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

Appeals No. 63-06, 64-06

FINDINGS RE APPELLANTS' EMPLOYMENT STATUS AND ORDER RE AGENCY'S MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

MIKOYAN WATSON and **HERMAN WHITE,**
Appellants,

vs.

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

I. INTRODUCTION

In these combined appeals, the Appellants, Mikoyan Watson and Herman White, appeal their dismissals from employment with the Denver Department of Parks and Recreation, the Agency. A limited hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on November 8, 2006. The Appellants appeared with their attorneys-at-law, Robert Hoban and Frank Finger. The Agency was represented by Robert D. Nespor, Assistant City Attorney, with Michael Barney serving as advisory witness. Agency Exhibits 1, 3, 5 and 6 were admitted, while Appellant Exhibits A-J, L-N, and P were admitted. The Appellants presented witnesses Daniel Betts and Dennis Weber, in addition to testifying on their own behalf. The Agency presented Michael Barney as the only additional witness.

II. ISSUES

There were two issues to be decided at the November 8, 2006 hearing: (1) During their employment with the Agency, were the Appellants on-call, non-career status employees, or part-time, career status employees? The parties concede if the Appellants were on-call, then the Agency could dismiss the Appellants for any or no reason, and their appeal would fail pursuant to CSR 5-64. If, on the other hand, they were Career Service employees, they may be dismissed only for cause. CSR 5-62; (2) Which party has the burden of persuasion with respect to presenting evidence?

In addition to the two issues considered at the November 8 hearing, this Order disposes of issues in the following pending motions and responses: Agency's Motion to Dismiss," filed September 18, 2006; Appellants' Opposition to Agency's Motion to Dismiss, filed September 22, 2006; Agency's Renewed Motion to Dismiss, filed October 30, 2006; and the Appellants' Response, filed as part of their Closing Arguments on November 22, 2006.

III. FINDINGS

The Appellants were employed by the Agency. The circumstances of their hiring, their duties, and the circumstances of their dismissal are so similar that both cases are identical for purposes of determining the aforementioned issues.

The Appellants were hired as on-call, non-career status employees. [Exhibit 1, Personnel Action; Exhibit 3, Personnel Action]. They were paid hourly and received no benefits. They did not serve a probationary period of employment pursuant to CSR 5-50 et seq, nor did they receive merit increases in pay. The Appellants were not promised they would be terminated only for cause. They were not told by any supervisor or hiring authority they were career status employees. [Watson cross-exam].

White's employment for the Agency began in 1990. Watson began in 2001. At the time of their separation, the Appellants worked at the Hiawatha Davis Recreation Center as Recreation Instructors. Dennis Weber was their immediate supervisor. Michael Barney, Director of Recreation, and Dennis Betts, Deputy Manager were their second level supervisors.

The Appellants' duties included coaching a football team, running athlete fitness programs, coaching basketball, working at the front desk, and occasionally opening and closing the center. [Exhibit J, White testimony, Watson testimony]. Both Appellants had full-time employment outside the Agency. Neither had a specific task to complete as the basis for his assignment, and their assignments were ongoing. [Betts testimony].

Weber signed the form order of separation as a termination of the Appellants employment, rather than as an end-of-assignment, effective 8/11/06. [Weber testimony, Exhibits A, B]. The Appellants filed timely appeals on August 23, 2006.

IV. ANALYSIS

A. Who has the burden of persuasion?

The parties disagreed as to who bears the burden of persuasion concerning the issue of the Appellants' employment status. The burden of persuasion depends upon the claim involved. The Appellants claim they had or obtained career status so that cause for their dismissal was required, while the Agency claims the Appellants were non-career, on-call employees who could be dismissed for any or no reason. This is the essence of at-will employment. See III.C., *infra.* Thus the dispute may equally be

stated as whether the Appellants were at-will employees.

The law in Colorado state and federal courts is well-settled as regards the burden of persuasion in an at-will dispute.

> [T]he employee must show that although there was no express contract provision to this effect, the parties nevertheless agreed that the employment would not be at-will. Graffi v. Unisys, 1994 U.S. App. LEXIS 33178 (10th Cir. 1994), *citing* Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1001 (Utah 1991).
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> The presumption of at-will employment places the burden on the [Appellants] to plead and prove circumstances that would authorize application of one of the recognized exceptions to the [at-will] doctrine. Wisehart v. Meganck, 66 P.3d 124, 127, LEXIS 1426 (Colo. App. 2002).

Accordingly, I find the Appellants bear the burden of persuasion, by a preponderance of the evidence, to show they were career status employees, rather than on-call, non-career status employees.

B. Whether the Appellants were part time, career status employees, or on-call, non-career status employees. Appellants' claims.

1. Introduction. The Appellants seem to advance eight arguments in favor of their claim they were part-time, career status employees, rather than on-call, non-career status employees. It remains unclear if the Appellants assert they were career status *ab initio*, converted from non-career status to career status, or assert both alternatively. Some of the Appellants' arguments point toward an *ab initio* claim, for example where they claim the Agency "misclassified the Appellants as 'on-call'." [Appellants' Closing Argument, p. 4, Appellants' Pre-hearing Statements]. In other places, they seem to argue a conversion claim due to: the length of their employment [Appellant's Closing Argument, p. 4]; the nature of their responsibilities subsequent to hiring, [*id* at p. 4-5]; their work schedules as viewed in hindsight [Appellants' pre-hearing statements]; and according to certain benefits bestowed subsequent to hiring. [Appellants' Closing Argument p. 5].

2. Appellants' claims.

a. CSR 5-33 B. 3. unequivocally identifies an on-call employee as one who works as needed and does not have an established work schedule. [Appellants' Closing Argument, p.3]. The Appellants argue they worked regular, established schedules and therefore do not fit this description of on-call employees. Their claim, while true to an extent, fails to address the complex and sometimes ambiguous interplay of all the pertinent provisions within the Career Service Rules. Some background is in order.

Under CSR 5-30, all employees hired under the Career Service Rules are defined

by two characteristics: the duration of their appointment, and the number of hours worked. The duration characteristic of employment is further specified as either unlimited or limited. Unlimited positions have no ending date, while limited positions have a specified end date. CSR 5-32. The Appellants did not have an end date to their employment, thus they were unlimited employees pursuant to CSR 5-32.

Regarding the number of hours worked characteristic, all employees are further designated as full-time, part-time or on-call, depending on the number of hours worked per week. CSR 5-33. Full-time employees are scheduled to work 40 hours; part-time employees work less than 40 hours; on-call employees, such as ushers, do not have an established work schedule and work only as needed. CSR 5-33 B.

Under CSR 5-33 B. 3. an on-call employee must meet two "criteria." He works as needed, and he has no established schedule. On the other hand, the Career Service Rules define an "on-call" position as having either "routine or variable" work patterns and is "normally only filled to accommodate seasonal or short term activities..." CSR 1-7. Definitions apply wherever the terms defined are used in the rules. CSR 1-1.Thus the term "on-call" has broader application as defined in CSR 1, than as the term is used in CSR 5-33 B. 3. This is the crux of the issue in this case, and the parties have understandably aligned themselves with the use of the term which best suits their respective positions. The Appellants insist that because they did not work only as needed and had established schedules, they are not "on call" under CSR 5-33 B. 3. The Agency posits the Appellants are on-call under the definition of "on-call" employees because the definition allows for either fixed or variable schedules and may be ongoing. CSR 1. Due to this ambiguity in the Career Service Rules, I turn to the rules of statutory construction.

In construing an administrative rule such as the Career Service Rules, the same rules of construction apply as they would in interpreting a statute. Woolsey v. Colo. Dept. of Corrections, 66 P.3d 151 (Colo. App. 2002). The first rule of construction is not to use the rules of construction when a plain reading of the language will do. *See* J.P. Meyer Trucking & Constr., Inc. v. Colo. Sch. Dists. Self Ins. Pool, 18 P.3d 198 (Colo. 2001). In this case, there are conflicting meanings for the same term "on-call" within the rules, so it is appropriate to refer to the interpretive rules of construction.

Conflicting provisions should not be read in isolation, but in the context of the rules as a whole. Stenberg v. Carhart, 530 U.S. 914, 992-993 (U.S. 2000), *citing* United States v. Morton, 467 U.S. 822, 828, 81 L. Ed. 2d 680, 104 S. Ct. 2769 (1984). The Career Service Rules have extensively treated the separation of employees into their respective types and status. CSR 5-30 and 5-40. Other Career Service Rules have described extensively how such status is attained and have explained the effect of status on employee rights. CSR 5-42 and 5-60, 64. Here are some examples of how the rules give a broader context than the isolated reading suggested by the Appellants.

CSR 5-42 A. requires employees to enter probation as condition precedent to career status, yet the Appellants did not enter probation. CSR 5-42 B. requires

employees to pass probation as a second condition precedent to attaining career status, yet the Appellants did not pass probation. CSR 5-42 D. states employees hired into non-career status remain in that status throughout their appointment, and the Appellants were hired into on-call, non-career status. The Appellants' claims would require me to find they became de facto career-status employees. Such an outcome would, in effect, repeal the requirements of CSR 5-42 A, B, and D, and thus violate two directives of the interpretive rules, to read the rules as a whole, Stenberg, *supra,* and to give full effect to each provision therein. Askew v. Industrial Claim Appeals Office, 927 P.2d 1333 (Colo. 1996).

A third rule of interpretive construction favors the Agency's interpretation of what is an on-call employee. "The agency's interpretation of [a] rule should be given great weight unless plainly erroneous or inconsistent with the rule." Bryant v. Career Service Authority, 765 P.2d 1037, 1038 (Colo. Ct. App., 1988). *Citing* Department of Administration v. State Personnel Board, 703 P.2d 595 (Colo. App. 1985). The Agency deems the Appellants were on-call because they were appointed as such, and under CSR 5-42 D. they remain in that status. Agency's Written Closing Statement, p.2-3. This reading is not plainly erroneous or inconsistent with other sections of the Career Service Rules. For the reasons stated here and immediately above, the Agency's interpretation of the Appellants' status is more persuasive, by a preponderance of the evidence, than the Appellants' interpretation.

b. The duration of the Appellants' employment indicates they were part-time, rather than on-call employees. *See* Appellant's Closing Argument, p.4. The duration requirement, under CSR 5-32, determines the distinction between unlimited and limited positions in the career service. This distinction is not at issue in this case.

I also find the distinction claimed by the Appellants, that the category (CSR 5-33 A.) and criteria (CSR 5-33 B.) of on-call employees may not include part-time employees, and vice versa, is without merit. Admittedly, the structure of 5-33 A. and 5-33 B. places a distinction between part-time and on-call employees; however, a plain reading of those terms does not require the distinction to be one of total, mutual exclusivity. As stated above, in order to give meaning to each provision, I read the terms "part-time" and "on-call" both to include employees who work less than 40 hours per week.

c. The Appellants worked regular, established work schedules. *See* Appellants' Closing Argument, p.4-5., established schedules. The evidence establishes the Appellants worked, for the most part, variable hours during each year and variable hours per week; however, in the most recent years their hours became mostly regular. [Exhibits 2, 4, G, H]. From this evidence I cannot conclude that either Appellant's work schedule constitutes "an established schedule" pursuant to CSR 5-33 B. 3.

d. The Appellants' duties were not restricted to seasonal work. Appellants' Closing Argument, p.4]. The Appellants' argument here is that an "on-call" employee is defined as one who is employed "normally...to accommodate seasonal or short term

activities..." CSR 1-7. The Appellants conclude since their duties were regular and not seasonal, they are therefore not on-call as defined in the rule. The major problem with this rationale is it ignores the qualifier "normally" which does not restrict the use of on-call employees to seasonal work. In addition the rule does not require the Agency to establish any exceptional circumstances in order to justify using on-call employees for non-seasonal, long-term activities, so that if the Agency chose to employ the Appellants to perform non-seasonal, long-term activities, that choice appears justifiable under the on-call definition of an on-call employee. Moreover, as described above, the tension created between the CSR 1 definition of "on-call" and the CSR 5-33 B. 3 definition must be resolved in favor of the Agency's interpretation.

e. The Appellants received benefits. The Appellants state this is their most important argument. *See* Appellants' Closing Argument, p.5. White stated he was paid for a 2004 vacation, [White testimony], while Watson was paid for a 2002 vacation, [Watson testimony]. Both Appellants stated they were paid for non-work activities (Martin Luther King weekend for the past six years, and one weekend several years ago under a previous supervisor, according to White; Martin Luther King weekend 2006 and one two-week vacation in 2002 under a previous supervisor, according to Watson). [White and Watson testimony, Exhibits G, H].

The Agency's witnesses denied the Appellants were paid for non-working time, [Barney, Weber testimony], and there was no evidence such a practice was approved by anyone with authority to do so within the Agency or at the Career Service Authority. 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 the 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].

f. The Appellants' career status is not at issue. The Appellants deny their career status was at issue in the November 8, 2006 hearing. [Appellants' Closing Argument]. Alternatively, they present argument in favor of their status as career status employees. There is an explicit link between appointment to an on-call position and non-career status. Employees who are on-call are, perforce, non-career status as stated in CSR 5-42 D. Part-time employees are required to hold and pass probationary status pursuant to CSR 5-42 A and B. Therefore, part-time employees are, perforce, career status employees, since only career status employees are required to pass probation. Since the Appellants' employment criteria, either as on-call or as part-time employees, necessarily implicates a finding as to their status under CSR 5-42, their career status is at issue. Consequently, I consider the Appellants' alternative claims.

(1). The Appellants argue their favorable job performance histories are evidence of their career status. [Appellants' Closing Argument, p.5]. I disagree. A favorable job performance is evidence of career status only if career status is already established.

Therefore, this argument begs the question of the Appellants' status. If anything, the facts seem to favor a finding that the Appellants were non-career employees. "On-call employees are not eligible for merit increases." CSR 13-62 A.). There is no evidence the Appellants received, or were eligible for merit pay increases. Therefore, to complete the syllogism, the Appellants were on-call.

(2). The Appellants received paid training. The Career Service Rules are silent regarding whether Agencies may pay for the training of non-career employees, so if the Appellants were non-career status, presumably it would be in the discretion of the Agency whether to pay for training which it deems appropriate as a benefit to the Agency and to the employee. [1] Since it is optional whether agencies pay for any training of non-career employees, this argument does not tend to prove either the career or non-career status of the Appellants.

(3). The Agency referred to the Appellants as part-time employees. The Agency concedes the Appellants were referred to as part-time employees, but argues they were nonetheless non-career status. [Barney, Betts testimony]. The Career Service Rules are clear that part-time employees who pass both probation and training attain career status. "Every person when first appointed [to a part time position] shall hold employment probationary status for the probation period required for the class.... Employees attain career status though...[s]uccessful completion of the probationary period and training program..." CSR 5-42. A., B. More importantly, however, the same rule, CSR 5-42 A. states "[e]very person **when first appointed**...to a...part time...position..." (emphasis added). The clearest evidence of the Appellants' status "when first appointed" is the "personnel action," which is the official hiring document. The Appellants' personnel actions state they were appointed to on-call, non-career status positions. [Exhibit 1, 3]. In addition, the Appellants' personnel files contain many personnel actions over many years. Each personnel action affirms the Appellants' on-call status. *Id.* I find the supervisors' references to the Appellants as part-time employees did not convert their status from non-career to career.

g. The Appellants' length of service defines them as career status employees. [Appellants' Closing Argument, p.6]. Again, I must disagree. A review of the Rules reveals two duration-based qualities of employment, but neither transforms non-career status employees to career status based upon their length of service. First, career status employees must pass a mandatory six-month probation; however, if the Appellants intend that all employees who remain more than six months become career status, such a self-defining method of attaining career status would undermine CSR 5-42 D. "Every person who is appointed to an on-call position shall hold non-career status for the duration of the appointment...". Such a result runs counter to two of the interpretive rules of statutory construction, to avoid conflict between relevant provisions, People v. Smith, 971 P.2d 1056 (Colo. 1999), and to give effect to every provision. Askew, *supra.* The second duration-based quality of employment characterizes

[1] The same choice, whether an agency decides to pay for the training of an employee should also apply to a probationary employee, also a non-career status identification. CSR 5-61.

positions by duration of service, but only as such duration relates to unlimited or limited positions, CSR 5-32. This characteristic of employment is not at issue here.

C. The Doctrine of At-Will Employment.

The elements that characterize non-career employees under the Career Service Rules share the attributes of public at-will employees. The doctrine of public at-will employment is therefore instructive. At-will employees have no property interest in their jobs and are terminable by either party, at any time, for any or no reason. **J. SANCHEZ STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY** §14:9 (2004). Therefore, procedural due process plays no role. *Id.* Even if the reason for dismissal is mistaken or unfair, the decision to dismiss is not subject to judicial review. *Id.* Unless modified, by contract or otherwise, employees of indefinite duration are at-will. *Id.* The Appellants complain that the Agency changed its position as to why it dismissed the Appellants. *Compare* Exhibits A and B with Exhibits C, D, E, and F. I agree the Agency gave the impression it was waffling on what basis to explain its decision. Nonetheless, under the doctrine of at-will employment and under CSR 5-64, the Agency may state any or no reason for dismissal.

V. APPELLANT'S DISCRIMINATION CLAIM

The Appellants claimed their dismissals were motivated by unlawful discrimination. I previously dismissed this claim for reasons stated in my October 3, 2006 Order Re Agency's Motion for Reconsideration ¶4.

VI. CONCLUSION

A. Employment Status.

The Career Service Rules refer ambiguously to an "on-call" position according to its "definition," CSR 1 p. 1-7; "characteristic," CSR 5-31; "category," CSR 5-33 A.; and according to its "criteria of categories," CSR 5-33 B. According to the Career Service Rules, on-call employees may not have an established work schedule, CSR 5-33 B. 3., or they may have a varied schedule. CSR 1 p. 1-7. They usually only fill seasonal or short-term needs, CSR 1 p. 1-7, but they may fill unlimited-duration positions. CSR 5-31, 32. On-call employees may not be part-time, CSR 5-33 A., or they may be part-time. CSR 5-33 B. 2., 3. An individual hired by the Agency under the personnel rules is an "employee," CSR 1 p.1-4, is in the "Career Service," CSR 1 p. 1-2, and is a "Career Service employee," CSR 1 p.1-2, CSR 5-41, yet may not have "career status." CSR 1 p. 1-3, 1-7, CSR 5-41, 5-42 D. It seems this turbid stew of conflicting provisions is a recipe ripe for revision.

What is clear is that the Appellants were hired into the status of on-call employees, and never served probation. The parties did not alter the general conditions of employment, the Appellants never challenged or asked for clarification of their status until their dismissal, and importantly, no exception to their at-will status applies. Thus, pursuant to CSR 5-42 D, and under the doctrine of at-will employment, I conclude the Appellants were on-call, non-career

status employees throughout their employment with the Agency. I further conclude there was no change to the terms of their employment that transformed their status from non-career to career employees. I therefore FIND and CONCLUDE the Appellants were hired into on-call, non-career employment status. I also FIND and CONCLUDE the Appellants remained on-call, non-career employees throughout their employment.

B. Agency's Motion to Dismiss.

Because I have determined the Appellants' status was that of non-career employees, and have dismissed the Appellants' discrimination claim, the Agency did not require a reason to dismiss the Appellants. CSR 5-64 1) and 2). Consequently the Appellants' remaining arguments regarding the propriety of the dismissal are moot, and no remaining defense against termination is available to the Appellants.

VII. ORDER

The Agency's dismissal of the Appellants' employment on August 11, 2006 is AFFIRMED.

DONE this 19th day of January, 2007.

Bruce A. Plotkin
Hearing Officer
Career Service Board

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