

ORDER ON AGENCY'S MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

EUGENE G. ABEYTA, JR., Appellant,

vs.

**DEPARTMENT OF PUBLIC WORKS, PARKING MANAGEMENT DIVISION,
RIGHT OF WAY ENFORCEMENT**, and the City and County of Denver, a municipal corporation, Agency.

The Agency filed its motion to dismiss on January 25, 2010. Appellant has not submitted a response to the motion.

This is a pro se appeal by a Vehicle Control Agent (VCA) based on the Agency's failure to permit bidding on its graveyard shift in Nov. 2009. Appellant alleges that this action, and the Agency's later denial of his grievance of the action, 1) violated CSR § 9-61 by denying him shift differential pay, and 2) constituted retaliation for his use of FMLA leave.

The Agency contends that the Hearing Officer lacks jurisdiction over the appeal because 1) Appellant had no right to work a specific shift, and 2) Appellant failed to assert any connection between his use of FMLA leave and the elimination of the graveyard shift.

I. Grievance Appeal

Appellant's first claim is that the Agency denied him shift differential pay by concealing the bid sheet from him, resulting in his inability to bid for the graveyard shift. Appellant invokes the jurisdiction of the Hearing Office based on the Agency's denial of his grievance of that action. In response to the Order to Show Cause, Appellant produced a copy of his Nov. 27, 2009 bid sheet, which shows that Appellant did in fact bid the graveyard shift as his first choice. [Response, Exh. B.] The Agency asserts in its motion that the shift was eliminated in response to the permanent VCAs' objections to working Saturdays and the Agency's inability to pay overtime. [Exh. A.] Appellant did not challenge the Agency's statement.

Appellant also filed a copy of the Agency's notice of the creation of a Special Enforcement & Relief Shift, which would be open to VCAs "by self-selection." [Exh. E.]

Appellant admits he was informed that the VCAs for this special shift would be selected by seniority. [Appellant's Response.] He does not allege that he was turned down for the new shift in spite of his seniority or other qualifications.

An agency's denial of a grievance may be appealed if the action violates a Career Service Rule and negatively affects the grievant's pay, benefits or status. CSR § 19-10 A.2.b.i. Here, the documents submitted by Appellant show that his bid for the graveyard shift was denied based on the elimination of that shift and replacement with a shift that also paid the shift differential rate.

Where the documents outside the pleadings demonstrate that there is no genuine issue of material fact supporting a claim, summary judgment is appropriate. The responding party "may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise . . . must set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e). In light of Appellant's failure to present any evidence supporting his claim that he was entitled under the rule to be awarded his bid for the original graveyard shift, summary judgment for the Agency must be granted on the grievance appeal.

2. Retaliation Claim

Next, Appellant asserts that the Agency action in denying his shift bid was taken in retaliation for his use of FMLA leave. The Agency does not deny that Appellant exercised his right to take FMLA leave, and thus Appellant has made a showing that he engaged in a protected activity. A retaliation claim must also include an allegation that the employee suffered an adverse employment action; i.e., an action that is reasonably likely to deter an employee from engaging in a protected activity. Burlington Northern & Santa Fe Ry. Co v. White, 548 U.S. 53 (2006); EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998). Finally, in order to survive a motion for summary judgment, an appellant must show some connection between the adverse action and the protected activity. CSR § 15-106; 42 USCA § 2000e-3(a); Nichols v. Harford County Bd. of Educ., 189 F.Supp.2d 325 (D.Md., 2002.)

In Appellant's response to the Order to Show Cause, he asserts that the Director became angry over graveyard shift employees' use of FMLA leave, and declared, "I will stop this." Appellant does not claim that, based on his seniority or other qualifications, he would have been given his first shift choice absent the act of retaliation, or that only employees using FMLA were affected by the change.

The Agency argues in its motion to dismiss that it denied Appellant's bid because it eliminated the graveyard shift for all VCAs. It claims that the action was taken for legitimate business reasons, including avoidance of overtime expense and its employees' objections to Saturday work. It further challenges Appellant's claim by asserting that Appellant had been using FMLA leave for the past four year, during which no action was taken against him for that use. Under the burden-shifting formula of McDonnell Douglas v. Green, 411 U.S. 792 (1973), it was then incumbent on Appellant to show that "there is a

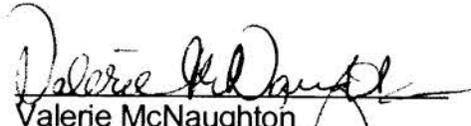
genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual - i.e., unworthy of belief." Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997), quoting Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir.1995); Hawkins v. PepsiCo, Inc., 203 F.3d 274, 278 (4th Cir. 2000.)

Appellant failed to make any showing that the stated reasons were pretextual. Moreover, Appellant admits that his old graveyard shift no longer exists, and that he later rejected the opportunity to bid on the new graveyard shift. [Appellant's Response.] At the time of the events in question, the Career Service Rules specifically provided that "[a]ppointing authorities shall be responsible for establishing daily work schedules." CSR § 10-11A. Daily work schedules affected all VCAs, regardless of their use of FMLA leave. Thus, without a further showing that the reasons given by the Agency for elimination of the shift were not the real reasons for the action, summary judgment must be granted as to the claim of retaliation. See Gates v. Caterpillar, Inc., 513 F.3d 680 (7th Cir. 2008.)

Order

Based on the foregoing findings of fact and conclusions of law, it is ordered that summary judgment is granted as to Appellant's grievance appeal and retaliation claim, and the appeal is DISMISSED WITH PREJUDICE.

Done this 9th day of February, 2010.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the following:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org

AND Opposing parties or their representatives, if any.