

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

Appeal No. 384-01

DISMISSAL ORDER

IN THE MATTER OF THE APPEAL OF:

VICTORIA J. ORTEGA, Appellant,

v.

Agency: Career Service Authority and the City and County of Denver, a municipal corporation.

Appellant filed an appeal with the Career Service Authority Hearing Officer on December 7, 2001. Upon review of the appeal, it appeared to the Hearing Officer that she lacked jurisdiction to consider this appeal, pursuant to CSR §§7-50 and 19-10. An Order to Show Cause was issued on February 8, 2002, giving both Appellant and the Agency an opportunity to respond on this jurisdictional issue by February 19. Appellant requested that the matter be held in abeyance until the final resolution of the appeal *In the Matter of Liz Abromeit, et al.* CSA Appeal No. 105-01 through 216-01 or for an extension of twenty days to respond to the Order to Show Cause. Appellant filed her Response to the Order to Show Cause on March 11. Cathy Havener Greer, Esq., filed an entry of appearance on behalf of the Agency on February 19. The Agency filed its response on March 26.

The Motion to hold this matter in abeyance until the final resolution of *In the Matter of Liz Abromeit, et al.*, is denied. The Hearing Officer will proceed to the issue of her subject matter jurisdiction to consider this appeal.

The issue of the Hearing Officer's subject matter jurisdiction over the issues raised is fundamental to any case. The Hearing Officer's subject matter jurisdiction is extremely limited to matters specified in the CSR. The Hearing Officer may not act in excess of her jurisdiction. In other words, if the Hearing Officer is not given the specific power to hear an issue on appeal and grant the requested relief, she must dismiss the matter.

The problem with this case is that Rule 7, entitled Classification and Play Plan, was extensively revised effective March 21, 2000. This revision severely limited an employee's right to seek review of classification decisions as compared with the former version of Rule 7.

The pre-March 2000 version of Rule 7 permitted an aggrieved employee to request administrative review of a classification by the Personnel Director and if the employee was still aggrieved, the employee could appeal that decision to the Hearing Officer. The Rule formerly read:

7-66 Reallocation of Positions

- h) Request for review of classification decisions: The appointing authority **or any affected employee** who disagrees with a classification decision may, within ten (10) calendar days from the mailing of the classification decision, request a review of the decision by the Personnel Director. The request for review shall state all of the following:
- 1) the specific reasons for disagreement;
 - 2) the title of the class specification involved; and
 - 3) the specific rule, ordinance, or charter provision violated; and
 - 4) the action sought.

The Personnel Director or his or her designee shall review the protest and shall inform the applicant of his decision. **Any incumbent** or appointing authority **who is aggrieved by this action may appeal in accordance with Rule 19 Appeals**. The period of time for filing the appeal shall be computed in accordance with sub-paragraph 19-22 a) 2).

(Emphasis added)

This provision was eliminated in March 2000. The right to review of classification decisions is now set out in CSR §7-50, which provides:

7-50 Requests for Classification Review

An appointing authority may ask the Personnel Director for review of a classification decision within ten (10) calendar days of the date of notice of audit results. The Personnel Director shall review the decision and provide a response to the appointing authority.

This means that under the current version of Rule 7, only the appointing authority has the power to request administrative review; the aggrieved employee no longer has the right to seek additional review to the Hearing Officer.

In order to accommodate this change in Rule 7, Rule 19, which concerns the appeals process, was amended, effective August 24, 2000. Prior to this amendment, CSR §19-10 read in relevant part:

19-10 Actions Subject to Appeal

The following administrative actions relating to personnel matters shall be subject to appeal:

Actions of the Personnel Director: Actions of the Personnel Director or a designated representative, which meet all of the following criteria:

- 1) The actions results in an alleged violation of the Career Service provisions of the Denver City Charter, or Ordinances relating to the Career Service, or the Personnel Rules.
- 2) The actions arises out of:
 - (a) the examination and certification of an applicant, as provided in Section 3-40 Review and Appeals, or
 - (b) **The classification of a career service position, as provided in paragraph 7-66 h) Request for review of classification decision.**
- 3) The action is one which the Personnel Director is not required to perform, and over which personal discretion or judgment in its performance is permissible.

(Emphasis added)

CSR §19-10 now reads, in relevant part:

19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- a) Actions of the Personnel Director: Actions of the Personnel Director or a designated representative, which meets any of the following criteria:
 - 1) The action results in an alleged violation of the Career Service provisions of the Denver City Charter, or Ordinances relating to the Career Service, or the Personnel Rules.
 - 2) The action arises out of the examination and certification of an applicant, as provided in Section 3-40 Review and Appeals, or
 - 3) The action is one, which the Personnel Director is not required to perform, and involves personal discretion or judgment.

According to the documentation filed with the notice of appeal, Appellant requested a classification audit in January 2000. The audit findings were issued on November 29, 2001. She filed her request for administrative review with the Personnel Director and her notice of appeal with the Hearing Officer simultaneously on December 7, 2001.

Upon initial review of the Notice of Appeal, the Hearing Officer was concerned about the jurisdictional defects in this case, any one of which would be fatal to her ability to hear the matter on the merits.

The primary issue in this case is whether the old or new version of Rule 7 applies. If the old version applies, then Appellant might have a chance for review before the Hearing Officer, although, as explained below, such a request is premature and requires dismissal without prejudice, providing Appellant to seek a hearing when the case becomes ripe. But, if the new version applies, Appellant is not entitled to a hearing before the Hearing Officer even after the Personnel Director completes his administrative review. The case must be dismissed under this theory with prejudice. Therefore, it is important to determine which versions of Rule 7 and 19 apply since Appellant's future right to appeal will be affected.

On January 2, 2002, Hearing Officer Michael Beida issued Findings and Order in *In the Matter of the Appeals of Liz Abromeit, et al.*, CSA Appeal Nos. 105-01 – 216-01. This decision fully addresses the issue as to whether the Hearing Officer has jurisdiction to hear reclassification appeals after the Career Service Board revised Rule 7 and 19 in 2000. The appellants in that case, like Appellant in this case, had made their request for classification consideration prior to March 2000. The appellants in *Abromeit* claimed that their right to an appeal to the Hearing Officer vested on the date they submitted their requests for classification review and that, therefore, they were entitled to the procedures in place at the time of their initial requests. The Agency argued that the Board intended to eliminate an employee's ability to a classification appeal and that this change was procedural in nature and did not affect substantive rights. Hearing Officer Beida agreed with the Agency that:

the appeal process which Appellants refer to as a "vested right" is really only a remedy or procedure. Classification reviews still exist, however the decision by the Personnel Director, in conjunction with the Board and the City Council, is final with no further review permitted by the Hearing Officer.

As a procedure or remedy, the appeal process may therefore be modified with retrospective application to the Appellants without running afoul of the Due Process Clauses.

(*Id.*, p. 8)

Hearing Officer Beida went on to conclude:

The repeal of Rule §7-66, together with the modification of Rule §19-10, removed the appeal process for classification decision from the jurisdiction of the Hearing Officer. Applying the new rules eliminating classification appeals to the Appellants is not a retroactive application and is therefore enforceable. Accordingly these appeals must be dismissed with prejudice for lack of subject matter jurisdiction.

(*Id.*, pp. 8-9)

The *Abromeit* appellants appealed this decision to the Career Service Board, where it is currently pending. Unless and until the Board decides that Hearing Officer Beida was incorrect in his decision, it remains the law of this tribunal. Therefore, the Hearing Officer

concludes that she lacks subject matter jurisdiction over this appeal under the current CSR and the appeal must be dismissed with prejudice.

Appellant raises another argument that would moot the *Abromeit* decision. Appellant alleges that the Career Service Board did not properly adopt the March 2000 version of Rule 7 in compliance with CSR §2-90. Therefore, the previous version, giving her the right to an appeal to the Hearing Officer, still exists. More specifically, Appellant claims that Rule 7 was not published according the requirements of the CSR and that the defect in publication renders the adoption of the Rule void.

Appellant argues that CSR §2-90 was violated because the new version of Rule 7 was not published in the proper official newspaper. The legal notice of the amendments to the Rules concerning the Classification and Pay Plan (Rule 7) were published on December 16th, 1999, in *The Daily Journal*, which is an official publication for notices. However, at the time the Rule was published, it was the "official publication" for construction matters only. *The Rocky Mountain News* was the "official publication" for all other notices. Appellant argues that, since the wrong publication was used, the adoption of Rule 7 in March 2000 was fatally defective. The Agency, on the other hand, argues that there was substantial compliance with the requirements of Rule 2 and that the publication in "the other official newspaper" is harmless error.

Rule-making procedures are set out in the CSR and the Denver City Charter and Municipal Ordinances. Many steps are involved, publication of the finalized version of the rules being only one such step.

CSR §2-90 provides:

Adoption, amendment or Repeal of Personnel Rules

When the Personnel Director considers that a change in the rules is necessary or desirable, the procedure shall be as follows:

- 1) The Personnel Director shall submit to the City Attorney the proposed rules change for his ruling as to legality, at any time prior to adoption by the Career Service Board.
- 2) The proposed rules change shall be posted on bulletin boards and made available to appointing authorities, employee, and the general public for comments, suggestions, and requests for public hearings. A short notice of the proposed rules change shall be published.
- 3) After ten (10) calendar days following distribution of the rules proposal, the Board shall consider all comments and suggestions. The period of time shall be computed in accordance with subparagraph 19-22 a) 2), except that the date of the rules proposal shall be the date of posting in the City and County Building.

If a written request for a hearing has been received, the hearing shall be scheduled and held in accordance with Section 2-50 Hearings by the Career Service Board.

- 4) The Board shall than accept, reject or modify the rules proposal and adopt, amend or repeal the appropriate section of the rules unless disapproved as to legality.
- 5) When a rule is adopted, amended or repealed by the Career Service Board, it shall become effective when the following procedure has been completed, unless otherwise provided under paragraph 6):
 - (a) Three copies are filed with the City Clerk;
 - (b) One copy has been filed with the City Attorney;
 - (c) One copy has been filed with the Career Service Authority; and
 - (d) A notice of the adoption, setting forth the date of such filings, has been published once in the official newspaper.
- 6) Effective date of such adoption shall be the date of publication or any appropriate date as set by the Career Service Board.

Rules changes may also be proposed by appointing authorities, employees, or other interested citizens. Such proposals shall be in writing and shall be directed to the Career Service Board through the Personnel Director. The Board, after considering the proposal, may reject it or accept it, with or without modification, for further consideration. If the Board accepts the proposal for further consideration, the procedure outlined above for rules changes shall be followed.

The Denver Charter and Code of Ordinances, Title II Revised Municipal Code, Chapter 2, Administration, Article VI, Rules and Regulations, contains similar provisions. It provides, in relevant part:

Sec. 2-91. Definitions.

When used in this article:

- (1) Adopting authority shall mean any officer, employee, agent or agency of the city, authorized by law to make rules and regulations, including departments, boards, commissions or members thereof.
- (2) Ordinance shall mean any ordinance enacted by the city council and shall include any code or compilation of ordinances, or any part thereof, enacted under the authority of council.
- (3) Rules, regulations, or rules and regulations shall mean the whole or any part of rules or regulations adopted pursuant to Charter or ordinance authority, and includes modifications and amendments, but shall not include the following: personnel rules and rules relating to personnel systems...

- (4) Rule-making shall mean the process by which an adopting authority adopts, re-adopts, amends or repeals rules or regulations.

Sec.2-92. Authority to adopt.

No officer, employee, agent or agency, board or commission or member thereof of the city shall have power or authority to adopt any rules or regulations save and except by and under the authority of the Charter or ordinances of the city.

Sec. 2-93. Publication.

All notices and other matters which are required to be published under this article shall be published in the official newspaper of the city. Notices of proposed rule-making may also be compiled and published monthly in book, pamphlet or looseleaf form by either the city clerk or by a publisher selected by the city clerk. Only the notice published in the official newspaper of the city, and the rule itself as finally adopted and as filed with the city clerk, shall be considered in judicial or administrative review of rules or rule- making under this article.

Sec. 2-94. Notification and public hearing.

- (1) If the city clerk establishes or selects a publication for compiling and publishing notices of proposed rule-making as described in section 2-93, adopting authorities shall submit notices of proposed rule-making to the city clerk who may cause them to be published in such publication according to a schedule established by the city clerk that allows at least twenty (20) days between the publication of the notice and the date of the hearing. Whether or not the city clerk establishes or selects such a publication, adopting authorities shall cause to be published a notice of proposed rule-making at least twenty (20) days before conducting public hearings on the proposed rules. Adopting authorities shall also file a copy of such notice and the complete text of the proposed rule with the city clerk on or before the date of publication.
- (2) The notice shall include the following information:
 - (a) The date, time, place, purpose and subject of the public rule-making hearing;
 - (b) A description of the subject of the proposed rules;
 - (c) The requirements, if any, for interested parties to notify the adopting authority of their intent to participate in the hearing, including the manner of such notice and the deadline for such notice;

- (d) The authority under which the rule is proposed; and
 - (e) A statement that the complete text of the proposed rule is on file with and may be examined at the office of the city clerk.
- (3) The adopting authority may revise the text of the proposed rule on file with the city clerk as necessary in the judgment of the adopting authority by filing the revised portions of the text with the city clerk at least three (3) days before the date of the hearing. Changes in the text of the proposed rule may be made during or as a result of the hearing in the discretion of the adopting authority without further notice or hearing. The adopting authority may reschedule the rule-making hearing by publishing a notice of rescheduling at least twenty (20) days before the rescheduled hearing, setting out the date, time and place of such rescheduled hearing, the purpose of the proposed rules, and citing the prior notice by its date of publication. Once a hearing has begun, it may be continued by the adopting authority without further publication or notice.
- (4) Any person who wishes to comment on proposed rules may do so in writing delivered to the adopting authority prior to the date of the hearing or in person at the hearing, subject to any requirements for participation set out in the notice of hearing. Minutes may be prepared by the adopting authority to memorialize oral comments or presentations at the hearing as part of the rule-making record. If minutes are not prepared, the adopting authority shall preserve the proceedings at the hearing on audio magnetic tape or similar audio-recording media so that the proceedings may be transcribed at a later date at the expense of the one requesting a transcript of the hearing.
- (5) Each adopting authority shall maintain a list of the names and mailing addresses of parties who request to be notified when the adopting authority proposes to adopt rules, relying solely on such request for names of interested parties. All parties on such a list shall be sent, at the expense of the city at the last address furnished (unless the name and address have been deleted at the party's request), the notice described in subsection (1) of this section by first class mail on or before the date of publication of notice of rule-making.
- (6) At the time and place stated in the published notice, the adopting authority shall conduct a public hearing to allow interested parties the opportunity to participate. The adopting authority may set reasonable time limits on participation.

Sec. 2-96. Adoption of final rules.

- (1) Final adoption of rules shall be effected by the dating and signing of the rules by the adopting authority and approval for legality by

the city attorney. In making the judgment to adopt rules, the adopting authority shall consider the rule-making record and the need for such regulations. Final rules shall be within the adopting authority's rule-making authority and consistent with the rule-making notice published pursuant to section 2-94(1). Within seven (7) business days after adoption of the rules, the adopting authority shall file a copy of the rules as finally adopted with the city clerk and shall cause to be published a notice of their adoption in the city's official newspaper. The notice shall include a statement that the rules are on file with the city clerk and available for public inspection and copying. The rules shall become effective upon the signature of the adopting authority or at such later date as stated in the notice.

- (2) To be enforceable, rules must be adopted within one hundred eighty (180) days from initial publication of the notice required under section 2-94(1). If rules do not become effective, the adopting authority may begin rule-making again.
- (3) Each adopting authority shall maintain a record of rule-making for each rule adopted. The record shall include, but not be limited to, the following: the notice of proposed rule-making, either the minutes of the public hearing or the recording of the proceedings at the public hearing, the rule as proposed and finally adopted, and documents submitted during or prior to the hearing relating to the rule.

Sec.2-97. Impact on the public.

Each adopting authority shall determine, to the extent reasonably practicable, the impact of the proposed rule on the public, including a determination as to what groups of people are likely to be affected by a particular rule and how they will be affected by the rule. Groups such as registered neighborhood organizations or industry or trade associations who are likely to be affected, in the judgment of the adopting authority, shall be notified of proposed rules at the time notice of the proposed rule is published....

Sec. 2-99. Enforcement.

- (1) Rules and regulations shall not be enforced unless they are adopted pursuant to this article.
- (2) An action to contest the validity of rules and regulations on the grounds of noncompliance with this article may not commence more than one hundred twenty (120) days after the adoption of the rule.

Sec. 2-100. Public inspection.

Each adopting authority shall maintain an official copy of its rules and

regulations, but the city clerk shall be the custodian of all rules and regulations of the city and its adopting authorities. The clerk shall maintain all such official copies and make them available for public inspection and copying during regular business hours, charging a fee for such copies in accordance with the law in such case made and provided. The city clerk may codify and publish or cause to be codified and published the rules and regulations of the city in a publication to be known as the Denver Code of Rules, making the publication available to the public at a reasonable price.

The question that must be resolved is whether the failure to publish the notice of the final adoption of the Rule in the proper "official publication" is fatal to its adoption or whether there has been substantial compliance with the applicable procedures.

The cases provided by the Agency are not particularly instructive as they deal with ballot initiatives, not with the issue of substantial compliance in rule making. However, a review of both Colorado and Federal cases involving rule-making under their respective administrative procedure acts establishes that the failure of the publication at the last step of rule-making is harmless error when there has been substantial compliance with the other steps.

The Colorado Court of Appeals, in *Jimerson v. Pendergast*, 697 P.2d 804 (Colo. App. 1985), pointed out that, while the State Administrative Procedures Act does not apply to agencies within the City of Denver, the Career Service Rules have analogous provisions to the State APA, such as those concerning notice of hearings of rule-making, conduct of public hearings, and publication of the adopted/amended rules. Therefore, while the City's agencies, including the CSA, are not required to comply with the State APA, the Court's discussion about what constitutes substantial compliance with rule-making are still applicable here.

In *Studor, Inc. v. Examining Board of Plumbers of Division of Registrations, Department of Regulatory A, State of Colorado*, 929 P. 2d 46, 49 (Colo. App. 1996), the Court found that

Administrative regulations, however, are presumed valid and will not be struck down on review unless the challenging party has carried its burden to demonstrate that the regulation is in excess of statutory authority or otherwise invalid. *Barr Lake Village Metropolitan District v. Colorado Water Quality Control Commission*, 835 P.2d 613 (Colo. App. 1992).

When an agency engages in rule-making, "substantial compliance" with the rule-making procedures established in [the statute] required, and an agency's failure to meet that standard renders a rule invalid...*Charnes v. Robinson*, 772 P.2d 62 (Colo. 1989); *Jefferson County School District R-1 v. Division of Labor*, 791 P.2d 1217 (Colo. App. 1990).

In determining whether there has been substantial compliance we look, *inter alia*, to the extent of the noncompliance and the purpose of the provision violated. See *Bickel v. City of Boulder*, 885 P.2d 215 (Colo. 1994). See also *Woodsmall v. Regional Transportation District*, 800 P. 2d 63 (Colo. 1990) (substantial compliance is more than minimal compliance but less than strict or absolute compliance). Thus, we must examine the agency's actions in light of the legislative objectives of the rule-making

provisions at issue, as well as the objectives of the APA procedures in general.

Over a decade earlier, the United States Supreme Court found that:

The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.

Morton v. Ruiz, 415 U.S. 199, 232, 94 S.Ct. 1055, 1073 (1974). See also, *Vigil v. Andrus*, 667 F.2d 931, (10th Cir. 1982); d

The Colorado Courts have found that there has not been substantial compliance when the agency violated the provisions governing the conduct of public hearings. *Home Builders Association of Metropolitan Denver v. Public Utilities Commission of the State of Colorado*, 720 P. 2d 552 (Colo. 1986); *Studor, supra.*

The Federal Court for the District of Colorado, as well as the Tenth Circuit Court of Appeals, rejected contentions that rules were invalid when the violation in adopting a rule was technical and procedural, rather than affecting substantive rights. *Colorado Health Care Association v. Colorado Department of Social Services*, 598 F. Supp. 1400 ((D.C. Colo. 1984), *aff'd*, 842 F2d 1158 (1988).

In the instant case, Appellant contends that the Agency failed to comply with the final publication requirement for the adoption of the revised Rule 7. However, Appellant has not indicated that the publication of the adopted Rule in the *Daily Journal*, rather than the *Rocky Mountain News*, affected any of her substantive rights. This was the last step in the process, not the first. Further, the purpose of the publication was merely to notify City employees that copies of the amended Rule had been filed with the City Clerk and at the CSA office. There is no indication that this error in publication denied any City employees the right to notice of the prospective rule changes or of the hearing or deprived them of the right to be heard at the hearing conducted by the CSA on the proposed rules changes, which arguably might have affected substantive due process rights.

Since the publication of the notice of filing copies of amended Rule 7 with the City Clerk and with the CSA Board does not involve a substantive due process right, the publication in the "other official newspaper" is harmless error. There was substantial compliance with CSR 2. The amended version of Rule 7 was properly adopted.

Even if the publication of the notice of filing of Rule 7 was not in substantial compliance with CSR Rule 2, the Municipal Code clearly limits the right to appeal the adoption of Agency Rules is 120 days from the effective date of the adoption. *Municipal Code* § 2-99. Appellant did not raise the issue until November 2001, considerably more than 120 days after Rule 7 was adopted. Therefore, the issue was not raised in a timely manner and must be denied.

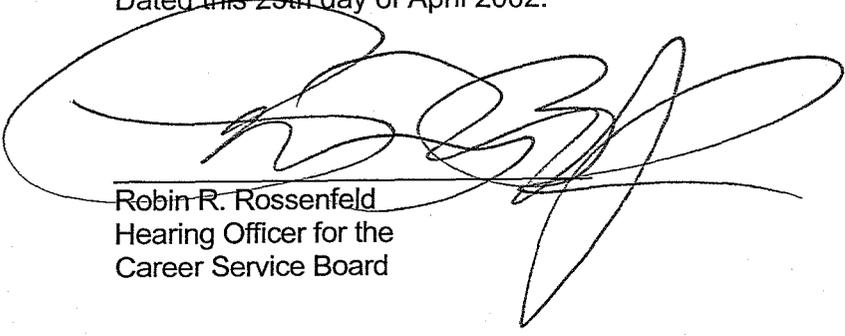
Assuming Appellant is correct and the former version of Rule 7 applies to this case. The appeal still must be dismissed because it would be considered premature under the earlier version of Rule 7.

Appellant claims in her Notice of Appeal that the CSR are vague and unclear and that, "in the abundance of caution," she was filing her notice of appeal at the same time as she filed her request for administrative review. The problem is, that if Appellant is correct and the old version of Rules 7 and 19 applies to this matter, then her appeal to the Hearing Officer is premature. Under the prior version of Rule 7, an appellant has to wait for the Personnel Director to complete his administrative review, which has not yet occurred. If an employee is still aggrieved after the Personnel Director completes the administrative review, it is then, and only then, that the employee's right to appeal to the Hearing Officer would become ripe. Therefore, the appeal to the Hearing Officer is premature and must be dismissed.

Appellant also claims violations of the due process provision of the 5th and 14th Amendments of the United States Constitution. It is well established that the Hearing Officer does not have jurisdiction to determine the constitutionality of the Rules under which this tribunal operates. *Clasby v. Klapper*, 636 P.2d 682 (Colo. 1981). This argument is dismissed.

Based upon the foregoing, the appeal is DISMISSED with prejudice for lack of subject matter jurisdiction pursuant to Rules 7 and 9 and Municipal Ordinance §2-99.

Dated this 25th day of April 2002.

A large, stylized handwritten signature in black ink, appearing to read 'R. Rossenfeld', is written over a horizontal line. The signature is highly cursive and loops around the line.

Robin R. Rossenfeld
Hearing Officer for the
Career Service Board