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

Appeal No. 22-06

ORDER

IN THE MATTER OF THE APPEAL OF:

DAVID W. LEWIS,
Appellant,

vs.

DENVER AUDITOR'S OFFICE,
and the City and County of Denver, a municipal corporation,
Agency.

Appellant has been ordered to show cause why this appeal should not be dismissed for lack of jurisdiction. Appellant filed a response to the order on April 24, 2006, and the Agency submitted its response on April 27, 2006. Upon consideration of the pleadings and the parties' submissions, the following findings and order are entered herein:

This is an appeal of the March 24th response to a grievance challenging a written reprimand for sleeping on the job. The appeal also alleges age and political affiliation discrimination, retaliation and harassment. The response withdrew the written reprimand, and substituted a verbal reprimand. Appellant replied by asking for clarification of the allegation made, and for a response to his grievance comments about "current and future punitive actions, job responsibilities, and appropriate medical considerations." The reply also sought assurance that his new performance plan would be achievable in light of the STARS evaluation standards. [Appeal form, p. 17.] The Agency's answer, if any was made, has not been provided to the Hearing Office.

I. Jurisdiction over a Complaint of Discrimination, Harassment or Retaliation

The appeal invokes jurisdiction under CSR § 19-10 (B)(1) following a formal complaint of discrimination or harassment. Appellant alleges that he lodged harassment complaints on March 10th and 21st in compliance with CSR § 15-103. The file contains no documents dated March 10th or 21st. Appellant is apparently referring to two or three oral requests he made for details of the allegation which led to the reprimand. His grievance listed "several unacceptable behaviors by my supervisor and manager" he raised at the March 21st open door meeting, including comments about retirement, union membership,

and his political party. Appellant argues that his oral requests for details and/or his grievance should be deemed a formal complaint of harassment within the meaning of § 19-10(b)(1).

An analysis of the jurisdictional rule does not support Appellant's interpretation. "An employee may file an appeal following a *formal complaint* only as described below: Any action . . . resulting in alleged . . . harassment . . . may be appealed if after filing a *formal complaint as required by Rule 15 Code of Conduct,* the disposition of such complaint has not resulted in stopping or otherwise addressing the alleged . . . harassment." CSR § 19-10(B)(1), (emphasis added). Rule 15 instructs employees to report harassing conduct to their supervisor "so that the agency may investigate and resolve the problem." CSR § 15-103(B). A formal complaint is an unambiguous statement by an employee of the intent to require the agency to "immediately undertake effective, thorough, and objective steps," which may include an investigation by a trained investigator when necessary. CSR § 15-104.

These rules, when read together, clearly intend to afford an agency notice of the nature of the alleged harassment or discrimination, as well as a real opportunity to investigate, evaluate, and correct any harassment or discrimination. This intention would be thwarted if an employee could file an appeal under CSR § 19-10(B)(1) after simply making comments that could be interpreted as raising an issue of harassment. Here, Appellant expressed his belief that recent actions were punitive, but he did not submit any document that could interpreted as a formal complaint within the meaning of the above rules. Therefore, the appeal fails to state the existence of jurisdiction over "the disposition of [a formal complaint of discrimination, harassment or retaliation which] has not resulted in stopping or otherwise addressing" the complained-of actions.

II. Jurisdiction over a Grievance

Next, Appellant asserts that he suffered a negative impact on his pay, benefits or status because he retired to avoid additional harassment. Appellant claims that he suffered a hostile work environment because he was given a less desirable office and an impossible work plan, and because permission to attend a conference was withdrawn. [Appellant's Response dated 4/24/06.] Appellant's grievance also claimed his temporary reassignment was punitive. [Appeal form, p. 12.] In essence, Appellant alleges that he was constructively discharged by the Agency.

There are two issues presented by this argument: 1) is a grievance taken for a withdrawn written reprimand appealable under CSR § 19-10(B)(2)(a); and 2) if it is, do the facts alleged support a constructive discharge claim? Both must be answered in the affirmative in order for jurisdiction to exist under that rule.

A. Withdrawn Grievance

As to the first issue, a grievance is appealable only if it "results in an alleged violation of the Career Service Rules . . . *and* negatively impacts the employee's pay,

benefits or status" (emphasis supplied). Rule 18, which includes the rules regarding mediation, the open door policy, and grievances, "provide[s] a process to resolve workplace issues at the lowest possible level." Rule 18, Purpose Statement. The written reprimand which was the subject of this grievance was withdrawn in response to the grievance. The work plan added to the grievance response is not itself separately appealable. Appellant does not allege that either the withdrawn grievance or the work plan negatively affected his pay, benefits or status, or that any other subsection of § 19-10(B) provides a jurisdictional basis for the appeal. Therefore, the grievance itself is not appealable.

B. Constructive Discharge

Appellant next asserts that he was constructively discharged because of a number of actions taken by the Agency before and after his grievance, including a new assignment and office, a work plan, and loss of permission to attend a conference. Appellant states that he retired rather than allow what he believed to be harassment to continue.

A supervisor has the duty to assign work as needed for the benefit of the Agency. CSR § 16-60(J). Appellant has not alleged his new assignment was unreasonable or otherwise motivated by a desire to harass. It is noteworthy that the assignment preceded Appellant's grievance, and that both Appellant and his manager expressed enthusiasm for it within the discipline and grievance correspondence. [Appeal form, pp. 6, 17.] An agency assigns offices, imposes work plans, and grants attendance at conferences in accordance with its perception of what is in its best interests. An employee bears the burden to prove that such terms and conditions of employment constituted discrimination; i.e., that they were imposed because of Appellant's membership in a protected class, and that they were "so severe or pervasive as to alter the conditions of a victim's employment and [create] an abusive working environment." Faragher v. City of Boca Raton, 524 U.S. 775 (1998); 42 U.S.C. § 2000e-2(a)(1).

Moreover, "[a] hostile-environment constructive discharge claim . . . must show working conditions so intolerable that a reasonable person would have felt compelled to resign. Unless conditions are beyond 'ordinary' discrimination, a complaining employee is expected to remain on the job while seeking redress." Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) (citations and internal quotations omitted). The Tenth Circuit and Colorado courts apply this legal standard. Wilson v. Board of County Commissioners, 703 P.2d 1257 (1985); Irving v. Dubuque Packing Co., 5689 F.2d 170 (10th Cir. 1982).

Appellant has failed to demonstrate that his working conditions were objectively unendurable as viewed by a reasonable person. Therefore, his retirement decision was a voluntary act and not a constructive discharge. The resulting loss of pay is not attributable to the written reprimand, even if it had not been later withdrawn. The grievance which presented these issues thus did not affect his pay, benefits or status, as required to establish jurisdiction under § 19-10(B)(2)(a).

ORDER

Based on the foregoing findings, the appeal is dismissed with prejudice.

Done this 2nd day of May, 2006.

Valerie McNaughton
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing it in the U.S. mail, postage prepaid, this 2nd day of May, 2006, addressed to:

David W. Lewis
3550 So. Kendall St., #4208
Denver, CO 80235

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing it in interoffice mail this 2nd day of May, 2006, addressed to:

Robert A. Wolf, Esq.
City Attorney's Office
Litigation Section
201 West Colfax Avenue Dept. 1108
Denver, CO 80202

Dennis Gallagher
Denver Auditor's Office

Laurie A Cromer