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

Appeal No. 130-03

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

HARVEY MILLER, Appellant,

Agency: DEPARTMENT OF SAFETY, DENVER POLICE DEPARTMENT, and THE CITY AND COUNTY OF DENVER, a municipal corporation.

This Order concerns Appellant's appeal filed August 14, 2003. Appellant appeals the grievance of a written reprimand he received while still an employee. Appellant subsequently resigned in lieu of termination.

On October 17, 2003 the Agency filed a Motion to Dismiss this appeal, arguing that the Hearings Office lost jurisdiction when Appellant resigned because he is no longer an employee.

The following documents have also been received and considered: Appellant's Response to the Agency's Motion to Dismiss filed October 27, 2003, the Agency's Reply to Appellant's Response filed October 28, 2003 and Appellant's Sur-Reply filed November 10, 2003.

DISCUSSION

The Agency incorrectly asserts that Appellant's status as no longer employed automatically destroys jurisdiction over an appeal. There are several situations in which the Hearings Office maintains jurisdiction over an individual when they are no longer an employee.

The first, most obvious case is one where the employee is dismissed and then appeals the dismissal. In such cases, jurisdiction is retained because the dismissal action is not considered effective until the dismissal appeal is complete.

Several other situations present circumstances in which the Hearings Office retains jurisdiction over issues raised by a former employee. For instance, an employee might resign and then appeal, arguing they were "constructively discharged." *See, e.g.* Montemayor v. Jacor Communications, Inc., 64 P.3d 916, 921 (Colo. App. 2002). Once again, the resignation is not final until the Hearings Office has heard and decided the appeal of the constructive discharge.

Furthermore, in cases where an employee who was either discharged or resigned and then argues constructive discharge, if the employee has an outstanding appeal for a prior disciplinary action, then the Hearings Office retains jurisdiction over that prior appeal, unless and until the dismissal issue is determined.

There is further case law to suggest that in the case of disciplinary actions giving rise to due process rights (i.e. actions affecting pay, status or tenure), the employee is afforded an appeal as a matter of right. Once again, such a disciplinary action is not considered effective until the process due (in the case of the Career Service, this is a pre-disciplinary meeting and a hearing before the Career Service Board) has been afforded. *See,* Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). This reasoning tends to suggest the due-process right to a hearing on the prior disciplinary action survives a voluntary resignation or undisputed dismissal. *See,* Armstrong v. Tennessee Dep't of Veterans Affairs, 959 S.W.2d 595 (1997).

The reasoning in Loudermill and its progeny assumes an infringement of the employee's property or liberty right; namely, the pay, status or tenure of the employee's job. Due process rights protect individuals from *deprivations* of "life, liberty, or property, without due process of law." *See,* U.S. Const. Amd. 14. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'... *Only after finding the deprivation of a protected interest* do we look to see if the State's procedures comport with due process." American Mfg. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59; 119 S.Ct. 977, 989 (1999) (emphasis added) *citing* U.S. Const. Amd. 14, Mathews v. Eldridge, 424 U.S. 319, 332 (1976); *see also,* Greene v. Barrett, 174 F.3d 1136, 1140 (10th Cir. 1999).

In the case of a written reprimand there is no suggestion of an adverse impact on Appellant's current pay, status or tenure:

> First, to be actionable, the statements (in a written reprimand) must impugn the good name, reputation, honor, or integrity of the employee. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972). Second, the statements must be false. Codd v. Velger, 429 U.S. 624, 628 (1977). Third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities. Paul v. Davis, 424 U.S. 693, 710 (1976). And fourth, the statements must be published. Bishop v. Wood, 426 U.S. 341, 348 (1976). These elements are not disjunctive; all must be satisfied to demonstrate deprivation of the liberty interest. *See, e.g.,* Melton v. City of Oklahoma City, 928 F.2d 920 (10th Cir. 1991) (*en banc*) (trial court erred in instructing jury to find either stigmatization or loss of employment opportunities), *cert. denied,* 502 U.S. 906 (1991).

Workman v. Jordan, 32 F.3d 475, 481 (10th Cir. 1994). The Court in Workman further elaborated that "damage to `prospective employment opportunities' is too intangible to

constitute a deprivation of a liberty (or property) interest." Id., quoting Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1269 (10th Cir. 1989).

Therefore, the infringement giving rise to the due process protections provided in the case of a dismissal or suspension under the Loudermill analysis, is not presented by a written reprimand.[1] The appeal of a written reprimand is therefore not constitutionally guaranteed, but discretionary.

The basis for retaining jurisdiction over an appeal of any type of disciplinary action taken before employment ends is that the employee has a due-process right to appeal an action affecting pay, status or tenure. That jurisdictional basis is not present in written reprimands. In this case it is undisputed that Appellant is no longer a CSA employee. Thus, jurisdiction over his discretionary appeal was lost when he resigned.

ORDER

For the above reasons, the Agency's Motion to Dismiss is GRANTED. This appeal is DISMISSED with prejudice.

Dated this 21st day of November, 2003.

M. Calleyon for
Joanna Lee Kaye
Hearing Officer
Career Service Board

[1] For these same reasons, the predisciplinary meeting required under Loudermill is not provided for written reprimands under CSR Rule 16-30 as it is for dismissals, suspensions and the like.