HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 40-07

ORDER ON AGENCY'S MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

SHARMAINE NORMAN-CURRY
Appellant,

vs.

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

The Agency filed a motion to dismiss this appeal on July 25, 2007. Appellant has not responded.

PROCEDURAL BACKGROUND

On its face, the appeal claims jurisdiction by the Hearing Office as a direct appeal of the May 20, 2007 suspension. The appeal also claims discrimination, harassment and retaliation, and the failure of the Agency to respond to her June grievance based upon her removal from the Field Training Officer (FTO) program.

The appeal lists as her representative Eric James, Esq., of the firm of Hamilton and Faatz, P.C. Mr. James filed on Appellant's behalf a response to a show cause order which stated that Mr. James does not represent Appellant in her internal grievance or the EEOC charge, and enters his appearance "for the sole purpose of responding to the Show Cause Order." The response argues that this appeal should not be consolidated with CSA #28-07, which was a timely appeal of the May suspension. Appellant was not served with a copy of Mr. James' response, and therefore the response will not be considered as binding on Appellant in resolving the issues presented by the motion to dismiss.

The Agency argues that the appeal should be dismissed because 1) Appellant was not removed from the FTO program, and 2) Appellant failed to file an internal complaint of discrimination, harassment or retaliation as required by CSR § 15-100. The Agency attached Div. Chief Wilson's July 2nd denial of the request to remove Appellant from the program, and the June 28th FTO meeting sign-in sheet which includes Appellant's signature. [Atchs. B, D.]

Appellant's prehearing statement indicates that the appeal challenges her June 17th removal from the FTO program, and that this action was discrimination, harassment and retaliation for her filing of an October 2006 grievance. The prehearing statement did not raise the May suspension as an issue in this appeal. Appellant attached the same letter by Div. Chief Wilson filed by the Agency in its motion to dismiss, as well as the June 28th FTO meeting roster. [Exhs. E, F.] Appellant argues that she "was informed in a meeting with Chief Wilson and Deputy Steckman as my representative that I was still an FTO. . . . Chief Wilson told me to attend the FTO meeting on June 28th." [Appellant's PHS, p. 9.]

ANALYSIS

1. Appeal of Suspension

It appears from the prehearing statement that Appellant does not intend to challenge the May suspension in this appeal. That suspension is already the subject of CSA #28-07 pending before the Hearing Officer. Moreover, this appeal is untimely as to the suspension.

2. Discrimination, Harassment and Retaliation Claims

The Agency alleges that Appellant failed to file an internal complaint as to these charges as required by CSR § 19-10 B. 1. Appellant's prehearing statement alleges her discrimination, harassment and retaliation complaints were made known to the Agency through the June 17th grievance[1]. Appellant also states that the Agency has not responded to the grievance as of June 30th, the date of her prehearing statement. [PHS, p. 3.]

The grievance alleges race discrimination and retaliation for the filing of an October grievance. Thus, the grievance gave the Agency notice sufficient to permit the Agency to investigate those allegations under CSR § 15-103. The EEOC charge of discrimination does not itself meet the requirement of a formal complaint under Rule 15, and it is therefore insufficient to establish jurisdiction under CSR § 19-10 B. 1.

Appellant alleges that she was discriminatorily removed from the Field Training Officer (FT0) roster for about a week before Div. Chief Wilson intervened and ordered her placed back in the program. The facts alleged present no genuine issue of material fact regarding an essential element of a claim of discrimination: the existence of an adverse employment action. In re Boden, CSA 86-06, 2 (5/23/07); McDonnell Douglas v Green, 411 U.S. 792 (1973); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2268, 141 L.Ed. 2d 633 (1998). Removal from a training program for a week is not the kind of ultimate employment action that affects Appellant's "compensation,

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[1] The grievance was actually signed by Appellant on June 18th in response to Agency action on June 17, 2007. [Appeal, p. 5.]

terms, conditions, or privileges of employment" under Title VII, § 2000e-2(a). Traylor v Brown, 295 F.3d 783, 788 (7th Cir., 2002).

As to the harassment claim, Appellant did not include this allegation in her June grievance, and therefore failed to file a formal complaint permitting the Agency to investigate, as required before filing an appeal. In addition, while the prehearing statement alleges that Sgt. Collier continues to harass her, she has made no showing that it is severe or pervasive enough to amount to a hostile work environment, as required to prove harassment. Robinson v. City and County of Denver, 30 P. 3d 677, 682 (Colo.App. 2000), quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) ("[t]o show a hostile work environment, the discriminatory conduct must not only be bothersome to the individual employee, it must also be 'severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive.'")

Retaliation requires a showing of action that is materially adverse to a reasonable employee, that is, one that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405, 2415 (2006). In Burlington, the Supreme Court upheld a verdict of retaliation based upon a reassignment to less desirable duties. In contrast, the only action being appealed here is a recommendation to remove Appellant from the FTO program, a recommendation that was rejected after Appellant was taken off the program's rolls for a week. Appellant alleges she was humiliated by this removal, but fails to allege she missed any program assignments or other benefits of participation. I find that these acts do not allege materially adverse actions as needed to make a showing of retaliation as necessary to proceed on that claim.

3. Grievance

Finally, Appellant alleges that the Agency failed to respond to her June 18th grievance. The parties do not dispute that the Agency, in the person of Div. Chief Wilson, rejected a sergeant's request to remove Appellant from FTO, and that Appellant was placed back on the rolls by June 28, 2007. This Agency action responded to the basis for the grievance. Appellant was informed of that decision in a meeting with Div. Chief Wilson and Appellant's representative. [PHS, p. 9.] Therefore, Appellant has not established jurisdiction over the grievance under CSR § 19-10 B. 2. b., which permits jurisdiction over a matter raised in a grievance if the Agency fails to respond to a grievance.

Order

Based on the foregoing, the following orders are entered in this appeal:

1. The appeal's challenge to the May suspension is dismissed as untimely.

2. The discrimination, harassment and retaliation claims are dismissed on the

basis that the appeal fails to state a claim upon which relief could be granted. In addition, the harassment claim was not the subject of an internal complaint, and is therefore dismissed for failure to exhaust internal remedies.

3. The appeal of the grievance for failure to respond is dismissed based upon the Agency's July 2, 2007 response.

Dated this 9th day of August, 2007.

Valerie McNaughton
Career Service Hearing Officer

I certify that I have sent copies of the above order to the following:

Sharmaine Norman-Curry, by regular mail, to 5145 Black Hawk Way, Denver, CO 80239
City Attorney's Office at dlefiling.litigation@denvergov.org
Mr. Alvin J. LaCabe, Department of Safety at Alvin.LaCabe@denvergov.org
Mr. William Lovingier, Director Sheriff's Department at Bill.Lovingier@denvergov.org
Cc: Eric James, Esq., Hamilton & Faatz, handf@handf.com