

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 43-08

ORDER DISMISSING APPEAL WITH PREJUDICE

IN THE MATTER OF THE APPEAL OF:

GARY LUFT, Appellants,

vs.

DEPARTMENT OF AVIATION,
and the City and County of Denver, a municipal corporation, Agency.

Hearing in this matter was scheduled for July 24, 2008. A pre-hearing conference was conducted immediately prior to hearing. The Appellant appeared without a representative while the Agency, the Department of Aviation, was represented by Robert A. Wolf, Assistant City Attorney.

The Appellant is a Master Trades Worker at the Agency. He appealed the Agency's failure to respond to his April 28, 2008 grievance. These facts underlying the grievance were not disputed. The Agency recently changed the method by which it assigns shifts and assignments in response to the need for additional staff needs on its evening and night shifts, and because day operations were causing disruption to the traveling public. [Appellant's appeal, attachment]. Consequently, on April 9, 2008, the Agency notified all employees by email, including the Appellant, of a new process by which they were required to bid their preference for shift and specific work assignment. Master Trades Workers had until April 16 (one week later) to submit their preferences for which of the 12 shifts and assignments they preferred by marking their order of preference, 1-12. Shifts were then assigned based upon seniority.¹ The Appellant was on vacation April 9-15. When he returned to work on April 16 he was informed about the change, and was given until the end of the day to list the order he preferred for his shift/assignment. He did so and received his third choice. His first and second choices were assigned to employees with greater seniority.

There were three issues to resolve in the pre-hearing conference, all of which were jurisdictional. In other words, if all three issues were resolved in favor of jurisdiction, the matter could proceed to hearing. If the issues were resolved against finding jurisdiction, the appeal must be dismissed without hearing. The three pre-hearing issues were as

¹ The prerequisite requirement was to have the required license or certificate for the position bid, but licensing/certification was not at issue in this case.

follows. (1) Was the Agency's failure to respond to the Appellant's April 28, 2008 grievance a claim over which the Hearing Officer has jurisdiction? (2) If so, was the Appellant's only discernable requested remedy - to require the Agency to assign him to his first or second bid choice - a matter over which the Hearing Officer has jurisdiction? (3) If the Appellant's only discernable request for relief was not one over which the Hearing Officer has jurisdiction, was there a different remedy under the Career Service Rules that would afford relief?

1. Agency's failure to respond to Appellant's grievance.

The Agency's failure to respond to the Appellant's grievance is governed by Career Service Rule (CSR) 19-10 A. 2. b. ii. which grants hearing officers jurisdiction over the Agency's failure to respond to a grievance filed pursuant to CSR 18. It appears the Appellant's grievance was filed pursuant to CSR 18, and none of the Agency's pre-hearing filings stated an objection on that basis. I therefore find I have jurisdiction over the Appellant's allegation that the Agency failed to respond to the Appellant's April 28, 2008 grievance. During the pre-hearing conference the Agency presented the Appellant a written response to his April 28 grievance. The Appellant acknowledged the Agency's written response satisfied his claim that the Agency failed to respond. This claim is therefore dismissed as moot.

2. Jurisdiction over Agency's discretion to assign shifts by bid and by seniority.

As stated elsewhere, if the only remedy acceptable to an employee is not one over which the hearing officer has jurisdiction, the appeal may be dismissed for lack of jurisdiction on the hearing officer's own motion.

In an appropriate case, where an Appellant seeks one remedy for which the hearing officer has no jurisdiction, but another remedy, while not sought by the Appellant, but for which there is jurisdiction would afford relief under the Career Service Rules, the Hearing Officer may not dismiss the appeal for lack of jurisdiction. Rather the hearing officer must assess the possible causes of action and possible avenues of relief to afford the appellant the broadest possible relief under the Career Service Rules. However, where, as in the present case, the hearing officer is without jurisdiction to grant the only relief acceptable to the appellant, the appeal may be dismissed upon agency motion or upon the hearing officer's own motion. In re Felix, CSA 82-07 (2/14/08) (*additional citations omitted*), *affirmed In re Felix*, CSB 82-07a (6/5/08).

In the pre-hearing conference, the Appellant clarified the only other remedy he sought, besides requiring the Agency to respond to his grievance, was to change the manner in which the Agency conducts its shift/assignment bid process. Specifically, the Appellant requested the Agency be directed to assign him to his first or second bid choice. The assignment of shifts and specific work duties is entirely within the discretion of the agency, unless the assignment constitutes a wrongful demotion, is discriminatory, retaliatory, constitutes harassment, or is made in violation of a Career Service Rule, City charter, executive order, or written agency policy, and negatively

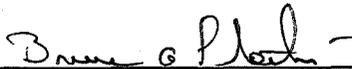
impacts the employees pay, benefits or status. [CSR 19-10 A. 2. b]. The Appellant did not allege his assignment was made on any of these bases. Without such an allegation of wrongdoing, the Agency's decision to assign employees on the basis of both choice and seniority is entirely within its discretion, and not within the jurisdiction of a hearing officer.

3. Any other remedy under the Career Service Rules.

The remaining issue is whether any other remedy under the Career Service Rules might provide relief the Appellant seeks. Any other remedy under the Career Service Rules would still come down to requiring the Agency to ignore or overturn its internal rule giving preference to assignments based upon seniority. The Appellant did not claim such rule was created or applied on an improper basis. Thus, I have no jurisdiction to grant any other remedy which might provide the relief sought by the Appellant. The Appellant's remaining contentions were outside the scope of this appeal.

The Appellant fails to state a remaining claim for which I have jurisdiction to grant relief. Consequently I order this appeal DISMISSED WITH PREJUDICE.

DONE July 24, 2008.



Bruce A. Plotkin
Career Service Hearing Officer