

ORDER OF CONSOLIDATION WITH CSA APPEAL NO. 02-13

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IN THE MATTER OF THE APPEAL OF:

DAWN BIENEK, Appellant,

vs.

DENVER COUNTY COURT,  
and the City and County of Denver, a municipal corporation, Agency.

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The parties have responded to the Order to Show Cause issued in this appeal on June 17, 2013 as to the nature of claims presented and the appropriateness of consolidation with the previous appeal filed by Appellant.

Procedural Background

On Jan. 11, 2013, Appellant filed a whistleblower claim alleging that the Agency took several adverse actions against her from November to December 2012, in retaliation for her October reports of official misconduct arising from exposure to oleoresin capsicum (OC) spray during mandatory training. That appeal was later amended to include a one-day suspension imposed in February and unfavorable performance ratings issued in March, actions Appellant argues were a continuation of the Agency's pattern of retaliation after her October complaints. The hearing in CSA # 02-13 was held on May 13 and 14, 2013, and that appeal is now awaiting decision.

During the May hearing, Appellant and her supervisor Teri Cueva both presented testimony about the events that would later become the basis for the second appeal. A week after the hearing was concluded, the Agency issued this five-day suspension. On June 17, 2013, Appellant filed CSA # 26-13, alleging that the suspension was a separate violation of the Whistleblower Protection Ordinance.

In response to the first issue raised in the Order to Show Cause, Appellant stated that this appeal is not intended as a direct challenge to the five-day suspension under CSA § 19-10 A.1.b., but simply an allegation of an additional whistleblower violation. Thus, the filing deadline is 30 days under CSR § 19-20 A.1.a., and the appeal is timely. Next, Appellant asserts that consolidation is appropriate because the second appeal "is in response to another adverse action stemming from the same incident (an unlawful order to submit to OC exposure) . . . Appellant claims that the [suspension] is a progressive action of discipline previously received and evidenced as retaliatory during the hearing on Appeal 02-13." Appellant argues that the evidence supporting the new appeal is based entirely on evidence in the first appeal. [Appellant's response, June 18, 2013.]

The Agency objects to consolidation on the grounds that it would delay resolution of the first appeal. It adds that the evidence already presented is not complete, as the five-day suspension had not yet been issued and at least one witness with knowledge of those events did not testify. The Agency does not assert that consolidation would cause any specific prejudice other than delay final resolution of the first appeal. In order to limit such delay, the Agency representative suggests stipulations to streamline the evidence and a limitation of a half-day for hearing.

### Analysis

The Career Service Rules are silent on the consolidation of appeals. However, hearing officers are required to maintain a hearing process that provides parties with a fair and efficient resolution of the issues being appealed, and consolidation is therefore granted when it aids administrative efficiency. CSR §§ 19-30, 19-46; *see e.g. In re Harrison*, CSA 55-07 (Order, 1/4/08). The analogous Colorado procedural rule provides for consolidation in the sound discretion of the court "when actions involving a common question of law or fact are pending before the court." C.R.C.P. 42(a); *Paratransit Risk Retention Group Ins. Co. v. Kamins*, 160 P.3d 307 (Colo.App. 2007). If actions are consolidated, the court may then "make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Based on Appellant's response limiting the issue in the second appeal to a whistleblower claim, it is apparent that both appeals raise the same claim stemming from Appellant's October complaints about the mandatory exposure to OC spray. Thus, both require a determination of whether those complaints were reports of official misconduct within the meaning of the whistleblower ordinance. D.R.M.C. § 2-107(d). The first appeal asserted that the Agency took several adverse actions over a six-month period of time, including two actions taken by the same supervisor who made the disciplinary decision in the second appeal. [CSA # 02-13, Exhs. R, CC-6.] The second appeal alleges a further adverse action in May, 2013, and asserts a continuing course of retaliatory conduct based on the original protected activity. The disciplinary letter at issue suggests that the same witnesses and similar facts and legal issues will be presented in this appeal, rendering consolidation more efficient than re-calling witnesses who have already testified about the events from October, 2012 to March, 2013. I agree with the Agency that the evidence in the first appeal is not complete with regard to the issues raised in the second appeal.

I conclude that consolidation is appropriate in these circumstances, where Appellant alleges a continuing pattern of retaliatory conduct based on the same protected activity over a single period of time. These two appeals raise common issues of law and fact involving similar witnesses and evidence. The short delay necessary to conduct an expedited hearing in this new appeal does not outweigh the duplication of evidence and risk of inconsistent findings inherent in holding entirely separate proceedings.

### Order

Based on the foregoing findings and analysis, it is hereby ordered as follows:

1. The sole claim raised by CSA # 26-13 is a whistleblower claim;
2. CSA # 26-13 is consolidated with CSA # 02-13 for decision, and all evidence and arguments taken in CSA # 02-13 will be considered in the consolidated appeal;

3. The hearing in CSA # 26-13 will be limited to the facts and issues related to the May 20<sup>th</sup> suspension and the whistleblower claim raised by that appeal; and

4. A Notice of Hearing and Prehearing Order will control further proceedings in this consolidated appeal.

DONE this 20<sup>th</sup> day of June, 2013.

  
Valerie McNaughton  
Career Service Hearing Officer

I certify that on June 20, 2013, I delivered a copy of this Order to the following:

Dawn Bienek, <a href="mailto:Dawn.Bienek@denvergov.org">Dawn.Bienek@denvergov.org</a>	(via email)
City Attorney's Office at <a href="mailto:Defiling.Litigation@denvergov.org">Defiling.Litigation@denvergov.org</a>	(via email)
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