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

Appeal No. 86-06

ORDER DENYING AGENCY MOTION TO DISMISS APPEAL

IN THE MATTER OF THE APPEAL OF:

PETER BODEN,
Appellant,

vs.

DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation,
Agency.

The Agency filed its "Agency's Motion to Dismiss" on November 6, 2006. The Appellant did not respond. I have reviewed the Agency's motion, the file, relevant case law, and now find and order as follows.

The Appellant challenges the denial of his grievance in which he alleged discrimination based on gender. The Appellant's female supervisor, who was wearing earrings, told the Appellant he may not wear any earrings under Sheriff's Department Order 2700.1G2b(2). The Order describes permissible earrings and prohibits males from wearing any earrings at all. The Appellant alleges the Order discriminates against males unlawfully.

The Agency bases its motion to dismiss on two claims. (1) the Appellant failed to exhaust required remedies before filing his appeal, thus depriving the Hearing Officer of jurisdiction, and (2), the Agency "is allowed to enforce a dress code that differentiates between male and female officers."

1. Exhaustion of remedies.

The Agency argues the Appellant failed to exhaust his administrative remedies pursuant to Career Service Rule (CSR) 15-103, in that he did not formally report the objectionable conduct to his supervisor or other agency representative so that the agency could investigate and resolve the problem. I disagree with several of the Agency's averments. The Agency alleges the Appellant is required by CSR 15-103 (b) to report unlawful harassment. First, CSR 15-103 is permissive, not mandatory ("individuals who

experience unlawful harassment are urged to...") (emphasis added). Second, the Appellant does not appear to claim harassment. Third, assuming the Agency takes issue with the Appellant's failure to file a formal complaint of discrimination with his supervisor, then CSR 19-10 B. 1. would apply, requiring the filing of a formal complaint of discrimination. The Appellant's grievance gave ample notice to the Agency regarding his claim of gender-based discrimination. Therefore the Appellant substantially complied with CSR 19-10 B. 1. Finally, CSR 15-103 refers to an employee's obligation to address harassing conduct, whereas the Appellant's complaint is not one of conduct, but rather a challenge to an Agency order. Therefore the Appellant's complaint falls under the purview of CSR 19-10 B.1. rather than under CSR 15-103.

Next, the Agency relies on In re Chappel , CSA 02-02 (3/22/02). Chappell is inapplicable to the present case. In Chappell, the Hearing Officer found the Appellant complained of harassing and discriminatory activities by his supervisor "when they amount to nothing more than personality disputes and mere rudeness." Consequently the Hearing Officer found no colorable claim of discrimination, so that there was no discrimination to report. On the other hand, the Appellant in the present case alleges it is an order, rather than an action, that is discriminatory. Moreover, even assuming CSR 15-103 were applicable, the Appellant substantially complied with the notice requirements outlined in CSR § 15-103. The Agency acknowledgement of the Appellant's discrimination complaint is evidenced by its response to the Appellant's grievance, which states "[w]e believe your claim of not being allowed to wear earrings while on duty does not constitute discrimination, harassment, retaliation, or intimidation based on race, color, national origin, religion, age, gender, or sexual orientation").

2. Whether the Appellant has stated a colorable claim of discrimination.

In an agency motion to dismiss prior to hearing, statements in the appeal must be viewed in the light most favorable to the appellant, all appellant's assertions of material facts must be accepted as true, and the motion to dismiss must be denied unless it appears beyond doubt that the appellant cannot prove that the facts as she alleges them would entitle her to relief. Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996), In re Martinez, CSA 176-03 (6/28/04). Here, there are no factual allegations in dispute. The Appellant filed a grievance in which he claimed gender discrimination based upon the inherent inequity in the Agency's earring order. He therefore raised his claim of discrimination in the grievance and his claim states a basic set of facts that tends to illustrate he is being treated disparately because of his membership in a protected group. Nothing more is required. In re Benoit, CSA 123-02 (9/18/02), *citing* In re Douglas, CSA 317-01 (4/3/02).

The Agency cites Rathert and Zybak v. Village of Peotone, et al, 903 F. 2d 510 (7th Cir. 1990) in support of its contention that the Agency may permissibly discriminate with respect to dress. In that case, the court found the employer was justified in terminating a police officer for refusing to remove earrings because police power "requires the choice of organization, dress and equipment be a state decision entitled to a presumption of legislative validity." There are two important distinctions from the present case. First, the cited case involved a police department where "similarity of appearance of police officers is desirable...because it allows

members of the public to readily recognize police officers or because it aids police esprit de corps. Either reason provides a sufficiently rational justification for a regulation regarding appearance."[1] Thus, in Zybak, the first rational basis for permitting a facially discriminatory policy was to allow members of the public to readily recognize police officers by their common appearance. Denver deputy sheriffs, whose primary responsibility is the "care and custody of inmates" in the city and county jails[2], have no such need for the public to recognize a similar appearance, and it is doubtful inmates care.

The second rational basis found by the Zybak court was the justification of "esprit de corps," a sense of common bond.[3] It is unknown if the Sheriff's Department's "esprit de corps" could be materially affected if its male members were permitted to wear earrings. The Appellant should be entitled to present evidence that it would not.

In addition to the Zybak court's finding of a rational basis for the police rule, Zybak was decided in 1990, at a time when far fewer men wore earrings. It has become an increasingly accepted accessory in the intervening years.

For reasons stated above, the Agency's Motion to Dismiss must be DENIED.

DONE this 22nd day of November, 2006.

Bruce Plotkin
Hearing Officer
Career Service Board

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[1] If "similarity of appearance" is the critical factor, then the opposite conclusion would better achieve it: either all officers must have or must not have earrings.
[2] *See* In re Simpleman, CSA 31-06, p.5,
[3] The same comment in note 1 applies here as well. If "esprit de corps" is the critical factor, then it would be better achieved through requiring all officers to wear or not to wear earrings.