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

Appeal No. 189-02

ORDER GRANTING MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

STEPHEN DRAPER, Appellant,

Agency: **COMMUNITY PLANNING AND DEVELOPMENT AGENCY, and
THE CITY AND COUNTY OF DENVER**, a municipal corporation.

BACKGROUND

This decision concerns two issues in Appellant's grievance appeal filed October 18, 2002. The first issue is whether Appellant had a right to a second-level grievance review, even though the reviewer at that level was the same person who performed the first-level review.¹

The second issue is the actual date Appellant's grievance was filed. This issue is important because the date of the grievance determines the due-date of Appellant's appeal. Two different versions of the grievance bear two different dates, September 27, 2002 and September 28, 2002. The Agency contends that the date of Appellant's grievance is September 27, making his appeal one day late. Appellant claims his grievance was filed on September 28, which would make his appeal timely.

The hearing officer held a prehearing conference in this matter on March 10, 2003 at Appellant's request.² Appellant was present and was represented by Giorgio DeShaun Ra'Shadd, Esq. Assistant City Attorney Richard A. Stubbs represented the Agency, with Director Jennifer Moulton also present. At the prehearing conference, two witnesses testified on the issue of the filing date of Appellant's appeal. Those witnesses were Appellant, and Ms. Moulton's staff assistant, Toyet Lynn Sargent.

After testimony and arguments at the prehearing conference, the hearing officer granted the Agency's Motion to Dismiss. She now memorializes that ruling in this Order.

¹ The hearing officer considered this issue because the outcome may have impacted the required timely filing date of this appeal, which is part of the second issue.

² Both parties filed numerous pleadings in this case, raising multiple issues. The prehearing conference was held to permit arguments on those pleadings. Because the hearing officer concluded she lacks jurisdiction over this appeal based on arguments raised in the Motion to Dismiss, it is the only pleading directly reached in this Order. The other pleadings are rendered moot by that ruling, and therefore are not enumerated here.

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FINDINGS OF FACT

Based on the testimony and exhibits, the hearing officer finds the following to be fact:

1. Appellant received a written reprimand on September 18, 2003. (*See*, Exhibit A attached to Agency's Motion to Dismiss.)³
2. In response to his written reprimand, Appellant prepared a grievance form (the original of which was admitted at the prehearing conference as Exhibit B-1). Appellant testified he prepared this form on September 23, 2002, and then left it with his representative for later filing. Appellant credibly testified that he recalls this date because he left town for a funeral later that same day.
3. Appellant was then out of town at the funeral from late on September 23, 2002 until very late on Sunday, September 29, 2002 or very early Monday morning, September 30, 2002. To corroborate this testimony, Appellant offered leave slips for these dates (admitted at the prehearing conference as Appellant's Exhibit 1).
4. The standard grievance form used by Career Service employees (*see*, Exhibit B-1) includes a certificate of service on the bottom third of the form. This certificate is supposed to be filled out by the person responsible for delivering or mailing the grievance. This person is supposed to fill in his or her name and the date of hand-delivery or mailing, and circle the manner of service (either hand-delivery or mailing). The purpose of the certificate of service is to record the identity of the person who served the grievance, the actual manner of service, and the date the grievance was served.
5. Appellant testified the portions of his grievance (Exhibit B-1) which he completed before leaving town for the funeral include all the block print above his signature line in blue ink, and the names "Stephen Draper" and "Jennifer Moulton," also block-printed in blue ink, in the certificate of service. The certificate thus reads in relevant part:

I STEPHEN DRAPER (grievant) hereby certify that I (circle one) hand delivered/mailed by U.S. mail/sent through interoffice mail, the foregoing first step grievance, addressed to JENNIFER MOULTON...⁴

6. Toyet Lynn Sargent was Jennifer Moulton's Staff Assistant at all relevant times. Ms. Sargent testified that she was the recipient of Appellant's initial grievance. Ms. Sargent knows Appellant. She testified that she received the filing from someone other than Appellant, and the server did not look familiar to her.

³ It is important to note that the Agency originally filed its Motion to Dismiss on February 26, 2003 without attachments. The Agency filed an amended version of the Motion with exhibits attached the following day, on February 27. Attachments referenced in this Order can be found in the February 27 version of the Motion to Dismiss.

⁴ Appellant also credibly testified he did not fill in the portion of the document indicating his attorney's name, address, and phone number, all of which appear in black ink in different handwriting than the handwriting on the top part of the form.

7. Ms. Sargent testified that when she received the original grievance (Exhibit B-1) from the unfamiliar server, she made a copy of the grievance form, wrote the words "Received by Lynn Sargent 9/27/02 2:10 p.m." across the bottom of the copy, and returned the copy with the writing on it to the server (*see*, Exhibit B, attached to the Agency's Motion to Dismiss; hereafter "Exhibit B"). Ms. Sargent testified she then wrote the following on a green Post-It which she placed on the original grievance for later delivery to Ms. Moulton (*See*, Exhibit B-1):

Rec'd 9/27/02
2: p.m.
9/27/02

8. The copy of the grievance Appellant's counsel filed with his appeal (Exhibit B) has Ms. Sargent's handwritten words across the bottom stating "Received by Lynn Sargent 9/27/02 2:10 p.m." It is therefore the same copy made by Ms. Sargent and returned to the server at the time of delivery.
9. In addition to Ms. Sargent's handwritten note across the bottom of the copy, there are several other differences between the certificates of service on the original grievance (Exhibit B-1) and on the copy submitted with Appellant's appeal (Exhibit B). The differences imply that both documents were changed after Ms. Sargent made the copy. It is unknown who made these changes. The differences between the two documents include the following:
 - a) The date has been filled in by hand on both the original grievance (Exhibit B-1) and the copy (Exhibit B). However, the handwriting on the two documents is slightly different.
 - b) The date of "27th Sept 2002" has been written on the original grievance (Exhibit B-1), and the copy (Exhibit B). However, the day entered on the certificate of service on the copy (Exhibit B) appears to have been changed either from "28th" to "27th" or from "27th" to "28th." In any event, the "7" and "8" are superimposed. This change does not appear on the original.
 - c) The words "hand delivered" are not circled on the original grievance form (Exhibit B-1), but are circled on the copy (Exhibit B).
10. Appellant credibly testified that he did not fill in the date or circle the words on either of these certificates, that he does not know who did, and that he did not hand-deliver a copy of the document. It is impossible for Appellant to have filed his grievance in Denver on either September 27 or 28, 2002 since he was out of town attending a funeral during that time.
11. The hearing officer takes adjudicatory notice that September 27, 2002 was a Friday, and that September 28, 2002 was a Saturday.
12. Ms. Sargent testified that city agencies are typically not open Saturdays, and that she was not at work on Saturday, September 28, 2002. Therefore, between the two dates of September 27 and September 28, 2002, it is more likely than not that date of September 27, 2002, which appears on both Ms. Sargent's hand note on both the copy (Exhibit B) and the Post-It she placed on the original (Exhibit B-1), is the date she received the grievance.

13. Appellant's supervisor, Jennifer Moulton, is also the agency head. Ms. Moulton responded to Appellant's grievance on October 8, 2002, denying the grievance. Since Appellant's grievance was originally filed September 27, 2002, under CSR 18-12 (*below*) the Agency's response was due ten days later, on October 7. Therefore the Agency's response on October 8 was one day late.
14. In the Agency's response, Ms. Moulton directed Appellant to treat the denial as to both Appellant's first- and second-level grievances, and to pursue an appeal as the next step in the process. (*See*, Exhibit D attached to the Agency's Motion to Dismiss.)
15. Appellant filed his appeal on October 18, 2002, ten days after Ms. Moulton filed her response to his first-level grievance on October 8, 2002.

DISCUSSION AND CONCLUSIONS

1. Appellant's challenge of the Agency's failure to provide a second-level grievance review.

a. The Agency's action is not a violation of due process.

Appellant first argues that his supervisor's simultaneous first- and second-level denials of his grievance (*see*, Exhibit D) violated Appellant's due process right to a second-level grievance review. The hearing officer disagrees.

Due process rights protect individuals from deprivations of "life, liberty, or property, without due process of law." *See*, U.S. Const. Amd. 14. The United States Supreme Court has said that "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'... *Only after finding the deprivation of a protected interest* do we look to see if the... procedures comport with due process."⁵ Similarly, the Tenth Circuit has held that there must be a demonstrated deprivation of a protected property or liberty interest before the question of the "appropriate" level of process is even examined.⁶ The Court has further clarified that "[t]he standard for the existence of a property right *in employment* is whether the plaintiff has a legitimate expectation of *continued employment*."⁷ "[D]amage to 'prospective employment opportunities' is too intangible to constitute a deprivation of a liberty (or property) interest."⁸

This case does not give rise to due process protections for two reasons. First, the grievance in this case concerns a written reprimand. While written reprimands might have some *potential future* affect on the pay, status or tenure of Appellant's position, there is no adverse impact on Appellant's *current* employment conditions.⁹

⁵ American Mfg. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59; 119 S.Ct. 977, 989 (1999) (emphasis added) *citing* U.S. Const. Amd. 14, and Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

⁶ Greene v. Barrett, 174 F.3d 1136, 1140 (10th Cir. 1999).

⁷ Hennigh v. City of Shawnee, 155 F.3d 1249, 1253 (10th Cir. 1998) (emphasis added).

⁸ Workman v. Jordan, 32 F.3d 475, 481 (10th Cir. 1994), quoting Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1269 (10th Cir. 1989).

⁹ *See*, Workman v. Jordan, *above*, at footnote 8.

Second, the grievance process only provides a forum for dialogue between an employee and an agency before the issue reaches an appeal. If any process is due, that process is provided for in this appeal.

For these reasons, there is no infringement in this case giving rise to due process protections as they are provided in the governing case law. Therefore, Appellant's due-process challenge must fail.

b. The Agency's action is not a violation of CSR 18-12.

Appellant next asserts that CSR 18-12, governing the grievance process, provides him the right to a second-level grievance, and that the Agency deprived him of that right. CSR 18-12 states as follows in relevant part:

1. Form: The grievance shall be presented in writing and shall be dated... The grievance form shall have a certificate of mailing or certificate of hand delivery which indicates the date the grievance was placed in the mail or was hand delivered to the immediate supervisor.
2. Filing with Supervisor: The employee shall present a grievance to the immediate supervisor within ten (10) calendar days after notification of the action which gives rise to the grievance. The supervisor shall consider the grievance and within ten (10) calendar days give the employee dated, written notice of a decision. The immediate supervisor's written decision shall contain a certificate of mailing or certificate of hand delivery which indicates the date the supervisor's decision was mailed or hand delivered to the employee...
3. Filing with the Agency Head: If the response of the immediate supervisor does not resolve the grievance and the employee wishes to pursue the grievance further, the employee shall present the grievance to the head of the agency, or designee, within ten (10) calendar days after receiving the decision of the immediate supervisor. The grievance form filed with the agency head or designee must contain a certificate of mailing or certificate of hand delivery.

If the immediate supervisor has not responded to the grievance within ten (10) calendar days and the employee desires to pursue the grievance further, the employee must present the grievance in writing to the head of the agency or designee ***no later than ten (10) calendar days after the supervisor's response was due***. The form filed with the head of the agency or designee must contain a certificate of mailing or hand delivery.

The head of the agency, or designee, shall consider the grievance and shall give the employee dated, written notice of a decision within ten (10) calendar days from the date contained on the certificate of mailing or certificate of hand delivery. The written decision from the agency head or designee shall contain a certificate of mailing or certificate of hand delivery...

4. Filing with the Career Service Authority: If the employee still feels aggrieved after receipt of this decision, *or the agency head has not responded within ten (10) calendar days*, and the grievance concerns an alleged violation of the Charter provisions relating to the Career Service, ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of **Rule 19 APPEALS...**

(Italics added.)

Appellant argues that the Agency's simultaneous treatment of both his first- and second-level grievances violated this rule. The Agency responds that since Appellant's immediate supervisor was the agency head, there would have been no purpose to be served by a second-level grievance.

This dispute requires the hearing officer to interpret the above CSR rule. The Colorado Supreme Court has spoken at length to the issue of rule interpretation. The fundamental responsibility in interpreting the rules is to find and give effect to the promulgator's intent in enacting them.¹⁰ If that intent is not readily discernible from the language, then the hearing officer may rely on other factors to determine the meaning of the rule, including prior case law, the consequences of a given construction, and the end to be achieved by the regulation.¹¹ In the end, the hearing officer "should give effect to each word and construe each provision in harmony with the overall statutory design, whenever possible."¹² However, interpretations which yield absurd results are disfavored.¹³ "The intention of the (promulgator) prevails over a literal interpretation of the statute that would lead to an absurd result."¹⁴

The apparent intent of CSR 18-12 (*above*) is to provide a mechanism for an employee and an agency to engage in a dialogue about a dispute, to see if the dispute can be resolved in that manner first before seeking a formal appeal. The rule states both the supervisor and the agency head "shall" respond to Appellant's grievance. The rule thus provides for two separate agency officials to review the grievance.

However, the italicized portions of CSR 18-12 (*above*) contemplate situations where both the supervisor and the agency head fail to respond. The rule places the burden on the employee to pursue the grievance process, despite the Agency's inaction.¹⁵ In harmonizing the entire text of the rule, if the language permitting such inaction is to have any meaning, it must mean that Agency participation in the grievance process is voluntary at both levels, not mandatory, as Appellant's argument implies.

¹⁰ Reg'l Transp. Dist. v. Lopez, 916 P.2d 1187, 1192 (Colo. 1996); Lakeview Assocs. v. Maes, 907 P.2d 580, 584 (Colo. 1995).

¹¹ *See*, § 2-4-203, 1 C.R.S. (1999); Schubert v. People, 698 P.2d 788, 793-94 (Colo. 1985).

¹² City of Florence v. Bd. of Waterworks, 793 P.2d 148, 151 (Colo. 1990).

¹³ Reg'l Transp. Dist. v. Lopez, 916 P.2d 1187, 1192 (Colo. 1996).

¹⁴ Hall v. Walter, 969 P.2d 224, 229 (Colo. 1998).

¹⁵ This rule also works to the employee's advantage, since it eliminates the delay that might be caused by an official who is slow to respond.

Moreover, the rule is silent with respect to situations where the supervisor and the agency head are the same person, as they are in this case. In the absence of any specific guidance in the rule, as a practical matter the Agency had to do *something*. There were only two apparent alternatives.

The first alternative would be to require Appellant to re-file the grievance with an individual who had already reviewed and denied it, as Appellant argues is the correct interpretation. Appellant's interpretation requires an employee to seek another review by an individual who has already reviewed the request. This literal interpretation places form over substance, serves no purpose, and therefore leads to an absurd result.

The second apparent alternative would be for the agency head to simultaneously handle the grievance at the first and second levels, and instruct the employee to proceed with an appeal. The Agency did so in this case. While Appellant complains this violated his right to a second review, he has offered no other alternatives on how to achieve such a second review. In the absence of any more reasonable alternatives, the Agency's chosen application in this case is the more reasonable of the two apparent alternatives.

For all these reasons, the Agency's action in merging Appellant's first- and second-level grievances was not in violation of CSR 18-12 (*above*) where the immediate supervisor is the same person as the agency head.

2. The date Appellant's grievance was filed.

Appellant argues that his representative filed the grievance on September 28, 2002, meaning that the Agency's response was due on October 8, 2002 under CSR 18-12 4 (*above*). Appellant asserts that therefore his appeal on October 18, 2002 was timely filed within ten days of the Agency's grievance denial, as required under CSR 18-12 4. The Agency responds that the evidence presented during the hearing shows that Appellant's appeal was actually filed on September 27, not September 28, making the Agency's response, and in turn Appellant's appeal, one day late.

a. Appellant's grievance was filed on September 27, not September 28.

The evidence establishes by a preponderance that Appellant's grievance was filed September 27, not September 28. First, in 2002, September 28 fell on a Saturday. City agencies are not typically open on Saturday. The recipient of Appellant's grievance, Ms. Sargent, testified she was not in the office on Saturday, September 28, 2002. Ms. Sargent hand-wrote "Received by Lynn Sargent 9/27/02 2:10 p.m." across the bottom of the copy she returned to the server (Exhibit B). Ms. Sargent also wrote the same date on a Post-It, which she placed on the original grievance form (Exhibit B-1).

In addition, the certificate on the copy indicating a date of September 28 (Exhibit B), relied upon by Appellant, differs in several ways from the original, which indicates a date of September 27 (Exhibit B-1). The handwriting bearing the date on the original is different than the handwriting on the copy. Both are different than Appellant's handwriting. Appellant did not fill these in and did not deliver the document. The identity of the server remains unknown. The date

on Appellant's copy of the grievance form (Exhibit B) has been changed, either from "27th" to "28th" or *vice versa*, and it is not clear which is the case. The words "hand delivered" are circled on Appellant's copy, but not on the original. All these changes had to be made separately *after* Ms. Sargent made the copy and returned it to Appellant's server. It is unknown who made the changes.

The purpose of such a certificate is to establish the identity of the server, and the date and method of service. In light of changes to both the original and the copy of the certificate, and the incorrect identity of the server, that purpose has been destroyed here. Neither version of the certificate is reliable. Since neither certificate is reliable, the hearing officer finds both are void, and defaults back to the credible testimony and reliable notes of Ms. Sargent. Based on this evidence, it is more likely than not that Appellant's grievance was initially hand-delivered to Ms. Sargent by an unknown individual on behalf of Appellant on September 27, 2002.

b. Appellant's appeal was one day late and therefore untimely.

Under CSR 18-12, subsections 2 and 3 (*above*), the Agency's response was due ten days after Appellant's grievance was filed on September 27, 2002. This makes the Agency's response due on October 7, 2002. Under CSR 18-12 4 (*above*) it was the Agency's response due date of October 7, 2002, not the late filing of its response on October 8, 2002, which determined the due date of Appellant's appeal. The appeal was therefore due no later than October 17, 2002. This means Appellant's appeal on October 18, 2002 was one day late.

It is well established that failure to timely file an appeal is a fatal jurisdictional flaw. Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980). If the notice of appeal is not filed within the time limits, the tribunal loses jurisdiction over the matter. *Id.* Since Appellant's appeal was filed after the deadline, it was untimely. The hearing officer therefore lacks jurisdiction to consider any of Appellant's additional pleadings filed in this matter, the Agency's responses thereto, or to otherwise consider any issues in this case.

ORDER

For the foregoing reasons, this appeal is DISMISSED WITH PREJUDICE for lack of procedural jurisdiction.

Dated this 1st day of April, 2003.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board