HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 31-10

ORDER ON AGENCY'S MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

DAMONI REMS, Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS, PERMITS OPERATIONS,
and the City and County of Denver, a municipal corporation, Agency.

The Agency has filed a motion to dismiss this appeal, and Appellant filed her response. This is an appeal of a grievance response as untimely under CSR § 19-10 A.2.b.ii, as well as claims of retaliation and violation of the city's whistleblower ordinance, DRMC 2-106 et. seq. Based on a review of the entire file and the findings below, the motion to dismiss is granted.

BACKGROUND

Appellant filed a grievance on Mar. 3, 2010, which alleged that her co-worker Lena Russell was unprofessional and hostile to her in a Feb. 19 email and at a meeting on Mar. 2, 2010. The Agency's Mar. 16 response determined after investigation that both Ms. Russell and Appellant "handled the situation without respect for each other" and the other supervisors at the meeting, and failed to de-escalate when requested to do so. Appellant was ordered to attend two classes, and the Agency representative, Right-of-Way Director Lindsey Strudwick, assured Appellant that he would "address this matter with Lena Russell and her supervisor, as well." [Appeal Atch. p. 8.] Appellant alleges that the Agency also retaliated against her by placing the grievance response in her personnel file. [Appeal Atch. p. 1.]

In her pre-hearing statement, Appellant alleged that Ms. Russell's hostile behavior was a violation of Executive Order 112, Violence in the Workplace. The designated witnesses and exhibits all relate to this claim, and Appellant's claim that the grievance response was untimely.

ANALYSIS

The Agency asserts 1) the grievance response was timely; 2) Appellant has failed to support her whistleblower claim by an allegation that she made a report of official misconduct; 3) the requirement that Appellant attend two classes

did not constitute an adverse employment action; and 4) the Hearing Office has no jurisdiction to grant Appellant's requested remedies.

As to the first argument, Appellant concedes that the Agency filed its response to her grievance on Mar. 16, which is within the 15-day time limit provided in CSR § 18-40 C. Thus, there is no genuine issue of material fact as to the appeal under § 19-10 A.2.b.ii, and that claim must be dismissed.

Secondly, Appellant argues that her complaint about the conduct of her co-worker was a disclosure of official misconduct because the conduct violated three disciplinary rules and CSR § 15-5 and 15-100, Employee Conduct and Harassment and Discrimination, respectively. Appellant correctly argues that a party need not prove that the official misconduct occurred; however, the disclosure must fit the ordinance's definition of official misconduct. Appellant does not describe how Ms. Russell's conduct rises to the level of a matter of public concern sufficient to affect the interests of the city and "the larger interests of the citizens of Denver", as contemplated by the ordinance. "Discussions between employee and supervisor about working conditions" are not disclosures of official misconduct under the Whistleblower Protection Act. In re Steward, CSA 18-08, 4 (4/11/08); Cf. Pickering v. Bad of Educ., 391 U.S. 563 (1968); Conic v. Myers, 461 U.S. 138 (1983). Thus, Appellant has failed to allege an essential element of a whistleblower claim.

Thirdly, the Agency challenges the retaliation claim based on Appellant's failure to assert an adverse action, which is action that is reasonably likely to deter employees from engaging in protected activity. In re Johnson, CSA 135-05, 4 (3/10/06). Under similar circumstances, the hearing office has held that an order to take remedial training is not "action likely to deter protected activity." In re Johnson, CSA 135-05, 5 (3/10/06). Likewise, Appellant does not explain why placement of the grievance response in her personnel file was a negative action which would discourage future protected activity. Finally, Appellant failed to file a complaint of retaliation prior to filing her appeal, as required by § 19-10 A.2.a.

Based on the above findings, the Agency's final argument as to the remedies requested in the appeal is moot.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered as follows:

1. The claim based on failure to timely file a grievance response is dismissed based on Appellant's admission that the response was filed within 15 days of the grievance,

2. Appellant's whistleblower appeal is dismissed for failure to state a claim,

3. The retaliation claim is dismissed for failure to allege that the Agency took adverse action, and

4. Dismissal of all claims made in this appeal moots all pending motions.

DONE May 12, 2010.

Valerie McNaughton
Career Service Hearing Officer

I hereby certify that on May 12, 2010 a copy of this Order was sent to the following:

Damoni Rems, Damoni.Rems@denvergov.org (via email)
Bill Miles, HR, Bill.Miles@denvergov.org (via email)
City Attorney's Office at Dlefiling.litigation@denvergov.org (via email)