

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

Appeal No. 185-03

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**ORDER OF DISMISSAL**

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IN THE MATTER OF THE APPEAL OF:

**TRACY BALBIN**, Appellant,

Agency: DEPARTMENT OF ENVIRONMENTAL HEALTH, OFFICE OF THE MEDICAL EXAMINER, and THE CITY AND COUNTY OF DENVER, a municipal corporation.

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This appeal was originally scheduled for hearing to commence February 20, 2004. On February 2, 2004, the Agency filed a Motion to Dismiss this appeal. The hearing was vacated for the purpose of allowing Appellant the opportunity to respond to the Motion. Upon consideration of the Motion to Dismiss and Appellant's response thereto, the Hearing Officer makes the following findings of fact and order:

**Factual Background**

This is a timely appeal of a grievance filed by Appellant Tracey Balbin which asserts discrimination, harassment and retaliation in violation of Career Service Rules (CSR) 15-101, 15-106 and 15-120.

Ms. Balbin is a Coroner's Investigator employed by the Denver Office of Medical Examiner within the Agency.

Appellant alleges that on September 22, 2003, she took a call from the daughter of a woman who had co-habited with a decedent whose death was being investigated by a different Coroner's Investigator, hereinafter referred to as "the co-worker."

After the call, Appellant forwarded a supplemental report to her immediate supervisor, Chief Deputy Coroner Michelle D. Weiss-Samaras. The report paraphrased the daughter as stating that the co-worker "had asked her mother if this office could consider her common law wife so they could make arrangements and this office would not have to look for the decedent's family." [Response to Grievance, p. 1; Agency's Exhibit 6.]

Both parties agree that the supplemental report alleged that the co-worker had committed a serious ethical violation. Appellant does not dispute that the supplemental

report was a permanent official document available to all staff members, and potentially available to other agencies. [Response to Grievance dated October 23, 2003, p. 1.]

The day after Appellant filed her supplemental report, Ms. Weiss-Samaras herself interviewed the daughter whose statements were placed at issue in Appellant's supplemental report. The daughter denied that she had told Appellant the co-worker had tried to persuade her mother to claim a common law relationship. "He was just trying to determine the relationship so he could write it down." [Agency's Exh. 8-1.]

On September 25, 2003, Ms. Weiss-Samaras conducted a taped interview of Appellant in order to obtain her statement pursuant to Appellant's allegation of unethical conduct by the co-worker. At that interview, Appellant expressed initial reluctance to speak with Ms. Weiss-Samaras in the absence of a specific representative, stating that she feared retaliation from the co-worker and Ms. Weiss-Samaras based upon her previous allegations of unethical conduct against the same co-worker. [Agency's Exh. 10-1, 10-2.] After a short break, Appellant apparently agreed to a substitute representative, and the questioning proceeded. [Exhs. 3-2, 10-3 and 10-5.]

During the interview, Appellant admitted that the daughter had said "no" when Appellant asked if the co-worker had told her mother to claim common law status. [Exh. 10-5, 10-12.] However, "I guess I got the impression . . . at the scene, they, for some reason it came up common law status when it never occurred to them. So someone had to bring up common law status." [Exh. 10-8] A change in the daughter's tone during the conversation caused Appellant to think that the co-worker had implied that a claim of common law status would save the Coroner's Office the work of finding the family. [Exh. 10-12 to 10-15.] Based on that impression, Appellant wrote her supplemental report alleging unethical conduct by the co-worker. [Exh. 3-1, 09-22-03 Balbin supplemental report.]

Appellant's supplemental report affirmatively states that the co-worker "had asked her mother if this office could consider her common law wife so . . . this office would not have to look for the decedent's family." [Response to Grievance, p. 1.]

On October 10, 2003, Appellant received a copy of her co-worker's grievance of the ethics investigation stemming from Appellant's supplemental report, and a letter addressed to her that threatened legal action if she "discussed these baseless allegations with other employees" in the future. [Exhs. 12 - 14.]

On October 17, 2003, the Coroner informed the co-worker that he had concluded that "nothing in this [ethics] investigation indicates any wrongdoing on your part." [Exh. 17.]

Both parties agree that the Agency issued a verbal reprimand to Appellant on October 17, 2003, a copy of which Appellant will submit as Exhibit F. The parties disagree as to the reason for the reprimand.

Appellant states that the reprimand was issued "for statements she made during her September 25, 2003 interrogation by Ms. Weiss-Samaras." [Appellant's Response to Agency's Motion to Dismiss, p. 6.] Appellant argues that the verbal reprimand "punished Ms. Balbin for raising valid questions and concerns she had about whether the investigation of [decedent's] common law marriage status and next of kin was adequate." [Appellant's Response to Motion to Dismiss, p. 6.]

The Agency claims the reprimand was issued "due to her failure to accurately note her conversation with [the witness] in her supplemental report." [Agency's Motion to Dismiss, p. 2, ¶ 7.]

On October 17<sup>th</sup>, Appellant filed a grievance after learning a week earlier that her co-worker had received information obtained from her interview. The first step grievance alleged harassment, discrimination, and retaliation in violation of CSR 15-101, 15-106 and 15-120 because of her ethics allegations against her co-worker. In support of the grievance, Appellant alleged that she had been subjected to intimidating and harassing questioning by her supervisor, Ms. Weiss-Samaras, and forced by the last-minute notice to use a representative not of her choosing during the taped interview. Appellant further stated that she was denied the opportunity to review the investigative materials, and that the co-worker was given information from her interview, despite her request for protection from retaliation. The grievance did not allege discrimination based upon sex. [Exh. 2.] On October 29<sup>th</sup>, her supervisor denied the grievance.

Appellant timely filed a second step grievance on November 6, 2003, asserting the same violations in the same words as the original grievance. The Chief Medical Examiner denied that grievance on November 14, 2003. This appeal followed on November 24, 2003.

The appeal repeated its assertion that the conduct of the investigation violated CSR 15-101, 106 and 110, and specified that the appeal was based upon the "Response to Second Step Grievance / Discrimination on the basis of Sex / Harassment & Retaliation." Thus, the appeal raised for the first time an allegation of sex discrimination, but repeated the claims of harassment, discrimination and retaliation on the basis of Appellant's whistleblower activity.

The sex discrimination allegation was not first presented to the Agency in the form of a request to investigate the asserted harassment as required by CSR 15-103.

The grievance appeal and discrimination claims contained in the appeal are supported by allegations that the Agency conducted a discriminatory and retaliatory interview with Appellant because she had "attempt[ed] to correct serious errors in a 'next of kin' determination". The appeal further asserts that the Agency improperly furnished information from her interview to the accused co-worker, causing the co-worker to send her a letter threatening legal action. The appeal requests as remedies

the cessation of harassment and disparate treatment, a transfer, and an impartial investigation into her allegations of unethical conduct.

### Discussion

#### I. Agency's Motion to Dismiss

The Agency has moved to dismiss the appeal on the ground that Appellant has failed to meet her burden of proof as to the discrimination, harassment, and retaliation claims. The Agency also argues that the Hearing Officer lacks jurisdiction under CSR 2-104(d) to grant any of the requested remedies since our authority is limited by City Charter to "affirming, modifying, or reversing the administrative action appealed." If the appeal is not dismissed in its entirety, the Agency requests that the Hearing Officer exclude Appellant from presenting evidence based on her failure to comply with the order to respond to the Agency's Motion for a More Particular Statement.

In response, Appellant argues that the Motion to Dismiss is in essence one for summary judgment, and that genuine issues of material fact exist that would be resolved by a hearing on this appeal. Appellant asserts that an evidentiary hearing would allow her to prove that her allegations of unethical conduct were true, that she was treated differently than the co-worker based on sex during the investigation into the ethics issue, and that she has asserted a prima facie case of retaliation and sex discrimination. Finally, Appellant asserts that the Hearing Officer has jurisdiction to rescind the verbal reprimand issued on October 17, 2003.

#### II. Jurisdiction Under Career Service Rules

Under the limited jurisdiction provided in the Career Service Rules, a hearing officer has jurisdiction only of appeals of actions set forth in CSR 19-10. Here, Appellant has invoked jurisdiction under 19-10 (d), "Grievances resulting in rules violations," and under CSR 19-10 (f), "Harassment or discrimination."

##### 1. Appeal of Grievance under CSR 19-10(d)

The grievance underlying this appeal claims discrimination and harassment in violation of CSR 15-101 and 102, and retaliation in violation of CSR 15-106 for making a report of unethical conduct.

Appellant asserts that the first violation occurred on September 25, 2003, the date of her interview. However, Appellant's failure to file a grievance within ten days of the interview deprives the Hearing Officer of jurisdiction under subsection (d) to consider the issue of whether the interview itself was in violation of CSR rules.

Appellant asserts that she learned of the second violation on October 10, 2003, when she received the co-worker's letter threatening legal action if Appellant repeated her allegations against him to other employees. While the first step grievance filed on

October 17<sup>th</sup> was timely, the co-worker letter is not an administrative action within the meaning of CSR 15-101, 106 or 120. The letter is alleged to be co-worker harassment based upon her whistleblowing activity. However, Appellant cannot avoid the requirements of 15-103 to report the harassment by filing the appeal under CSR 19-10(d) as a grievance appeal rather than a direct appeal under 19-10(f). A complaint of harassment or discrimination is necessary in order to allege that a supervisor's failure to take action was in violation of the Code of Conduct. Such a result would also deprive the Agency of the opportunity to investigate the charge and to correct any prohibited behavior. Thus, Appellant's failure to comply with CSR 15-103 renders the claims related to the co-worker letter premature based upon the absence of an administrative action or inaction that violated the Career Service rules. Therefore, the Hearing Officer lacks jurisdiction to hear the appeal of the grievance under CSR 19-10(d).

## 2. Appeal of Harassment or Discrimination under 19-10(f)

Under CSR 19-10(f), "[t]he disposition by a supervisor or other appropriate office of a complaint of harassment or discrimination may be appealed if such disposition has not resulted in stopping the prohibited behavior."

The appeal under subsection (f) asserts that Appellant has been subjected to a sex discrimination, harassment and retaliation for whistleblower activities based upon two cited incidents: 1) her treatment as a witness in the investigation into her ethics complaint against her co-worker, and 2) the co-worker's letter threatening legal action. [Appeal, ¶ 4.] Appellant requests as relief "cessation of the harassment and disparate treatment, transfer to a different agency under a different supervisor, and completion of a fair, objective and impartial investigation into the allegations of ethical violations I raised." [Appeal, ¶ 5.]

Appellant's Prehearing Statement asserted that her verbal reprimand on October 17<sup>th</sup> was also in violation of the same Career Service rules. However, since that claim was not made a part of either step of the grievance process or her appeal, in spite of Appellant's contemporaneous knowledge of its issuance, it is not properly raised as an issue herein. Moreover, a verbal reprimand cannot be grieved or appealed under CSR 6-40(C)

Subsection (f) requires the filing of an appeal within ten days after an employee reasonably suspects that a hostile environment is caused by discrimination. A hostile environment is by nature cumulative, and thus does not become actionable until it becomes so severe and pervasive that it affects a term, condition or privilege of employment. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); see also Katz v. Doie, 709 F.2d 251 (4<sup>th</sup> Cir. 1983). An appellant may raise in support of a harassment claim all related acts in an ongoing series of acts directed against the employee. See Taresian v. Carr Division of TRW, Inc., 407 F.Supp 336, 339-340 (D.Mass. 1976), and Scott v. Claytor, 469 F.Supp. 22 (D.D.C. 1978).

## A. September Interview

While Appellant's failure to grieve her September interview deprives the Hearing Officer of jurisdiction to hear that claim under subsection (d), that incident may still be used to support her claim under subsection (f) that she suffered harassment and discrimination under a hostile work environment theory if relief can be granted under the Career Service rules.

The interview in question did not give rise to any administrative action subject to the Hearing Officer's jurisdiction. See CSR 16-40(C). Appellant asserts instead that the interview was a part of an ongoing series of hostile events stemming from her ethics charge against her co-worker. In the light most favorable to Appellant, Ms. Balbin first reported the harassment by means of her first step grievance on October 17<sup>th</sup> and the second step grievance on November 6<sup>th</sup>. The administrative action being appealed is the November 14<sup>th</sup> failure of the Agency official to grant the relief requested in the grievances.

A review of the interview transcript fails to support Appellant's claim that she was subjected to hostile or abusive questioning, or that her treatment during the investigation was discriminatory. The interview was taped for the express purpose of allowing Appellant to review the transcript for accuracy. [Agency's Exh. 10, p. 1.] The interview questions themselves were not aggressive or hostile in nature, and Appellant's responses did not appear to indicate that she was reacting out of fear or intimidation. Ms. Balbin gave sometimes lengthy answers to the questions, expressed her opinions freely, and sometimes asked her own questions regarding past office and discipline practices.

Due process does not require procedural safeguards such as representation at an interview until there is a reasonable belief that an investigatory interview will result in disciplinary action. National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975.) An employee who is the subject of an investigation faces potential discipline or change of status, and thus has a corresponding need for documents, witness statements, and the time to prepare a response to the charge in order to exercise his right to a hearing conforming with due process prior to the imposition of discipline. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985).

Appellant claims in her grievance that she was denied the representative of her choice at her interview. As a witness rather than the target of the investigation, Appellant was not entitled to procedural due process during her questioning. Although Appellant was not permitted her first choice of representative, she apparently consented to the use of another representative after making "some phone calls [to] see if that will work for me," since the transcript indicates that the offered representative was present during the interview. [Agency's Exh. 10, pp. 3, 12 - 15.]

Appellant has not alleged any basis for a finding of discrimination, harassment, or retaliation by the conduct of the September interview of Appellant. The complete

transcript fails to demonstrate any discriminatory actions during the interview. Thus, this incident by itself cannot support a claim of harassment or discrimination under subsection (f).

### B. Co-Worker Letter

The second incident cited in support of the appeal under subsection (f) is the co-worker's letter notifying Appellant that he may pursue legal action as a result of her statements to fellow employees that he had committed unethical conduct. Appellant argues that the Agency's release of the information to the co-worker was an act of retaliation for her ethics charges. [Appeal, ¶ 4.] The Agency argues that the co-worker's letter to Appellant was neither threatening nor humiliating, and that it was not distributed throughout the office.

As the target of the investigation, the co-worker was entitled to notice of the charges against him, requiring the Agency to provide him with specific information sufficient to allow him to prepare his response. As a witness, Appellant had no such right. Appellant has not asserted any evidence that the Agency was motivated by a desire to retaliate in providing this information to the co-worker, and none appears in the record.

While Appellant asserted a fear that the co-worker would retaliate against her during the interview, she did not ask Ms. Weiss-Samaras to shield her as the source of the ethics claim. [Exh. 10-2.] The public nature of her allegation would have made such a request ineffectual.

It is clear from the record that the co-worker's letter was motivated by Appellant's claim in a "permanent official document" that the co-worker had committed unethical acts. [Agency's Exh. 3, p. 1.] Based on Appellant's actions, the co-worker responded to the charge, and sent Appellant a copy of his response, along with a cover letter in which he served notice to her that further "baseless" statements by Appellant may lead to legal action. On its face, the letter appears to be motivated solely by a desire to protect his reputation with his fellow employees. Appellant has failed to present any argument that the letter was motivated by her sex, or that the Agency caused or contributed to the sending of the letter in retaliation for her ethics complaint.

More importantly, Appellant has not alleged that the letter constitutes an administrative action that may be affirmed, modified or reversed by the Hearing Officer under CSR 2-104(d).

### 3. Retaliation

Appellant also alleges that the two above incidents established retaliation for her report of unethical conduct, in violation of CSR 15-106.

Appellant fails to assert that she suffered any adverse action in retaliation for her assistance in the investigation. Appellant's Prehearing Statement cites the October 17<sup>th</sup> verbal reprimand as the only tangible personnel action issued in retaliation for her ethics complaint. A verbal warning is the first step in progressive discipline under CSR 16-20, and may not be grieved or appealed under CSR 16-40(C). It is not reasonably likely to deter employees from engaging in protected activity, and is thus not a materially adverse employment action sufficient to establish that Appellant suffered any adverse action that can be affirmed, modified or reversed by a hearing officer. Ray v. Henderson, 217 F.3d 1234 (9<sup>th</sup> Cir. 2000); and EEOC Compliance Manual, § 8-II(C)(3) ("The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the [party] from engaging in protected activity. Of course, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity.")

In addition, Appellant's failure to raise the verbal reprimand in either her grievances or her appeals constitutes a waiver of that issue for purposes of this appeal.

### III. Remedies

Under CSR 19-27, "[t]he Hearings Officer shall issue a decision in writing affirming, modifying or reversing the action which gave rise to the appeal."

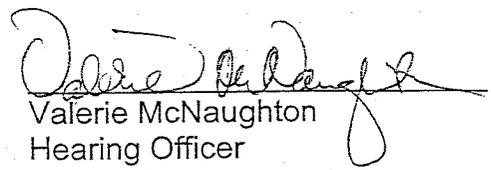
Appellant seeks cessation of harassment and retaliation, a transfer, and an investigation of her claims of unethical conduct. Her Prehearing Statement adds a request for additional training in order to locate other employment. Since none of these are directed to an administrative action, the Hearings Officer does not have jurisdiction to grant any of the requested relief.

Further, Appellant has not directed our attention to any administrative action taken against her except the verbal reprimand. Since that action cannot be grieved or appealed under the Career Service rules, it appears that there is no Agency action at issue in this appeal.

### ORDER

Wherefore, the Hearing Officer orders that the appeal is dismissed in its entirety for the reasons set forth herein. All pending motions are rendered moot by this order.

Dated this 10th day of May, 2004.

  
Valerie McNaughton  
Hearing Officer  
Career Service Board