointment – also places no time limit on the employment of on-call employees.

For these reasons, the Board finds that the Hearing Officer correctly interpreted all necessary career service rules and his decision finding that Appellants were on-call, non-career status employees is supported by the evidence and is not clearly erroneous.

B. Discrimination under C.R.S. § 24-34-402.5

Appellants’ discrimination claim is brought under C.R.S. § 24-34-402.5, which provides, in pertinent part:

It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours. . . .

Notwithstanding any other provision of this article, the sole remedy for any person claiming to be aggrieved by a discriminatory or unfair employment practice as defined in this section shall be as follows: He may bring a civil suit for damages in any district court of competent jurisdiction. . . .

The Hearing Officer’s Order of January 19, 2007, incorporates his October 3, 2006 ruling that because the state statute creates an exclusive remedy in district court, the Hearing Officer did not have jurisdiction over Appellants’ discrimination claim. Hearing Officer’s Decision, pp. 8, 9; Record, p. 267. The Board agrees with the Hearing Officer’s conclusion, but for different reasons.

The Hearing Officer derives authority to hear appeals from the career service rules enacted pursuant to the Denver City Charter. Therefore, the answer to this jurisdictional question lies not in the language of the state statute, but in the language of the career service rules. CSR 19-30 A. provides as follows:

A. Powers and Duties

The Hearing Officers shall have the **authority to hear and decide all appeals permitted by this Rule 19**; and shall perform the functions necessary to implement and maintain a fair and efficient process for appeals.

(emphasis added). CSR 19-10 governs the actions subject to appeal and CSR 19-10 B. 1. provides, in pertinent part:

1. Discrimination, Harassment or Retaliation: Any action of any supervisor/manager or employee resulting in alleged discrimination, harassment or retaliation because of race, color, religion, national origin, gender, age, political affiliation, sexual orientation, disability, **or any other status protected by federal, state or local law** may be appealed. . . .

(emphasis added).

Relying on this Rule and CRS § 24-34-402.5, Appellants contend that they had a protected status under state law by virtue of engaging in lawful activities during non-working hours, and their allegations that they were terminated because of that protected status may be appealed under CSR 19-10 B. 1. The Board disagrees. The highlighted phrase in Rule 19-10 B. 1. must be read in conjunction with the phrases that precede it and, in that context, “any other status protected by . . . law” refers to a characteristic, condition, or affiliation of a person, which, in relation to other members of society, the law recognizes as needing legal protection. While § 24-34-402.5 does create a form of discrimination, more aptly described as an unfair labor practice, it does not create a protected status within the meaning of CSR 19-10. If it did, every employee in the state of Colorado, including those who engage in unlawful activities, would have protected status simply by doing what everyone does: engage in lawful activities.

The Board finds that under CSR 19-10, claims of discrimination made pursuant to CRS § 24-34-402.5 are not actions subject to career service appeal and, for this reason, the Hearing Officer lacked jurisdiction to hear Appellants’ claims.¹ The Board notes, as did the Hearing Officer, that Appellants are not left without a forum, but that forum is the district court, not the Career Service Hearing Office.

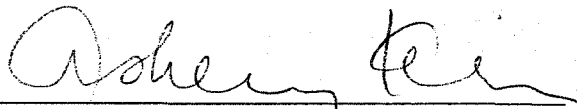
ORDER

IT IS THEREFORE ORDERED that Appellants’ Petition for Review is **DENIED**, the Hearing Officer’s Finding that Appellants were on-call, non-career status employees is **AFFIRMED**, the Hearing Officer’s Finding that he did not have jurisdiction over Appellants’ claims of discrimination is **AFFIRMED** on the grounds outlined in the Board’s Findings, and the Hearing Officer’s Order affirming the Agency’s Dismissal of Appellants’ employment is **AFFIRMED**.

¹ Appellants also rely on the broad policy language found in CSR 15-101. Notwithstanding any similarities or differences between the two rules, CSR 19-10 controls and determines the Hearing Officer’s jurisdiction to hear appeals, and therefore, the Board need not address Appellants’ arguments as to Rule 15-101.

SO ORDERED by the Board on May 3, 2007, and documented this
17th day of May, 2007.

BY THE BOARD:


Co-Chair

Board Members Concurring:

Tom Bonner
Nita Henry
Kit Williams

Luis Toro concurs with the Board's findings in Section II. A., but dissents from the Board's findings in Section II. B., on the following grounds:

I respectfully disagree with the Board's conclusion in Section II.B. of its Findings and Order. I believe that the Hearing Officer erred in dismissing without a hearing the appellant's claim that they were terminated as a result of their lawful off-duty activities and that the case should be remanded for consideration of that claim.

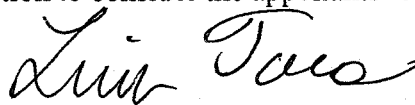
Rule 15-101 states that the City "maintains a strict policy prohibiting discrimination, sexual harassment and harassment because of race, national origin, sexual orientation, physical or mental disability, age, gender, marital status, military status, religion, political affiliation, **or any other basis protected by federal, state or local law or regulation.** All such harassment or discrimination is unlawful." [Emphasis added.] Rule 15-101 protects all City employees, even "on call" employees such as the appellants.

C.R.S. § 24-34-402.5 states that it "shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours" unless the employer can demonstrate that the restriction of the lawful off-duty activity reasonably relates to the employee's duties or is necessary to avoid conflicts of interest. The State of Colorado has declared that termination of employment due to an employee's lawful off duty activities is a form of discrimination, and therefore, it is a violation of Rule 15-101 for a City agency to terminate employment based on such activities. Instead of dismissing the claim for lack of jurisdiction, the Hearing Officer should have taken evidence regarding whether the appellants were terminated as a result of their lawful off-duty activities, and if they were, whether the agency had a lawful reason for taking those off-duty activities into consideration when it terminated the appellants' employment.

In reaching a contrary conclusion, the Board ignores Rule 15-101 and looks only to Rule 19-10 B.1., which states that an action of a supervisor is appealable when it results in discrimination based on "status." The Board then defines "status" to mean "characteristic, condition, or affiliation of a person, which, in relation to other members of society, the law recognizes as needing legal protection." This analysis ignores that by passing C.R.S. § 24-34-402.5, the State of Colorado has recognized that a person's lawful off-duty activities do indeed constitute a "characteristic, condition or affiliation of a person" (in this case, the appellant's "affiliation" with a sports league) that is deserving of legal protection. I do not agree that Rule 19-10 B.1. should be read as making certain personnel practices that are unlawful under Rule 15-101 to be unappealable. Rather, the term "status" should be interpreted as broadly as the term "basis" in Rule 15-101. There is no principled way to distinguish the "status" of being associated with others in a lawful off-duty activity and the "status" of being a Methodist, a Democrat, a divorcee or any other "status" that is unquestionably protected under Rule 15-101.

The Board also attempts to minimize the state legislature's use of the word "discrimination" by saying that discrimination under C.R.S. § 24-34-402.5 is "more aptly described as an unfair labor practice." Presumably the Board is referring here to the language of C.R.S. § 24-34-402.5 that a violation of that statute is a "discriminatory or unfair labor practice." However, when the Board has already passed a rule stating that discrimination "on any other basis protected by . . . state . . . law," it is in no position to decide that some forms of discrimination prohibited by state law do not really constitute "discrimination" but merely an "unfair labor practice." It should also be noted that C.R.S. § 24-34-402 defines an employer's firing of an employee due to "race, creed, color, sex, age, national origin or ancestry" as a "discriminatory or unfair labor practice." The fact that C.R.S. § 24-34-402.5 uses identical language further demonstrates that the statute was intended to address conduct the state legislature considers to be discrimination.

I would rule that C.R.S. § 24-34-402.5 is incorporated into Rule 15-101 and therefore, the Hearing Officer had jurisdiction to consider the appellants' claim that they were terminated in violation of the Rule.



CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the foregoing **FINDINGS AND ORDER**, postage prepaid, this 18th day of May, 2007, to:

William S. Finger, Esq.
Robert T. Hoban, Esq.
Frank & Finger, P.C.
Box 1477
20295-D Upper Bear Creek Rd.
Evergreen, CO 80439-1477

And VIA INTEROFFICE MAIL this 18th day of May 2007:

Robert D. Nespor, Assistant City Attorney
City Attorney's Office/Litigation Section
201 West Colfax Avenue Dept. 1108
Denver, CO 80202

Kathy Billings
Department of Parks & Recreation

CSA Hearing Office ✓

Deborah A. Sarsene