

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

Appeal Nos. 105-01 - 216-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEALS OF:

Appellants: LIZ ABROMEIT, ANGELA ACKLAND, JODY AMSBERRY, DENISE ARCHER, RACHEL ARCHER, JACK ARMIJO, KARLA BAKEN, BRENDA BANKS, GLORIA BARAJAS, ADELE BARNEY, ALBINITA BARRERAS, KAY BATEMAN, MARY BLAYLOCK, LUCIA BLEA (BACHICHA), WILLIAM BOGY, BARBARA BOLE, LUANN BOOTH, KIM BUCHHOLZ, LENA BUJANDA, MARIA BULLOCK, LINDA BURGDORF, LENNY BUSTOS, FREDDIE CARTER, SYLVIA CASTILLO, PHILLIP CEDILLO, BRENDA CESSAR, MICHELLE CHORENS, LORI COLEMAN, DIANN CURL, INEZ DELVILLAR, JOAN DOCHERTY, DAVID DOUCET, JUDY DURKEE, JULIE ERICKSON, ANNAMARIE ESCALERA, TERESA ESPINOZA, ROBBIE EVANS-PRICE, BONNIE FREEMAN, CHARLOTTE GARCIA, SCOTT GATES, MARY GONZALES, DEBRA GONZALES, LISA GONZALES, JULIA GRAVES, EDITH GRAY, MARY GUERRA, SABRINA GURULE, MARY GUTIERREZ, NANCY GUTIERREZ, BECKY HEINS, PATRICIA HERNANDEZ, JANETTE HERRERA, ALAN HERRERA, THOMAS HILL, BARBARA HUGHES, FELISHA HURTADO, DEBORAH JACKSON, THERESA JACKSON, PATTY JAMISON, SHARON KOOPS, KATHY LAPP, LAURA LARKINS, CINDY LINVILLE, MARILYN LUJAN, JEANETTE MADRID, DANI MADRIL, DIANE MAES, SHAWN MANZANARES, DEBORAH J. MARQUEZ, GLORIA MARQUEZ, JANINE MARTINEZ, CHRISTIANNA MARTINEZ, SUZANNE MCKINZIE, MARY L. MEAUX, SHARON MILLER, RICHARD MILTENBERGER, LAWRENCE (DAN) MITCHELL, JANINE MONDRAGON, ALVA MONTOYA, IRENE MUNIZ, FLORENCE MURTHA, DAWN NEELANDS CATHERINE NOTYCE, SHAWN NUNEZ, RAMONA ODOM, SHRILEY CAMPBELL OLIVER, NANCY ORTEGA, SHARON PEARSON, KRISTINE QUINTANA, KAREN QUINTANA, MARSHA REED, ANITA ROMERO, REBECCA ROSALES, JUDY ROSSO, TERRI RYSZKOWSKI, MONIE SALGADO, FRANCES SARNO, PHIL SHAW, LEVINIA SHOTTS, THERESA SONES, ALVIN TAFOYA, MONICA TRUJILLO, DIANE TUFFIELD, MARGARET G. VALDEZ, PAMELA VIGIL, YVONNE VIGIL, RENE VIGIL-STOKES, BRIDGET WASHINGTON, SHIRLEY WOODRUM, KATHI WRIGHT, VALERIE ZAMORA, WILLIAM ZIMMERMAN.

And

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

NATURE OF APPEAL

Appellants filed their appeals of a classification decision with the Career Service Board Hearing Officer on March 22, 2001. After reviewing the file, the Hearing Officer issued an Order to Show Cause that questioned the Hearing Officer's jurisdiction. Through counsel the Appellants and the Agency filed their respective Responses to the Order to Show Cause. The Agency and the Appellants also each filed a Reply to the other's Response. The Agency has urged dismissal for lack of jurisdiction. The Appellants are opposed to dismissal and assert that the Hearing Officer has subject matter jurisdiction.

The Agency has also filed a Motion to Dismiss alleging additional grounds for the lack of jurisdiction. The Appellant filed a Response to the Agency's Motion to Dismiss, opposing dismissal.

A hearing was held at which time evidence and legal arguments were presented on these specific issues. The Hearing Officer has reviewed and duly considered all of the briefs and evidence presented and now makes the following findings and order.

FINDINGS OF FACT

These consolidated Appeals involve several different employee classifications within the Department of Human Services. They include Collection Investigator, Administrative Service Clerk, Administrative Staff Assistant IV, Administrative Support Assistant IV, Technical Support Supervisor, Support Services Manager, "Retired" Collection Investigator, Technical Service Clerk, and Accounting Clerk. A total of 112 Appellants filed their appeals with the Hearing Officer indicating that they were appealing their respective classifications by Career Service.

According to their petition, four of the Appellants had first requested a classification review or "audit" as early as January, 1999. The remaining Appellants had requested their classification review in January 2000. Some of the Appellants apparently received an adverse decision and later requested an administrative review of the initial classification decision.

According to the petition, 43 Appellants filed a request in January 2000 requesting an administrative review of their respective classifications. The remaining 69 Appellants, according to their petition, filed a request for review of classification decision in April of 2000. Of those 69, the Appellants claim only three ever received a decision that denied their request. The other 109 Appellants allege that they have never received a decision on either their classification request or the request for an administrative review.

The Show Cause Order raised two issues:

1. Whether the Appellant's appeals are ripe, given that most of them claim they have

never received notice of final agency action; and

2. Whether the Hearing Officer has jurisdiction under Career Service rules to review a classification decision by the Career Service Authority.

The present Career Service Rule §19-10, effective August 24, 2000 does not specifically mention the appeal of a classification decision such as those presently included in this appeal:

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 meet 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.

* * *

The rule goes on to define other types of actions that may also be appealed to the Hearing Officer, such as disciplinary actions, discriminatory actions, and grievances which are the result of rule violations by the Agency.

However, at the time these classification audit requests were made in January of 1999 and January of 2000, a different version of CSR §19-10 was in effect. In that version, Paragraph 2 (b) specifically provided for the appeal of a classification decision:

Section 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 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:
 - (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 judgement in its performance is permissible.

* * *

Rule §7-66 was entitled "Reallocation of Positions" and was quite lengthy. Among other things it provided that::

- c) Request for review of individual position: The appointing authority, the Career Service Authority, or an incumbent may initiate a request for a review of a position if permanent and significant change has gradually occurred in the duties and responsibilities. . .

Paragraph h), of §7-66 referred to specifically in the old version of CSR §19-10 stated:

- h) Request for review of classification decision: 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 of the Personnel Director or the designee 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). (Effective September 1, 1989; Rules Revision Memo 129B) Page Issuance Date: July 26, 1989.

It is clear then that at the time that the Appellants initiated their classification audit requests, the Career Service Rules allowed for such a request and for the appeal of any classification decision by Career Service to the Personnel Director and ultimately to the Hearing Officer. It is also uncontroverted that shortly after their classification requests were made, the Career Service Board, on or about March 21, 2000, amended the rules. Not only was §7-66 completely eliminated, but also the entire Rule 7 was revised. A few months later, effective August 24, 2000 Rule 19 was also revised to reflect the elimination of §7-66 by removing any reference to an appeal of a classification decision.

Since the Appellants started their classification process under one rule, and later filed their appeal when different rules were in effect, there is a question as to whether the old rules §7-66 and §19-10 or the new rule §19-10 apply to these appeals. The answer will determine whether the Hearing Officer has subject matter jurisdiction over these appeals.

Analysis

The application of the appropriate rule raises two issues:

- I. Did the Career Service Board in fact eliminate the appeal process for individual classification audit decisions?
- II. If so, would the application of the new rules eliminating classification appeals to the Appellants be a retroactive application and therefore unenforceable?

I.

As indicated above, the Career Service Board changed the rules eliminating any mention of either individual classification requests or classification appeals. Appellant contends that nevertheless, the Board did not eliminate the employee's right to have his or her position properly classified as required under either the Charter or Personnel Rules. Appellants further contend that any failure of the personnel director to properly classify a position is a violation of Personnel Rules and therefore subject to appeal under Rule §§19-10 a)(1) and (d).

Appellant is correct that current version of CSR §19-10 (d) provides that an employee may appeal a grievance that alleges a rule or charter violation by the agency. However, as the Agency notes in its Reply, the Board also eliminated those provisions of Rule 7 that allowed for requests for individual audits. Under the current Rule 7, an employee can no longer request that Career Service conduct an individual reclassification audit of his or her position. Instead, he must make the request to the appointing authority, which in turn may make the request to Career Service. Under the new rule, the decision to seek an individual classification audit is vested with the appointing authority, not the employee (CSR § 7-22). Moreover, that request must first meet the specific criteria set forth in §7-14 "Reallocation Criteria".

Under the current rule 7, the Career Service has the authority to conduct annual position audits to maintain the classification and pay plan. The classes to be included in an annual review are to be determined by the Personnel Director (CSR §7-21). Nowhere does Rule 7 provide for the employee to seek or appeal an individual classification decision.

Moreover, the current Rule 7 provides for modification to classifications and pay plans to be approved by the Career Service Board upon recommendations by the Director. The Director does not have the authority to make such changes unilaterally. Those changes must also be approved by the City Council. Contrary to Appellant's contention, there is nothing in the current Career Service Rules that would vest jurisdiction to review the decisions of the Board or City Council.

As the Agency contends, the rules must be read in harmony to allow meaningful application. The Board clearly intended to eliminate an employee's ability to force an audit of his or her individual position. The Board seems to have favored a more systematic approach to classifications instead of an individual approach. Rule §19-10 must be read then in conjunction with the Board's action with respect to Rule 7. It would not make sense for the Board to eliminate individual classification audits initiated by the employee, but to nevertheless allow for the appeal of a non-existent individual classification decision. For one thing, but for the timing of Appellant's individual requests under the former Rule 7, they would not even be entitled to a classification review by Career Service in the first instance. Thus, if there is no entitlement to an individual classification review there can be no entitlement to an individual classification appeal.

The Hearing Officer can only conclude that notwithstanding the broad language of the current CSR §19-10 permitting an appeal of a grievance resulting from a "rule violation", the Board intended to eliminate all appeals for individual classification audit decisions. This would serve to divest the Hearing Officer of subject matter jurisdiction over individual classification appeals under the current Career Service Rules.

II.

The next question is whether the elimination of the appeal process for individual

classification decisions can be properly applied to the Appellants. Generally, under the rules of statutory construction, legislation is presumed to have prospective effect only. The general prohibition against retroactive laws is contained in *Colo. Const. Art. II, § 11*, which provides:

No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

However, the application of a statute (or in this case a Career Service Rule) is not rendered retroactive and unlawful merely because the facts upon which it operates occurred before adoption of the statute. See *Adams County School District No. 1 v. District Court*, 199 Colo. 284, 611 P.2d 963 (1980); *Tucker v. Claimants in re Death of Gonzales*, 37 Colo. App. 252, 255, 546 P.2d 1271, 1274 (1975); *Lohf v. Casey*, Page 1315 330 F. Supp. 356, 359 (D. Colo. 1971), *aff'd.*, 466 F.2d 618 (10th Cir. 1972). Thus, the fact that the Career Service rules were changed after the request for audit but before the appeal was ever filed does not necessarily preclude application of the new rules that divested the Hearing Officer of jurisdiction.

The application of a statute to a subsisting claim for relief does not violate the prohibition of retroactive legislation where the statute effects a change that is only procedural or remedial in nature. See *Adams County School District No. 1 v. District Court, supra*; *Jefferson County Department of Social Services v. D.A.G.*, 199 Colo. 315, 607 P.2d 1004, 1006 (1980); *In Re Colorado Mercantile Co.*, 299 F. Supp. 55 (D. Colo. 1969); *Smith v. Putnam*, 250 F. Supp. 1017 (D. Colo. 1965); See generally, *Denver, South Park & Pacific Railway Co. v. Woodward*, 4 Colo. 1, (1878). This is because:

"[t]he abolition of an old remedy, or the substitution of a new one, neither constitutes the impairment of a vested right nor the imposition of a new duty, for there is no such thing as a vested right in remedies."

Jefferson County Department of Social Services v. D.A.G., *supra*, at 1006 quoting from *Moore v. Chalmers-Galloway Live Stock Co.*, 90 Colo. 548 at 554-55, 10 P.2d 950 at 952.

The Appellants assert that to apply the new rule §19-10 retrospectively to their classification request would impair their vested contract rights and would deny them due process under the Fourteenth Amendment to the U.S. Constitution. Appellant cites *People v. D.K.B.* 843 P.2d 1326, (Colo. 1993) in support. However, Appellant's reliance is misplaced, because the Colorado Supreme Court, in reversing the ruling of the Court of Appeals, permitted the retrospective application of a revised statute that limited the sealing of a criminal record. The court noted: "the convicted person's interest and his or her corresponding claim for relief are not entitled to scrutiny of constitutional magnitude." *People v. D.K.B.*, *supra*, at 1330.

Unlike the constitutionally protected property right to the expectation of continued employment, here the employee's interest in having his or her position reclassified is not a claim of constitutional magnitude and does not preclude retrospective application of the revised rule. The nature of the employee's interest here is far different than that in a disciplinary proceeding, where due process requirements may limit retrospective application.

Appellants assert that their "right" to a classification audit and appeal are "vested" property interests by virtue of the contractual nature of their relationship with the City of Denver. Appellants seek to lump together all aspects of the employment relationship as part of the "contract". They fail to distinguish between the expectation of continued employment, which is a vested right, and the various other aspects of the employment relationship, including the entire body of Career Service Rules. If Appellant's "contractual" theory were to prevail, the Career Service Board would be powerless to unilaterally modify any Career Service Rules as to existing employees, because such a modification would be argued to be of "vested contractual property rights" of existing employees.

It is clear that the employee relationship that the Appellants enjoy with the City includes, by past practices and custom, the ability of the Board to unilaterally modify Career Service Rules and therefore the terms of that employment relationship. As such the characterization of the employment relationship with the city as a "contract" is a mere legal fiction. In fact, the Board may even modify disciplinary rules leading to dismissal without being in breach of this fictional "contract" with employees. Whether that reservation of the ability to modify is deemed to be a part of the "contract" or not then is a matter of semantics. As the Agency correctly notes, the right to an administrative review or appeal of a classification decision is not a "right" which cannot be removed except for cause, and is not protected by the Due Process Clauses of either the Colorado or United States Constitutions. The Appellant's contention that the provision for an appeal of a classification decision is part of a "contract" with the city is therefore not persuasive.

Upon closer examination, 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 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.

Conclusion

The repeal of Rule §7-66, together with the modification of Rule §19-10, removed the appeal process for classification decisions from the jurisdiction of the Hearing Officer. Applying the new rules eliminating classification appeals to the

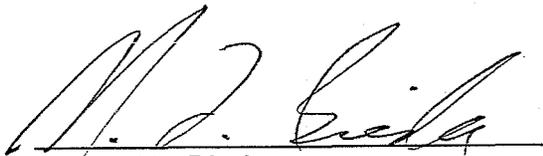
Appellants is not a retroactive application and is therefore enforceable. Accordingly these appeals must be dismissed with prejudice for lack of subject matter jurisdiction.

Since the lack of jurisdiction is dispositive of all appeals, the other issues raised in the Show Cause Order and the Agency's Motion to Dismiss are moot, and will not be addressed further.

Order

These consolidated appeals, as listed in the caption, are hereby **DISMISSED** with prejudice, for lack of jurisdiction.

Dated this 31st day of
December 2001.



Michael L. Bieda
Hearing Officer for the
Career Service Board