HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Consolidated Appeal Nos. A035-18, A036-18, A037-18, and A038-18

DECISION

JULIETTE OSBORNE, MARK NEWLAND, CHRISTOPHER BEARD, and LEROY BUNN,
Appellants,

v.

TECHNOLOGY SERVICES,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

Appellants, Systems Administrators Juliette Osborne, Mark Newland, Christopher Beard, and Leroy Bunn (Appellants) appeal the Technology Services's (Agency) denial of their grievances. They grieved the Agency for allegedly violating specified Career Service Rules (CSRs) governing their applicable pay for working remotely after regular work hours. They claim that the Agency should be paying them the two-hour minimum Call Back Pay each time that the Agency requires them to work after-hours for it. On August 22, 2018, Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the Agency's compensation to Appellants for their after-hours work. Appellants appeared *pro se*, and Charles T. Mitchell, Esq. represented the Agency. Appellants' exhibits A and B and the Agency's exhibits 1 through 12 were admitted into evidence, without objection. Appellant Leroy Bunn testified for Appellants and HR Compliance Officer Lauren Locklear, OHR Manager Garry Hinderliter, and Mark Newland (called by the Agency) testified for the Agency.

II. ISSUES

The issues presented for appeal include: whether the Agency violated CSR 9-55 (Standby Pay), 9-56 (Call Back Pay), and 9-80 F. (Telecommuting); and whether Appellants filed timely grievances to vest the Career Service Hearing Office with authority to grant them relief in their consolidated appeals.

III. FINDINGS

The Hearing Officer composed the findings from the exhibits, and the testimony at the hearing, as reconstructed with the consent of the Parties,[1] consistent with the August 24, 2018 Order. Appellants are 911 System Administrators in the Agency. There are scheduled to work from: 9:30 to 6:00 (Osbourne), 8:00 to 4:30 (Newland), 6:00 to 2:30 (Beard), and 8:30 to 5:00 (Bunn.) The Agency has also scheduled Appellants to be on standby duty after their regular work hours, to respond promptly but remotely to its needs. Appellants were generally on standby duty on an individual basis for a week from 6:00 p.m. to 6:00 a.m. on weekdays and 24 hours per day on weekends. The Agency has provided each Appellant with a laptop computer, a wireless connector device and a secure Virtual Private Network connection with which they can connect remotely to the Agency's computers and

[1] The Hearing Officer was unable to record the proceedings and reconstructed the record. The Agency filed its consent to this procedure by email dated August 29, 2018, as did Appellants on September 4, 2018.

its communication system. Therefore, Appellants can utilize this remote capability anywhere that they can access their wireless service.

In addition, Appellants can pick one day in each pay period on which they can Telecommute.

As necessary, the Agency activates an Appellant into work status via a page message to her/him. The Agency requires that Appellants respond to its page within 15 minutes. Appellants first log into the City and County of Denver's (City) timekeeping program, Kronos. They then call the person who sent the page to identify what issue requires their attention and take the necessary actions to resolve it. Appellants conclude their work with an email confirmation that the issue has been resolved, and then exit Kronos.

Pursuant to CSR 9-55 A, the Agency pays Appellants one and one-half hours of pay for each eight hours that they are on standby duty. Pursuant to CSR 9-55 C, the Agency pays Appellants basic pay or overtime pay, as applicable, when Appellants are required to work while on standby duty, and the associated standby pay of one and one-half hours is suspended. CSR 9-56 Call Back Pay requires payment of at least two hours of pay, and payment for the time worked when the employee works more than two hours. Thus, when Appellants work less than two hours and the Agency pays them for their actual time worked pursuant to CSR 9-55 A, it pays them less than CSR 9-56's two-hour minimum pay.

On April 2, Appellant Newland filed a grievance, and on April 3, 2018, Appellants Osbourne, Beard, and Bunn filed grievances, alleging that, when they worked less than two hours on standby duty, the Agency should pay them pursuant to CSR 9-56 instead of pursuant to CSR 9-55. Appellants claimed back pay and related benefits pursuant to CSR 9-56, retroactive to July 24, 2017 (Osbourne); March 7, 2016 (Newland and Bunn); and April 1, 2014 (Beard). On April 25, 2018, the Agency responded to Appellants that it was paying them correctly pursuant to CSR 9-55. On May 8, Appellants Osbourne and Newland filed appeals, and on May 9, 2018, Appellants Beard and Bunn filed appeals, all of them timely, relative to the Agency responses to their grievances.

IV. ANALYSIS

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction over the direct appeals of grievances pursuant to CSR 19-20 B.1.a. The Hearing Officer is 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

In an appeal of a grievance, Appellants retain the burden of proof, by a preponderance of the evidence, to prove the Agency denials of their grievances were arbitrary, capricious or contrary to rule or law. CSR 19-55 C. and E.; *see also* In re Gallo, CSA 63-09 (8/27/2010); Renteria v. Colorado State Dept. of Personnel, 811 P.2d 797, 803 (Colo. 1991), distinguished only as to disciplinary claims by Dept. of Institutions v. Kinchen, 886 P.2d 700, 710 (Colo. 1994).

C. Agency's Motion to Dismiss

Pursuant to CSR 19-20 B.3.'s requirement that "[t]he grievance must have been in conformance with and processed pursuant to the requirements of Rule 18 **DISPUTE RESOLUTION**", the Agency moved to dismiss Appellants' consolidated appeals, arguing that the Hearing Officer lacks jurisdiction over them. The Agency argues that Appellants were precluded from filing justiciable grievances by

CSR 18-30 B.2.'s 21-day deadline "after notification of the action or inaction which gives rise to the grievance." The Agency notes that CSR 18-30 D.1. defines notification, when Appellants' deadline begins to run, as "[t]he date of notification of the action or inaction shall be the date the employee knew or should have known of the action or inaction." The Agency argues that, because Appellants knew that it was paying them allegedly deficient compensation for more than 21 days before they filed their grievances, their grievances are untimely.

The Agency relied on In re Gibbons, CSA 49-05 (Order 8/17/2005), the dismissal of an appeal of a grievance due to Appellant's breach of the same deadline. In Gibbons, that Agency had promoted that Appellant to a position of an "acting" Construction Chief Inspector, with a higher job classification, but it did not pay him the commensurate, higher compensation. Gibbons held that the Agency notified Appellant of its action when it paid him his first deficient paycheck. The Agency also relied on In re Mullen,[2] 72-05 (Order 8/9/2005), the dismissal of an appeal of a grievance due to Appellant's violation of the same deadline.

The Hearing Officer denies the Agency's Motion to Dismiss in part because it failed to show that the Career Service Hearing Office lacks jurisdiction over Appellants' consolidated appeals. CSRs 19-30 E. and 31 A. and C. vest the Career Service Hearing Office with jurisdiction over appeals of grievances that are filed timely. The Agency does not allege that Appellants are in violation of CSRs 19-30 or 31. Rather, the Agency argued that Appellants failed to state a claim[3] on which relief could be granted due to their breach of CSR 18-30 B.2.'s 21-day deadline, analogous to a statute of limitations defense.

The Hearing Officer also denies the Agency's Motion for procedural reasons. In order to resolve its August 17, 2018 Motion, the Hearing Officer needed to consider Appellants' response, ultimately filed August 27, 2018, and/or their evidence at the hearing. *See* Quiroz v. Goff 46 P.3d 486, 488 (Colo.App. 2002) (Whether a statute of limitations bars a claim is normally a question of fact.) Appellants' response argues any communications involving their previous attorney discussing Exhibit A are inadmissible settlement negotiations, and the rest of the response was largely arguing the facts of the case, rather than the underlying motion to dismiss. The Agency also disregarded its duty to confer with Appellants before filing its Motion,[4] and the time frame did not allow it to correct this deficiency. So, this Motion had to be resolved after the hearing, within its decision on the merits.

D. Career Service Rule Violations

The Hearing Officer resolves the Agency's Motion to Dismiss, incorporating herein its arguments described above, which it analyzes as a statute of limitations defense. In Colorado's civil practice, from which the Hearing Officer obtains guidance, a claiming party needs to overcome an affirmative defense.[5] On August 8, 2018, the Agency raised this affirmative defense in its Prehearing Statement, timely pursuant to the Notice of Hearing and Prehearing Order, as amended. Thereafter, Appellants failed to establish their compliance with CSR 18-30 B.2.'s 21-day deadline.

Appellant Newland testified that he received a February 12, 2018 responsive email (Ex. 10) from Mr. Hinderliter with the Agency's position, that it compensated Appellants correctly for standby duty pursuant to CSR 9-55. Appellant Newland testified that he disseminated this email response to all other Appellants within one week of its receipt, which was February 19, 2018. Appellant Bunn testified that he had learned of the content of this email but did not recall when. As such, he does not contradict the testimony of Appellant Newland. Therefore, Appellants had to file a grievance within

[2] In Gibbons and Mullen, the Hearing Officer raised the deadline issue in an Order to Show Cause to the Parties.
[3] The Hearing Officer has also described this issue as jurisdictional, perpetuating the mischaracterization.
[4] The Hearing Officer infers this as the Agency did not address its compliance with its duty to confer in its Motion.
[5] A party's claim, filed outside of the statute of limitations, is barred unless the party can demonstrate that the statute of limitations should not apply, Lake Canal Reservoir Co. v. Beethe, 227 P.3d 882, 886 (2010).

21 days of February 19, by end of the day of March 12, 2018. As noted above, Appellants filed their grievances on April 2 and 3, 2018, outside of CSR 18-30 B.2.'s deadline.

Appellants did not allege any basis for any exemption from CSR 18-30 B.2.'s deadline or any reason why it should be tolled. Therefore, Appellants' breach of CSR 18-30 B.2.'s deadline, in and of itself, precludes them from obtaining relief from the Agency through their grievances, and from meeting their burden of proof in their appeal of the Agency's denials of their grievances.

Even if Appellants had overcome CSR 18-30 B.2.'s deadline issue, they cannot obtain relief pursuant to the applicable CSRs. The CSRs pursuant to which Appellants seek relief include:

9-55 Standby Pay
(Revised July 25, 2006; Rule Revision Memo 11C)

A. Appointing authorities may schedule employees to be on standby duty only when there is a reasonable anticipation that the employee will have to respond and perform work immediately. Eligible employees shall receive an amount equal to one and one half (1 1/2) hours of work at the employee's straight time hourly rate for each eight hours the employee is on standby duty. ...

C. When an eligible employee on standby is required to perform work, standby pay will be suspended and the employee will be paid basic pay or overtime pay, as appropriate, for the period the employee actually performs work. ...

9-56 Call Back Pay

A. Overtime eligible employees required by the appointing authority to report back to the work site shall be paid a minimum amount equal to two (2) hours of work at the employee's scheduled rate of pay from the time the employee begins work.

B. Employees who work more than two hours shall be paid for the actual time worked.

Section 9-80 Special Work Schedules ...

F. Telecommuting:

1. Telecommuting is the practice of working at home or from a site other than a department or agency's central workplace. It is a work alternative which appointing authorities may offer to or require of employees.

2. Telecommuting is not an employee benefit but an alternative method of meeting the City's needs. Telecommuting is a privilege and an appointing authority has the right to refuse to make telecommuting available to an employee and to terminate a telecommuting arrangement at any time. ...

4. Permission to telecommute shall be conditioned on compliance with the telecommuting guidelines established by the OHR Executive Director (see Appendix).

APPENDIX 9.A.
TELECOMMUTING GUIDELINES ...

F. The employee must designate a primary workspace at home that is maintained in safe condition, free from hazards. As an extension of the City's work site, the same insurance and workers' compensation coverage applies. ...

H. The employee will take all necessary precautions to secure department or agency information and equipment in his or her home and to prevent unauthorized access to any department or agency system or information. …

Appellants argue that their after-hours work from remote locations is Telecommuting, and that their remote locations are their work sites. Appellants Osbourne, Newland and Beard describe it as "Anywhere I 'setup' to remote into my work site becomes an extension of the City's work site." (Ex. 1, 3 and 5). They then argue that the Agency, by activating them into after-hours work from their remote locations, is effectively ordering them to report back to their work site, pursuant to CSR 9-56 A. They therefore argue that CSR 9-56 A entitles them to a minimum pay of two hours of work whenever the Agency activates them. Appellants allege that the Agency has paid them inadequately whenever it has activated them, they have worked less than two hours, and the City has paid them for their actual time worked.

The Agency responds that it has implemented CSR 9-55 properly and that Appellants have interpreted it and CSRs 9-56 and 9-80 incorrectly. It argues that Appellants' circumstance of being on standby duty cannot meet CSR 9-56's requisite "report back to the work site" and does not constitute Telecommuting. The Agency explains that every City employee is assigned a work site, and that Appellants' work site is 950 Josephine in Denver, CO. It also explains that Telecommuting does not change the work site, and that it is subject to cancellation at the discretion of the appropriate supervisor, in which case the employee must return to the work site.

The Parties do not dispute that the Agency has scheduled Appellants to be on standby duty at the times during which they dispute whether Appellants' compensation is appropriate.

The determinative issue is whether Appellants are reporting back to and working at their work site when the Agency activates them while they are on standby duty. If Appellants are not working at their work site when so activated, the Agency is compensating them correctly pursuant to CSR 9-55 A. If Appellants are reporting back to and working at their work site when so activated, then CSR 9-56 A's minimum compensation should apply.

While "work site" is not specifically defined in the CSRs, their references to it are sufficient to define it for purposes of resolving Appellants' claims herein and the Hearing Officer need not look elsewhere.[6] CSR 9-56 actually requires a specific, fixed location, "the work site," to which it authorizes the Agency to require its employees to report back, where they had been working during regular hours. CSR 9-80 F.1. synchronizes with this concept of the "work place" as a fixed location by defining telecommuting as "the practice of working at home or from a site other than a department or agency's central workplace." Two important parts of CSR 9-80F.1.'s definition of "Telecommuting" is that it is a "practice," something that occurs regularly, also from a fixed location, suggested by the phrase that identifies two alternatives, "working at home or from a site." CSR 9-80's Guidelines H and F of Appendix 9.A. also suggest a fixed location by requiring the employee to "designate a primary workspace at home," and to "secure department or agency information and equipment in his or her home." Thus, the CSRs consistently treat the "work site" as a specific, fixed location.

Appellants, by contrast, are not required to report back regularly to any fixed location to perform their after-hours, standby work. They need to only be able to access a wireless network with

[6] Appellants submitted Exhibits A (Code of Fed. Regs.) and B (U.S. Dept. of Labor 10/3/2005 Opinion Letter), which describe how to compute overtime compensation (§ 778.221), that an employee's hours on call are not considered work hours but compensation therefor is included in the employee's regular rate of pay (§ 778.221(2)), and whether a premium paid to an employee for a "short-call" activation to work is considered payment that is not made for hours worked and cannot be credited towards the employer's overtime obligation (Letter). Hence, while Ex. A & B use related words, they do not help define the CSRs' "work site."

which to connect to the Agency's communications system to work remotely. Since Appellants can work from practically any location, they do not have to be at or report to a fixed location to perform after-hours, standby work. Under these circumstances, Appellants' do not come within the scope of either CSR 9-56's call back clause or of 9-80 F.'s definition of telecommuting. Hence, the above-described CSRs do not provide Appellants with a legal basis for their claim that CSR 9-56 governs their compensation for their standby duty work.

For the above described reasons, Appellants cannot prove, either factually or legally, by a preponderance of the evidence that the Agency's denials of their grievances were arbitrary, capricious or contrary to rule or law.

V. ORDER

Accordingly, the Agency's denial of Appellants' grievances is AFFIRMED.

DONE September 5, 2018.

Federico C. Alvarez
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the:**

Career Service Board
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office
201 W. Colfax, Dept. 412, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org

AND opposing parties or their representatives, if any.