

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

Appeal No. 230-01

ORDER DENYING MOTION TO RECONSIDER

IN THE MATTER OF THE APPEAL OF:

FRANK CARILLO, Appellant

Agency: DEPARTMENT OF PUBLIC WORKS, SOLID WASTE MANAGEMENT, and
THE CITY AND COUNTY OF DENVER, a municipal corporation

This matter is presently before the hearing officer pursuant to the parties' written responses ordered during the telephonic conference which took place on December 18, 2001. That teleconference addressed Appellant's Motion to Reconsider the dismissal of Appellant's case filed October 31, 2001.

BACKGROUND

Appellant was formerly an employee of the Department of Public Works. He was terminated on March 29, 2001. Appellant appealed his termination on April 9, 2001.

Pursuant to the Notice of Hearing entered on April 13, 2001, this matter was originally set for hearing on June 18, 2001. Pursuant to the Prehearing Order, also entered April 13, the parties were required to file prehearing statements no later than May 3, 2001, and to file any amendments within ten days of the hearing.

The Agency timely filed its prehearing statement on May 3. Appellant did not. On May 18, 2001, the Hearings Office entered an Order to Show Cause why this matter should not be dismissed for Appellant's failure to timely file his prehearing statement. The Order required Appellant to respond by filing his prehearing statement no later than May 29, 2001. Appellant subsequently filed his prehearing statement on May 29, 2001.

On June 8, ten days before the hearing as required by the Prehearing Order, both parties filed amended prehearing statements.

On June 15, 2001, it came to the attention of the hearing officer assigned to hear the case that Appellant had indicated in his appeal form that he was a probationary employee. Under the Career Service Rules, CSR Rule 5-61 2), a probationary employee can only challenge the Agency's termination on the basis of discrimination. In his appeal, Appellant alleged "harassment and discrimination" but failed to articulate any set of facts supporting his allegations

of harassment and discrimination. Therefore, on that date the hearing officer entered an Order Vacating the Hearing and to Show Cause why the matter should not be dismissed for lack of jurisdiction. That Order required Appellant to respond by providing an explanation for the basis of his discrimination claim no later than June 30, 2001. Appellant failed to respond by that date. The appeal was subsequently dismissed by Order of July 16, 2001.

On October 31, 2001, Appellant filed another appeal, presumably on the same facts as the original one, which included assertions that he had not received any of the previous Orders requiring him to respond because of mail difficulties beyond his control. The hearing officer interpreted this filing as a Motion to Reconsider the July 16, 2001 dismissal of Appellant's appeal.

The parties engaged in a teleconference on December 18, 2001 to address Appellant's Motion to Reconsider. Two primary issues were discussed: first, whether Appellant could make a showing that he did not receive the previous orders for reasons beyond his control; second, whether Appellant could make an offer of proof that he had a colorable case of discrimination under CSR Rule 19-10 c). During the teleconference, Appellant described his mail difficulties in detail. He further set forth the facts which he believed supported his claim of discrimination. Appellant further alleged that he had CSA documents establishing that he was actually a permanent employee at the time of his dismissal, and therefore should not have been required to base his appeal solely on discrimination.

At the close of the teleconference, the hearing officer ordered the parties to respond to the issue of Appellant's employment status at the time of his dismissal with offers of proof regarding this subject.¹ The Response to that Order was due no later than January 3, 2002. Both parties timely filed responses on that date.²

DISCUSSION AND CONCLUSIONS

During the teleconference, Appellant stated that he had been living at 4758 West 13th Street at the time of his termination for several years. Upon his termination he moved to a motel where he lived for five months, from the end of March to the end of August. Thereafter he lived in various locations. He stated that during these various moves beginning in March, he had his mail forwarded to 653 Perry Street, the address of a relative, and has continued to use this address as his mailing address to the present time.³

¹ For the reasons set forth below, the decision contained herein renders this issue moot, as well as the issue of discrimination.

² Appellant's response included another appeal form. The hearing officer interprets this as a part of his response in the current case. To the extent that Appellant intended this as a new and separate appeal, the appeal addresses Appellant's right to a hearing in this matter and is dismissed as not yet ripe at the time of the filing, since this right would be determined by the Motion currently under deliberation. In addition, this is a subject not within the confines of appealable issues under the hearing officer's jurisdiction. Appellant cannot appeal the hearing officer's decisions to the hearing officer. Rather, Appellant's redress to the hearing officer's decision regarding Appellant's right to a hearing is to appeal the hearing officer's decision to the Career Service Board.

³ The file establishes that the Career Service has sent all relevant mailings in this case to 653 Perry Street. No documents sent to that address have ever been returned to the Hearings Office as undelivered.

Appellant stated that since his move from 4758 West 13th and his subsequent change of address to 653 Perry Street, he has had chronic mail problems. Appellant said that he has never filed a change of address from Perry Street to West 13th, only the other way around when he first moved. Appellant claimed that in spite of this fact, mail addressed to 653 Perry Street would turn up at 4758 West 13th. He further claimed that the new residents of that address frequently failed to forward or return his mail. Appellant asserted that probably because of these mail difficulties, he never received the Notice of Hearing, the Prehearing Order, the Orders to Show Cause and Respond by certain dates, and other documents putting him on notice of his responsibilities respecting his case. He therefore failed to respond to them because he never received them.

After a careful analysis of the dates of the events and Appellant's explanations as offered during the teleconference, the hearing officer finds Appellant's explanations lacking in credibility for several reasons. First, it is common knowledge that the postal service places forwarding address labels on mail sent to old addresses indicating the forwarding address, but not vice versa. Appellant's claim that his mail was being forwarded from Perry Street to West 13th on some occasions created the initial impression that perhaps the addresses were reversed in the forwarding request. However, Appellant claimed he received some of his mail addressed to Perry Street, but not all of it. This does not support the inference that the postal service reversed the forwarding address request. Appellant has provided no mail indicating a forwarding of his mail in reverse of his request, or other evidence demonstrating his claim that this was happening.

Second, the evidence tends to establish that Appellant *was* receiving the mailings relevant to this case. For instance, Appellant did timely respond to the May 18, 2001 Show Cause Order requiring him to file his Prehearing Statement no later than May 29 or face the dismissal of his appeal.

Appellant claims he did not receive the Show Cause Order, but that he learned of the May 29 due date when he called the Career Service Authority shortly before that date, to check on the status of his appeal. Appellant claims that it was during this telephone conversation that he learned his prehearing statement was due May 29. Appellant's stated reason for calling the Career Service was to establish the status of his appeal because he had not received anything in the mail regarding his hearing. At the time of this alleged call, which had to be between May 18 and May 29, the hearing was already set for June 18. Yet Appellant maintains that he never knew of the hearing set for June 18 which is why he did not appear on that date.

The hearing officer finds it not credible that during this alleged phone call, the Career Service told Appellant of the Order requiring him to file his prehearing statement, but did not tell him of the hearing then set for June 18 when Appellant called to find this out in the first place. It is therefore more likely than not that if he did call Career Service as he asserts, he was put on notice at that time that his hearing was set for June 18 and that he was required to appear.

Most damning to Appellant's claims that he did not know of the June 18 hearing, and that he did not otherwise receive the Career Service mailings, is the filing of his amended prehearing statement on June 8, 2001. The Prehearing Order, which Appellant also claims he did not receive, required the filing of this document ten days before the hearing date. Appellant did

timely file this document within ten days of the hearing, which establishes that he knew of the June 18 hearing date. Yet he claims he never received the pleadings and Orders and that he never knew of the hearing date.

Appellant asserts that he never knew of the June 18 hearing date as an explanation for why he did not appear that day, and for why he never responded to the Show-Cause portion of the Order to Vacate. Yet Appellant's knowledge of the hearing date is evidenced by the filing of his prehearing statement. This can only mean one of two things. Either Appellant knew the hearing had been vacated because he did receive the Order vacating the hearing, or he did not receive the Order vacating the hearing but failed to appear for it anyway. If he did not appear because he received the Order to Vacate and Show Cause, he therefore was on notice that he was required to show cause no later than June 30, 2001 why the matter should not be dismissed, which he failed to do. In either case, Appellant's actions constitute abandonment of his appeal

As the Agency correctly points out in its January 2, 2002 Response to the Hearing Officer's Order, C.R.C.P Rule 60 (b) requires that Appellant must show "excusable neglect" by "clear and convincing proof" in order to achieve a reversal of the dismissal of Appellant's case. Even assuming Appellant's claims about mail difficulties were true, Appellant was responsible for assuring the receipt of his own mail. It is clear from Appellant's own description of chronic problems with his mail that he was put on notice early on that there was a problem with delivery to that address. Even assuming this alleged problem were the cause of Appellant's repeated failures to respond to the Orders issued in this case, curing the problem was his responsibility.

However, the hearing officer finds that Appellant's claim that he did not receive the Career Service mailings is inconsistent with the evidence and incredible for the reasons set forth above. She therefore finds that Appellant failed to provide clear and convincing evidence of excusable neglect under C.R.C.P. Rule 60 (b). Appellant's Motion to Reconsider the dismissal of this case must therefore be denied.

For the reasons set forth above, the hearing officer's denial of the Motion for Reconsideration prevents her from considering the merits of Appellant's other arguments. The standing dismissal renders all other issues in this case, including Appellant's employment status and discrimination claims, moot. These issues therefore will not be addressed in this Order.

ORDER

For the reasons set forth above, Appellant's Motion to Reconsider the dismissal of this case is DENIED. This matter therefore remains DISMISSED WITH PREJUDICE.

Dated this 11 day of January, 2002.


Joanna L. Kaye
Hearing Officer for the
Career Service Board