

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

Appeal No. 318-01 and 319-01

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**ORDER OF DISMISSAL**

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IN THE MATTER OF THE APPEAL OF:

**PATRICIA BEER and JAN L. OBERT, Appellants**

Department: THE ASPEN PROJECT, and  
THE CITY AND COUNTY OF DENVER, a municipal corporation

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**INTRODUCTION**

This matter comes before the Career Service Board on appeal by Patricia Beer and Jan L. Obert<sup>1</sup> (hereinafter "Appellants") filed August 24, 2001. Appellants appeal the ASPEN Project's ("Agency") denial of their grievances seeking an adjustment of their step designations.

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Kaye ("hearing officer") on December 12, 2001 at the Career Service Authority Offices. Appellants were present and were represented by Mr. Milo N. Gonser and Mr. Terry Cipoletti, Gonser and Bryant, P.C. The Agency was represented by Assistant City Attorney Sybil R. Kiskan, with the ASPEN Project's Director, Gary Elliott, present for the entirety of the proceedings and serving as advisory representative for the Agency.

Witnesses for the Appellants included Acting Director of Human Services and Information Technology Section Manager Mike Watson, and CSA Director Jim Yearby. Because this case was dismissed as set forth below following Mr. Yearby's testimony, no additional witnesses were called in this case.<sup>2</sup>

**ISSUES**

The only issue in this case is whether the hearing officer has subject-matter jurisdiction over the Agency's denial of Appellants' grievance for the Agency's failure to request an

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<sup>1</sup> Renee M. Salois was previously an Appellant in this case. On the morning of the hearing, she withdrew from the case.

<sup>2</sup> The parties stipulated to the admission of a number of exhibits prior to the hearing, including Appellants' Exhibits A-H, K, L, N, P, Q, X, GG, HH, II and JJ, and Agency Exhibit 1. Because this matter was dismissed for lack of jurisdiction and none of the exhibits are relevant to that determination, they have not been considered in this Decision.

adjustment in their pay steps under CSR Rule 9-53. After testimony by the Rule's promulgator, Mr. Yearby, that he did not intend to create Hearings Office jurisdiction over this regulation by its promulgation, the hearing officer concluded she did not have jurisdiction over the Agency's action and dismissed the case. All other issues are therefore moot.

### **BACKGROUND**

Appellants are two of five Senior Information Technology Developers for the ASPEN Project, which is a special project being executed by a team of computer specialists with the goal of integrating and updating the computer system for the entire City. Appellants are presently at pay grade 812. Ms. Beer's pay step is 18. Ms. Obert's pay step is 14.

In January of 2001, Ms. Obert and Ms. Salois were assigned the responsibility of seeking an additional Senior Information Technology Developer. Ms. Salois prepared the specifications for the job announcement, and they both generated the technical interview questions and conducted the interviews. After consideration of several candidates, the interviewers made their recommendations to then Program Director, Mel Thompson. They recommended Mr. Grant Chappell because of his experience with PeopleSoft software, a state-of-the-art system which the ASPEN Project intended to use in replacement of several older non-integrated aspects of the City's computer system.

Mr. Thompson was aware that Mr. Chappell was formerly employed in the private sector on the West Coast and received a high salary. In order to achieve Mr. Chappell's hire, the Agency had to offer him a salary which was competitive with the private market. Mr. Thompson therefore sought a waiver from CSA Director Jim Yearby for the hire of an individual above step I under Rule 9-52. The Rule states in relevant part:

- b) Career Service Approval: If the class to which a new employee is to be appointed is in a pay schedule which has sectors, and the mission of the agency can only be accomplished by employing a person at a rate above... the "K" step in the exempt schedule, the appointing authority may request that the Personnel Director authorize a waiver in pay to such person at a step within the growth sector. The request shall be accompanied by a written justification for the request. The Personnel Director may approve the request if the justification establishes that the waiver is essential to the accomplishment of the agency mission and is justified by market conditions.

Based on Mr. Thompson's written justification, Mr. Yearby granted the waiver and Mr. Chappell was hired on May 7, 2001 at pay grade 812, step 19.

On approximately July 17, 2001, during a discussion with CSA employees assigned to the project, Appellants learned of the existence of CSR Rule 9-53, which states in relevant part:

An appointing authority may adjust pay for an existing employee, if the purpose is to eliminate pay inequity created by market factors which has resulted in the existing employee being in a lower pay step than a subsequent hire in the same classification. A pay adjustment within the salary range requires the approval of the Personnel Director.

Pursuant to this rule, Appellants filed grievances seeking an adjustment of their pay steps commensurate with that of Mr. Chappell.<sup>3</sup> Appellants argue that their positions, duties and expertise rival those of Mr. Chappell. They assert that the clear intent of this regulation is to eliminate pay inequities when a new employee of the same title and duties is hired at a higher rate of pay, and that the Rule should therefore be applied to their positions in light of Mr. Chappell's hire at a higher rate of pay.

### DISCUSSION

On October 26, 2001, the Agency filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment ("Motion"). In its Motion, the Agency argues that CSR Rule 9-53 is discretionary, not mandatory. It permits an appointing authority to seek step adjustments of the salaries of existing employees under the conditions it sets forth, but does not require that this be done. Because the appointing authority had the discretion to refuse application of the Rule, the Agency posits that this refusal does not constitute a violation of a regulation, which is a requisite condition of jurisdiction under CSR Rule 19-10 d).

On November 8, 2001, Appellants filed a Response to the Agency's Motion. In their Response, Appellants argue that their circumstances are precisely why CSR Rule 9-53 was adopted by the Board. They point out that their first-level grievance was denied by their direct supervisor, Ms. McKenna, only eight days after Ms. McKenna was hired, and that their second-level grievance was denied by the newly-appointed Project Director, Mr. Elliott, only eight days after his hire. Therefore, neither of them had sufficient knowledge of the grievance process, or of the working conditions and similarity in qualifications of the Appellants and Mr. Chappell, to have made an informed decision. Appellants argue that in recent conversations with Ms. McKenna, she has stated that if she knew then what she knows now, she would have proceeded differently and supported Appellants' request.<sup>4</sup>

Appellants posit that the totality of CSR Rule 9, as expressed in the policy statement set forth at CSR Rule 9-10, is to create equity in the system of compensation for CSA employees. That Rule states in relevant part:

#### Section 9-10 -- Policy

The policy of the *Career Service Board in recommending pay for employees* in the career service is:

<sup>3</sup> The Agency asserts that Appellants' grievances of July 25, 2001 were untimely based on Mr. Chappell's hire date of May 7, 2001. Appellants respond that they did not know of the existence of CSR Rule 9-53 because the Agency failed to post the new CSR Rule as directed on the Rule change forms distributed to the Agencies, and because the Agency did not maintain a current version of the CSR Rules. Appellants therefore had no reason to discover Mr. Chappell's salary until their conversation with the CSA employees on July 17, 2001, and did not actually know what that salary was until July 25, the date they filed their grievances. Because the hearing officer lacks jurisdiction for other reasons, dismissal of the case renders the timeliness issue moot.

<sup>4</sup> The Rule clearly suggests that an action under 9-53 should be initiated at the discretion of the appointing authority. Therefore, the Agency's prior denial of Appellants' grievance does not bar it from initiating such a request now.

- a) To provide like pay for like work.
- b) To compensate employees at rates equal to generally-prevailing rates in the Denver Metropolitan area....

(Emphasis added.) Appellants posit that in light of the scheme of the CSR Rules and the clear intent of the entire CSA personnel system to provide fair compensation, the inequity of their situation constitutes a violation of the broader intent of those regulations. They argue that the hearing officer therefore has jurisdiction over their claim.

Appellants further point out that under the C.R.C.P and controlling case law, motions to dismiss and for summary judgment should not be granted unless it is beyond doubt that the party against whom the motion is made can offer no evidence in support of its claim.

CSR Rule 9-53 is a relatively new regulation. There was heretofore no case law interpreting or applying it to circumstances such as those in this case.<sup>5</sup> The Hearings Office carefully reviewed the Motion and Response, and the controlling CSR Rule 9-53. After that analysis, there remained some doubt as to whether there had been a regulatory violation in light of the language "...if the purpose (of the request) is to eliminate pay inequity created by market factors..." In the absence of any guidance by the promulgator, this language could have been considered a condition whose satisfaction was sufficient to invoke the Rule. After consideration of the Motion and Response, and in light of apparent lingering material disputed issues of fact and law, Hearing Officer Michael Lassota entered an Order denying the Agency's Motion on November 9, 2001.

At the hearing, Appellants called CSA Director Jim Yearby to the stand. During his testimony, Mr. Yearby stated that he was the author of CSR Rules 9-52 and 9-53. Mr. Yearby unequivocally testified that he did not intend to create Hearings Office jurisdiction over CSR Rule 9-53 in its promulgation. Mr. Yearby testified that the Rule is intended to be discretionary and not mandatory, and that its intent is to provide appointing authorities with the option of seeking pay adjustments for existing City employees in the face of new hires who must be offered higher salaries for reasons of market demand. Mr. Yearby testified that such an option must be discretionary, for to have made it mandatory could have had disastrous budgetary ramifications for the entire City personnel system, and thus would have been grossly irresponsible. Mr. Yearby further testified that to his knowledge, an employee's challenge of pay in isolation is insufficient to create jurisdiction in the absence of an alleged violation of some CSR Rule from which the challenge in pay arises.

Upon receipt of this testimony, the hearing officer solicited additional oral arguments on the issue of her jurisdiction. After careful consideration of those arguments, the hearing officer concluded she lacked jurisdiction over the case. The reasons for that determination are as follows.

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<sup>5</sup> In In the Matter of Tamara Watkins, Appeal No. 186-00, Appellant challenged the CSA Director's denial of a waiver under CSR Rule 9-53. The CSA Director never reviewed the waiver request in the case at bar which factually distinguishes it from Watkins.

The role of the courts in interpreting a regulation is to give effect to the promulgator's intent. Negonsott v. Samuels, 507 U.S. 99, 104 (1993). It is presumed that the promulgating entity expresses its intent through the plain and ordinary meaning of the language it chooses. In interpreting a statute, a court should always turn first to one cardinal canon of construction before all others: that courts must presume a legislature "says in a statute what it means and means in a statute what it says..." See, e.g., United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-242 (1989). The plain and ordinary meaning of the term "may" is that it is permissive, not mandatory as is the typical alternative regulatory term "shall."

Even if the terms of the regulation were ambiguous, interpretation on matters within the Agency's expertise is entitled to deference. The Agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." Stinson v. United States, 508 U.S. 36, 45 (1993). Jim Yearby is the Director of the CSA. If his interpretation of this regulation is not inconsistent with its terms, and there is no express jurisdictional grant to the contrary, then his interpretation as the CSA Director must be accorded due deference.

The regulations which govern the CSA personnel system are the same regulations which create the hearing officer's jurisdiction. That jurisdiction is strictly a creature of those regulations. It is well established that CSA hearing officers do not have subject-matter jurisdiction which extends beyond the parameters of the express grants of such authority found in the CSR Rules.

There is no grant of authority which clearly brings CSR Rule 9-53 into the purview of Hearings Office jurisdiction. Nor is there any authority granting jurisdiction over pay rate decisions in general. See, In the Matter of Tamara Watkins, Appeal No. 186-00. In that case, Appellant appealed the CSA Director's denial of a request under CSR Rule 9-53. The Director denied the waiver because the justification did not satisfy the requisite conditions under the Rule. Hearing Officer Robin R. Rossenfeld concluded that she did not have jurisdiction to review the Director's determination. Citing In the Matter of Molly Austin-Flaherty, Appeal No. 23-00, Hearing Officer Rossenfeld held in Watkins that no authority exists under the CSR Rules granting jurisdiction to hear matters that concern compensation rates or decisions. Rather, that power lies "solely in the City Council and the Career Service Board itself." This conclusion is underscored by the language of CSR Rule 9-10, which policy directive is addressed to the Career Service Board.

Appellants argue that CSR Rule 19-10 d) grants Hearings Office jurisdiction over the appeal of grievances. However, while an employee may grieve virtually any action under CSR Rule 18, CSR Rule 19-10 d) requires that to give rise to jurisdiction over an appeal of the underlying grievance, the grievance denial must result "in the alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Rules." An Appellant cannot create jurisdiction over any incident whether or not it is a violation of the Rules simply by grieving it and then appealing the grievance. Use of the term "may" in CSR Rule 9-53 implies that "may not" is also an option, and that the choice not to is therefore not a regulatory violation. Therefore, Appellants' appeal of a grievance in itself does not give rise to jurisdiction under CSR Rule 19-10 d).

Appellants' argument that the intent of the totality of the CSR Rules, specifically CSR Rule 9, is to create equal pay for equal work, is not lost on the hearing officer. However, CSR Rule 9-10 is a policy statement guiding the Career Service Board in the ultimate goal to be achieved through its recommendations of pay for employees. It is not a mandatory regulation specifically creating any cause of action. The hearing officer is aware of no instance in which a policy statement of this nature has been used in isolation to manufacture a right to appeal. Rather, policy statements are universally used to determine the correct application and interpretation of the rules for the topics they address.

As is the case with most policy statements, CSR Rule 9-10 is followed by a set of specific regulations designed to make the intent it expresses a reality. The only rule which applies to Appellants' circumstances in this case is CSR Rule 9-53, which is discretionary. The existence of the policy statement in CSR Rule 9-10 cannot be viewed to make CSR Rule 9-53 mandatory, since such an interpretation would render the term "may" in CSR Rule 9-53 meaningless.

Finally, even if the policy statement in CSR Rule 9-10 were mandatory, it is mandatory as to "the Career Service Board in recommending pay for employees," not appointing authorities or any other entity who can be considered an actor in this case. *Accord, Watkins*, above. In light of concerns about turning the City budget on its ear by making such adjustments mandatory in every instance despite budgetary constraints and other considerations, the permissive nature of such an upward salary adjustment cannot be said to be inconsistent with the intent of the rules and mission of the Career Service Authority.

### CONCLUSION OF LAW

The testimony of Mr. Yearby, the promulgator of CSR Rule 9-53, clearly establishes that he did not intend to create an appealable right under the regulation. This testimony is determinative of the issue of jurisdiction because it is the CSA Director's interpretation. That interpretation must be accorded controlling deference because it is not inconsistent or clearly contradicted by the CSR Rules, past practice, or by other more persuasive authority. In the absence of any such contrary authority, and in light of the Agency's arguments and the above analysis, hearing officer must dismiss this case for lack of jurisdiction.

### ORDER

Based on the foregoing, this case is hereby DISMISSED WITH PREJUDICE.

Dated this 18<sup>th</sup> day of December, 2001.

  
Joanna L. Kaye  
Hearing Officer for the  
Career Service Board