

DECISION AND ORDER ON AGENCY'S MOTION TO DISMISS APPEAL

IN THE MATTER OF THE APPEAL OF:

DAVID NIEMEYER, Respondent-Appellant,

v.

OFFICE OF ECONOMIC DEVELOPMENT, and the City and County of Denver, a municipal corporation, Agency.

David Niemeyer (Appellant) was discharged by his employer, Denver's Office of Economic Development (Agency). He appealed that decision to a Hearing Officer but did not do so in a timely fashion.

The Hearing Officer issued a Show Cause Order to Appellant, requiring him to explain why the appeal should not be dismissed for lack of jurisdiction due to its untimely filing, and, also, giving Appellant an opportunity to provide evidence of his allegedly timely filing. Appellant provided excuses to the Hearing Officer but no evidence to back up those excuses. Finding that Appellant had failed to provide any evidence of extraordinary circumstances justifying his late appeal, the Hearing Officer dismissed Appellant's appeal with prejudice.

In response to the order dismissing his appeal, Appellant sent the Career Service Board an email, asking the Board to review the dismissal order and claiming that he possessed "extensive evidence," which, for reasons unstated, could not be attached to the email.¹ This was the last and only contact Appellant had with the Board.

The Agency has moved to dismiss Appellant's appeal to the Board. In its motion, the Agency asserts that Appellant's email is not a proper Petition for Review and, as a result, Appellant has failed to properly invoke this Board's jurisdiction. We agree.

The Agency is correct when it points out that Appellant's email fails to comply with the requirements outlined in our Rule 21-21 for the filing of a proper Petition for

¹ In the email, Appellant did state that he had "a medical condition which is protected by HIPPA (sic) and will not attach it on this email." We do not, however, see any relevance at all to this assertion. Appellant's claimed was that he did, in fact file his original appeal in a timely fashion (regardless of or despite any medical condition he may have possessed), and, as the Hearing Officer noted at page 2 of his decision, Appellant, in his response to the Show cause order, did not assert that he was medically incapacitated.

Review; and it is not even a close question where we might be inclined to find that Appellant, admittedly acting *pro se*, has substantially complied. Indeed, he has not. Appellant has utterly failed to file a proper petition invoking our jurisdiction.

In addition, Appellant has made no attempt to provide us with a transcript or record of proceedings. This failure, while also a failure to comply with our Rule 21-26, further serves to doom Appellant's appeal as a practical matter.

Even if we were to find that Appellant had filed a proper Petition for Review, we would be compelled to find against him on the merits of the Hearing Officer's dismissal of his appeal of his discharge, because Appellant has provided us with no facts, no evidence, and ultimately no record from which we could evaluate any alleged error made by the Hearing Officer.

We would be powerless, without any counterfactual evidence in a record before us, to find that the Hearing Officer's factual findings which compelled his jurisdictional decision were clearly erroneous to the point of warranting a reversal.²

Accordingly, the Agency's Motion to Dismiss is GRANTED and Appellant's appeal, such that it is, is DISMISSED WITH PREJUDICE.

SO ORDERED by the Board on December 19, 2019, and documented this 21st day of May 2020.

BY THE BOARD:



Neil Peck, Co-Chair

Board Members Concurring: Karen DuWaldt, Patricia Barela Rivera, Tracy Winchester, David Hayes

² We also do not believe that the Hearing Officer misinterpreted or misapplied any rule, law, or precedent in reaching his decision to dismiss Appellant's appeal as untimely.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER** on May 21, 2020, in the manner indicated below, to the following:

Career Service Board
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/s/ George Branchaud
For the Career Service Board