

ORDER OF PARTIAL DISMISSAL AND SECOND ORDER TO SHOW CAUSE

IN THE MATTER OF THE APPEAL OF:

PHAZARIA KOONCE, Appellant,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency.

This matter was stayed on Aug. 20, 2013 to permit the Agency to respond to Appellant's Aug. 2, 2013 grievance and complaint. The Agency has established that it filed that response on Aug. 15, 2013. The stay is now lifted, and the order to show cause is ripe for order based on the responses of both parties.

I. Basis for Direct Appeal under CSR § 19-10 A.1.

The order first seeks the parties' arguments on the claim that Appellant suffered an adverse action that is directly appealable. Appellant asserts that the July 29, 2013 end of her assignment as acting major is in essence a demotion to her former classification and/or a temporary reduction in pay. She further claims that removal of her acting assignment was motivated by her 2011 discrimination complaint and/or her status as an African American female, demonstrated by the fact that she previously tested number one for the position of major. The Agency responds that no one has been promoted to that position, and acting assignments are temporary under the Collective Bargaining Agreement and the Career Service Rules.

As the Agency points out, an assignment outside of classification is by its nature temporary and discretionary with the Agency. CSR § 9-64; In re Anderson et al., CSA 61-10 (Order 1/7/09). The 6.9% extra pay during the assignment does not act as a reclassification or entitle the employee to permanent appointment to the position. Before, during and after the acting assignment, Appellant remained classified as a captain. Thus, Appellant failed to allege that she was demoted. She argues that loss of the extra pay may be temporary if relief is granted by decision in this appeal. However, temporary reductions in pay appealable under Rule 19-10 A.1.b. are disciplinary in nature. § 16-50 B.3. Appellant has not alleged that the end of her acting assignment was imposed pursuant to Rule 16.

It appears that Appellant is not claiming the removal of the acting assignment was a separately appealable agency action, but rather an act of discrimination or retaliation. As such, a right to appeal only arises after the Agency responds to her complaint of discrimination or retaliation under § 19-10 A.2.a.

II. Discrimination claims under § 19-10 A.2.a.

The order next seeks the parties' allegations regarding the claimed protected bases, the nexus between her status and the adverse actions, and the jurisdictional basis for the discrimination claims.

The appeal asserts discrimination based on her race, color, sex and other protected basis. In her response to the order to show cause, Appellant states that she is an African American female. Thus, the discrimination claim is narrowed to race, color and sex. Since no directly appealable action is alleged, any discrimination claim must be first filed with the Agency as a complaint, and followed up by an Agency response, before an appeal may be filed. CSR § 19-10 A.2.a.

Appellant states that she did file a discrimination and harassment complaint in June 2011 based on the actions of Major Guerrero. That complaint was resolved on May 1, 2012, when the Agency determined that the complaint was unfounded. [Agency's Objection to Stay, Exh. 1.] Appellant failed to file an appeal within 15 days of that action, and therefore the discrimination claim under § 19-10 A.2.a. is untimely. § 19-20 A.1.b.

III. Retaliation claims

Although the retaliation claims were not addressed in the order to show cause, it is now apparent that there are also jurisdictional issues related to them.

Appellant asserts retaliation claims based on two separate protected activities. The first was taken in June 2011 when Appellant complained of race and sex discrimination by Major Guerrero. The Agency resolved that complaint against her in May 2012. Appellant claims that the Agency retaliated against her by ending her acting assignment and issuing a Performance Improvement Plan (PIP) and written reprimand on July 29 and 30, 2013. This appeal was filed on Aug. 5, 2013, and therefore appears to be timely as to that claim.

The second and third protected activities were her complaint and grievance, both filed on Aug. 2, 2013. The complaint alleges that the PIP, reprimand and the end to her acting assignment were taken in retaliation for her 2011 discrimination complaint. It also alleges race, color and sex discrimination. [Agency's Objection to Stay, Exh. 3.] As found above, that same discrimination complaint was first asserted in 2011, and the Agency's disposition of it in May 2012 was not appealed. Therefore, the Hearing Office has no jurisdiction over that claim. On the other hand, the complaint appears to raise viable and timely retaliation claims based on the 2011 protected activity and the July 2013 unfavorable actions taken by the Agency, allegedly in retaliation for the 2011 complaint.

Appellant's grievance claimed her PIP, reprimand and end of the acting assignment were imposed in retaliation for her 2011 discrimination complaint. The Agency responded the PIP and retaliation claims cannot be grieved, and argues the other claims are unfounded. [Agency's Objection to Stay, Exh. 4.]

Order

Based on the foregoing findings and conclusions, the following orders are entered:

1. Appellant's claims of involuntary demotion and temporary reduction of pay are dismissed;
2. Appellant's discrimination claims are dismissed as untimely.
3. The parties are ordered to file any response they may have, addressing the jurisdiction of the Hearing Office on the retaliation claims on or before **September 25, 2013**.

DONE September 18, 2013.



Bruce A. Plotkin
Career Service Hearing Officer