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

Appeal No. 86-06

DECISION

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.

I. INTRODUCTION

The Appellant, Peter Boden, appeals the denial of his grievance by his employer, the Denver Sheriff's Department (Agency). The Appellant claims an Agency policy which allows only female deputies to wear earrings constitutes unlawful discrimination and violates the Career Service anti-discrimination rules. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on March 12, 2007. The Agency was represented by Joseph A. DiGregorio, Assistant City Attorney, while the Appellant was represented by Reid Elkus, Esq. Agency Exhibits 1-4 and Appellant's Exhibits A-D were admitted. The Appellant testified on his own behalf. Undersheriff William Lovinger and Manager of Safety Alvin LaCabe testified for the Agency.

II. ISSUES

The only issue decided here is whether the Agency rule which prohibits male employees from wearing earrings violates the anti-discrimination provisions of the Career Service Rules (CSR).

III. FINDINGS

The Appellant has been a deputy sheriff at the Agency for 13 years. For the previous 12 years the Appellant wore a single stud earring to work daily. The earring complied with Agency regulations, and no one complained about his wearing it. [Exhibit A-1]. On February 10, 2006, the Agency revised its uniform policy, including a new prohibition against male deputies wearing earrings, by adding the sentence "[o]nly female deputies may wear earrings." [Exhibit 4 @ 3/33]. On September 13, 2006, the

Appellant wore his customary stud earring on duty. Citing the new policy, Sergeant Butts, a female supervisor, told the Appellant he could not wear it. No discipline was assessed, and the Appellant removed his earring, but he filed a grievance in accordance with the Career Service Rules on September 18. The Undersheriff denied the Appellant's grievance on September 27. This Appeal followed on October 10, 2006.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 B.1. as an appeal of a complaint of discrimination. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Appellant retains the burden of persuasion, throughout the case, to prove the Agency's earring policy violates the Career Service anti-discrimination rules. The standard by which the Appellant must prove his claim is a preponderance of the evidence.

C. Discrimination Generally. There are two distinct avenues to make a claim of discrimination: disparate treatment and disparate impact. Disparate treatment discrimination requires an intentional, adverse employment action. In re Crenshaw, CSA 18-06, 2 (4/6/06), *citing* McDonnell Douglas v. Green, 411 U.S. 792 (1973). Disparate impact, does not require a finding of intentional discrimination. Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186 (10th Cir. 2006). Instead, the employee is challenging an employment practice or policy that is neutral on its face, but discriminatory in operation. Carpenter v. Boeing Co.,456 F.3d 1183 (10th Cir. 2006).

D. Discrimination under the Career Service Rules. The Career Service Rules prohibit any action of an employee's supervisor, manager, or co-worker that results in discrimination because of any status protected by federal, state or local law. CSR 19-10 B. Since the Agency's earring rule distinguishes between men and women deputies on its face, the Appellant's challenge to the rule falls in the disparate treatment category, so that he must show some adverse employment action before a claim of discrimination will stand. In re Crenshaw, CSA 18-06, 2 (4/6/06), *citing* McDonnell Douglas v. Green, 411 U.S. 792 (1973). An adverse employment action is conduct which results in a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or causes a significant change in benefits. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2268, 141 L. Ed. 2d 633 (1998). The Appellant was not disciplined,

there was no change in his status, and there was no change in his benefits. In short, there was no adverse employment action, as required by CSR 19-10 B. 1.

The Appellant cites Gerdom v. Continental Airlines, 692 F. 2d 602, for the proposition that a policy that discriminates on its face does not require a showing of discriminatory intent. [Appellant written closing argument]. Gerdom involved the firing of a female flight attendant who did not meet the airline's weight rules which applied only to female flight attendants. That case is clearly distinguished in that the airline's weight rule was inherently onerous toward one gender, as opposed to gender-differentiated grooming rules, which do not significantly deprive either sex of employment opportunities and which are even-handedly applied to employees of both sexes." Gerdom at 605-6.

Grooming requirements that differentiate between men and women do not constitute wrongful sex discrimination. Kelly v. Johnson, 425 U.S. 238 (1976) (shorter hair for men than for women), Jepperson v. Harrah's, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (makeup required for women), and notably, Capaldo v. Pan American Credit Union, 1987 U.S. Dist. LEXIS 14475 (D. N.Y. 1987) (no earrings for men). I need not reach the Appellant's other arguments, all of which depend upon the Appellant's reading of Gerdom. Because the Appellant failed to establish there was an adverse Agency action, he failed to prove the Agency violated CSR 19-10 B. 1.

V. ORDER

The Agency's September 27, 2006 denial of the Appellant's September 18, 2006 grievance is AFFIRMED.

DONE May 23, 2007.

Bruce A. Plotkin
Hearing Officer
Career Service Board

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