

**REVISED CAREER SERVICE RULE 19-10 A. DIRECT APPEALS
AND RELATED PROVISIONS IN RULES 5, 16 AND 19
PLEASE READ AS SOON AS POSSIBLE**

TO: Appointing Authorities, Managers and Employees

FROM: Bruce Backer and Dani Brown, Acting CSA Co-Directors

DATE: October 2, 2007

SUBJECT: Revision of Career Service Rule 19-10 A. Direct Appeals, and related provisions in Rules 5, 16 and 19

The Career Service Board has approved a revision to Career Service Rule 19-10 A. Direct Appeals, and related provisions in Rules 5, 16 and 19.

Here is a summary of the proposed changes:

1. Rules 5-61, 5-64 and 5-65 (dealing with employees without Career Status)
 - Adds 'violation of "Whistleblower Protection" ordinance' as a basis for appealing employment decisions.
 - Edits language in each section so that it is consistent with the language in the other two sections.
2. Adds 'violation of "Whistleblower Protection" ordinance' as a basis for appealing a return from promotional probation under Rule 5-63.
3. Adds language to Rule 16-60 N that includes violation of the City's "Whistleblower Protection" ordinance as a basis for discipline for employees who are found to have committed a retaliatory adverse employment action in violation of the ordinance.
4. Rule 19-10 Actions Subject to Appeal;
 - Makes it clear that former employees can file direct appeals.
 - Makes it clear that appellants don't need to pursue a complaint before filing a direct appeal, even if they are alleging that the action being appealed was the result of discrimination, harassment or retaliation.
 - Makes it clear that non-career status employees can file direct appeals so long as discrimination or violation of the whistleblower ordinance is alleged.
 - Adds violations of the "Whistleblower Protection" ordinance as grounds for direct appeals to the Hearing Officer.
5. Adds language allowing employees 30 days after action being appealed to bring whistleblower appeal, while retaining existing 15 days after notice for all other appeals.
6. Attaches "Whistleblower Protection" ordinance as an appendix to the end of Rule 19.

Please provide a copy of this rule to employees who do not have access to a City e-mail account.

MEMORANDUM

REVISION 22 SERIES C

TO: Holders of CSA Rule Books

FROM: Career Service Board

DATE: October 2, 2007

SUBJECT: Revision of Career Service Rule 19-10 A. Direct Appeals, and related provisions in Rules 5, 16 and 19

The Career Service Board has revised Career Service Rule 919-10 A. Direct Appeals, and related provisions in Rules 5, 16 and 19. The effective date of this revision is September 28, 2007.

	<u>Page Number</u>	<u>Issuance Dates</u>
Remove	5-6 5-7 16-5 19-1 through 19-3	March 19, 2004 March 17, 2006 June 12, 2006 January 1, 2006
Replace	5-6 through 5-7.1 16-5 19-1 through 19-3.1 19.A.-1 through 19-3	October 2, 2007

PLEASE INSERT IN YOUR RULE BOOK AS SOON AS POSSIBLE. THANK YOU.

Section 5-60 Effect of Employment Status on Employee Rights, Privileges and Benefits.
(Effective November 1, 1980; Rules Revision Memo 127A)

5-61 Employees in Employment Probationary Status
(Revised effective October 2, 2007; Rules Revision Memo 22C)

An employee in employment probationary status:

1. May be terminated or demoted at any time;
2. May not appeal any decision relating to his or her employment, including termination, except on the grounds of alleged discrimination or violation of the City's "Whistleblower Protection" ordinance;
3. Is entitled to accumulate leave in accordance with Rule 11 LEAVE, except that such employee shall not be entitled to take vacation leave until completion of probation or completion of six (6) months of continuous service, whichever comes first;
4. Is entitled to disability leave in accordance with Rule 11 LEAVE;
5. Is entitled to such other rights, privileges, and benefits as set forth in these Rules.

5-62 Employees in Career Status

An employee in career status

1. May be disciplined or dismissed only for cause, in accordance with Rule 16, DISCIPLINE.
2. May file a grievance or appeal for any reason specified in Rule 18 DISPUTE RESOLUTION or Rule 19 APPEALS;
3. Is entitled to the full benefit of leave provisions in accordance with Rule 11 LEAVE;
4. May earn merit increases in accordance with Rule 9 PAY ADMINISTRATION; (Effective September 1, 1989; Rules Revision Memo 129B)
5. Is entitled to lay-off protection specified in Rule 14 SEPARATIONS OTHER THAN DISMISSAL except for employees appointed to limited positions after January 16, 2004; (Revised March 19, 2004; Rules Revision Memo 247B)
6. May receive reinstatement appointments as provided in Career Service Rule 14-40, reassignments, transfer appointments or demotion appointments without serving a new probationary period; (Revised March 19, 2004; Rules Revision Memo 247B)
7. May have continuous service credits earned prior to lay-off restored if such employee (a) is reinstated within two (2) years immediately following the lay-off; or (b) is reemployed within two (2) years after being laid off and is still on the reinstatement list. (Effective December 18, 1980; Rules Revision Memo 01, Series B)
8. Is entitled to such other rights, privileges and benefits as set forth in these Rules.

5-63 Employees in Promotional Probationary Status

(Revised effective October 2, 2007; Rules Revision Memo 22C)

An employee in promotional probationary status, whether attained through promotional or re-promotional appointment, has the rights, privileges, and benefits of an employee in career status, except that if the employee does not perform at or above "Successful" on a Performance Enhancement Program Report during the promotional probationary period, the employee shall be returned to a position in the class from which promoted within the department or agency from which promoted. A return from promotional probation may not be appealed except on the grounds of alleged discrimination or violation of the City's "Whistleblower Protection" ordinance.

5-64 Employees in Non-Career Status

(Revised effective October 2, 2007; Rules Revision Memo 22C)

An employee in non-career status:

1. May be terminated at any time;
2. May not appeal any decision relating to his or her employment, including termination, except on the grounds of alleged discrimination or violation of the City's "Whistleblower Protection" ordinance;
3. May promote to a higher level class if qualified in accordance with these rules;
4. May be re-assigned or transferred to another position in a class with the same job rate; and
5. May demote to another position, if qualified.

5-65 Employees in Trainee or Intern Probationary Status:

(Revised effective October 2, 2007; Rules Revision Memo 22C)

An employee in trainee or intern probationary status:

1. May be terminated or demoted at any time;
2. May not appeal any decision relating to his or her employment, including termination, except on the grounds of alleged discrimination or violation of the City's "Whistleblower Protection" ordinance;
3. Is entitled to accumulate and take leave in accordance with Rule 11 LEAVE;
4. Is entitled to disability leave in accordance with Rule 11 LEAVE;
5. May promote to a higher level class if qualified in accordance with these rules;
6. May be re-assigned or transferred to another position in a class with the same job rate; and
7. May demote to another position, if qualified.

- N. 1. Intimidation or retaliation against an individual who has been identified as a witness, party, or representative of any party to any hearing or investigation relating to any disciplinary procedure, or any violation of a city, state, or federal rule, regulation or law, or against an employee who has used the dispute resolution process in good faith.
- N. 2. A determination by the Career Service Board or Hearing Officer that the employee has violated the City's "Whistleblower Protection" ordinance. (Revised effective October 2, 2007; Rules Revision Memo 22C)
- O. Failure to maintain satisfactory working relationships with co-workers, other City employees, or the public.
- P. Conviction of or being charged with a crime. Prior to imposing discipline under this subsection, the department or agency shall follow the guidelines contained in subsection 16-61.
- Q. Failure to report charges or convictions of crimes as required by Rule 15 CODE OF CONDUCT. (Revised effective June 12, 2006; Rules Revision Memo 10C)
- R. Discrimination or harassment of any employee or officer of the City because of race, color, religion, national origin, sex, age, political affiliation, sexual orientation or disability. This includes making derogatory statements based on race, color, religion, national origin, sex, age, political affiliation, sexual orientation or disability. Discipline for this prohibited conduct does not have to rise to the level of a violation of any relevant state or federal law before an employee may be disciplined and the imposition of such discipline does not constitute an admission that the City violated any law.
- S. Unauthorized absence from work; or abuse of sick leave or other types of leave; or violation of any rules relating to any forms of leave defined in Rule 11 LEAVE.
- T. Reporting to work after the scheduled start time of the shift.
- U. Unauthorized performance of work by non-exempt employees outside of the established work schedule.
- V. Failure to use safety devices or failure to observe safety regulations which: results in injury to self or others; jeopardizes the safety of self or others; or results in damage or destruction of City property.
- W. Engaging in a strike, sabotage, or work slowdown.
- X. Divulging confidential or otherwise sensitive information to unauthorized individuals.
- Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.
- Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

**RULE 19
APPEALS**

(Effective January 1, 2006; Rules Revision Memo 3C)

Purpose Statement

The purpose of this rule is to describe the authority of and procedure for appeals before the Career Service Hearing Office ("Hearing Office") and the Career Service Board ("Board").

Section 19-10 Actions Subject to Appeal

(Revised effective October 2, 2007; Rules Revision Memo 22C)

A. An employee who holds career status may appeal the following:

1. Direct Appeals: An employee or former employee must file an appeal directly with the Hearing Office in order to challenge the following action(s) of an appointing authority:
 - a. Dismissal;
 - b. Suspension or temporary reduction in pay;
 - c. Involuntary demotion with an attendant loss of pay;
 - d. Disqualification;
 - e. Layoff; or
 - f. A retaliatory adverse employment action, as defined by the City's "Whistleblower Protection" ordinance (attached as an appendix).

It is not necessary that a complaint be filed or an investigation be conducted prior to the filing of a direct appeal where it is alleged that the action being appealed involved discrimination, harassment or retaliation, or violation of the City's "Whistleblower Protection" ordinance.

2. Appeal of Complaint or Grievance: An employee may file an appeal following a formal complaint or grievance only as described below:
 - a. Discrimination, Harassment or Retaliation: Any action, that is not subject to a direct appeal, of any supervisor/manager or employee resulting in alleged discrimination, harassment or retaliation because of race, color, religion, national origin, gender, age, political affiliation, sexual orientation, disability, or any other status protected by federal, state or local law may be appealed if, after filing a formal complaint as required by Rule 15 CODE OF CONDUCT, the disposition of such complaint has not resulted in

stopping or otherwise addressing the alleged discrimination, harassment or retaliation.

b. Grievance:

- i. Any grievance which results in an alleged violation of the Career Service Rules ("Rules"), the City Charter, ordinances relating to the Career Service, executive orders, or written agency policies and negatively impacts the employee's pay, benefits or status;
- ii. A grievance in which the agency/department failed to respond according to Rule 18 DISPUTE RESOLUTION; or
- iii. A grievance in which the agency/department has failed to implement the remedy granted and the grievant has notified the agency of the intent to file an appeal in accordance with Rule 18 DISPUTE RESOLUTION.
- iv. The grievance must be in conformance with and processed pursuant to the requirements of Rule 18 DISPUTE RESOLUTION.
- v. Notwithstanding the above provisions, written reprimands may not be appealed.

c. Grievance of Performance Enhancement Program Reports: Only grievances of Performance Enhancement Program Reports ("PEPRs") with overall ratings of "Needs Improvement" may be appealed. The only basis for reversal of the PEPR shall be an express finding that the rating was arbitrary, capricious, and without rational basis or foundation.

3. Bonus or incentive payments or the lack thereof, or the criteria used by an agency or department to make or not make such payments, or any other aspect of the bonus or incentive program may not be appealed.
- B.
1. Career Service employees who do not hold career status or former employees who did not hold career status may only file direct appeals when they have alleged that an employment decision subject to direct appeal is discriminatory or when they allege a violation of the "Whistleblower Protection" ordinance.
 2. Career Service employees who do not hold career status may appeal the disposition of a complaint alleging discrimination.

Section 19-20 Filing of Appeal

A. Time Limitation

(Revised effective October 2, 2007; Rules Revision Memo 22C)

1. a. Appeals claiming violation of the City's "Whistleblower Protection" ordinance shall be filed with the Hearing Office within thirty (30) calendar days of the alleged retaliatory adverse employment action.
- b. All other appeals shall be filed with the Hearing Office within fifteen (15) calendar days after the date of notice of the action being appealed.
2. The computation of the period of time for filing an appeal shall be as follows (all time periods are calendar days):
 - a. The date of notice of the action shall be the date on the certificate of hand-delivery if hand-delivered to the appellant or the date on the certificate of mailing of the notice if sent by U.S. mail or interoffice mail.
 - b. The period of time for filing the appeal starts on the day following the date of:
 - i. The alleged retaliatory adverse employment action in the case of an appeal brought under the "Whistleblower Protection" ordinance; or
 - ii. The notice of the action or date of inaction in all other cases.
 - c. If the final date of the appeal period falls on a day the Hearing Office is not open for business, the final date for appeal shall be construed to be the next working day.
 - d. The appeal period ends at 5:00 p.m. (close of business) on the final date for appeal.

B. Form of Appeal

1. Every appeal shall be on the form prescribed by the Hearing Office and shall include the name and address of the employee filing the appeal, the action which is the subject of the appeal, the reason for the appeal, and a statement of the remedy sought.

2. For any appeal filed pursuant to 19-10 A.2.a., the employee must identify the alleged discrimination, harassment or retaliation that has not been stopped or otherwise addressed. An appeal may be dismissed if the employee fails to comply.
3. For any appeal filed pursuant to 19-10 A.2.b.i., the employee must identify the alleged violation of the Rules, the City Charter, ordinances relating to the Career Service, executive orders or written agency policies, and how the employee's pay, benefits or status were impacted. An appeal shall be dismissed if the appellant fails to comply.
4. For any appeal filed pursuant to 19-10 A.2.c., the employee must identify why the employee asserts the "Needs Improvement" PEPR was arbitrary, capricious and without rational basis or foundation. An appeal shall be dismissed if the employee fails to comply.

19-25 Alternative Dispute Resolution Available

- A. A party may request mediation pursuant to Rule 18 DISPUTE RESOLUTION anytime during the appeal process. Requesting mediation shall not suspend the time limitation for filing an appeal. Scheduling the matter for mediation will not affect the appeal process or the appeal hearing date, except by agreement of the parties. If the parties mutually determine that an extension of time or a stay of the appeal is necessary to facilitate mediation, the parties shall file a motion for such relief with the Hearing Office.
- B. All mediation proceedings are considered confidential. This confidentiality shall be specifically acknowledged and agreed to by each party to mediation prior to the commencement of mediation. No testimony concerning discussions had at or during the mediation shall be admissible in any Career Service hearing. The nature and scope of the confidentiality of discussions, documents and other materials presented at the mediation shall be governed by the terms of the Colorado Dispute Resolution Act, C.R.S. 13-22-307, Sections 1 through 4 inclusive, as it may be amended.

APPENDIX 19.A.

RELEVANT PROVISIONS OF THE WHISTLEBLOWER PROTECTION ORDINANCE SECTION 2-100 OF THE DENVER REVISED MUNICIPAL CODE

Sec. 2-106. Legislative Declaration

The city council hereby determines and declares that employees of the City and County of Denver should never suffer retaliation from their supervisors or appointing authorities for communicating information about illegal activities, unethical practices or other forms of official misconduct experienced or witnessed by employees in the scope of their employment. The interests of the City and County and Denver and the larger interests of the citizens of Denver are served by encouraging all employees to speak out fully and frankly on any official misconduct which comes to their attention without fear of retaliation. Therefore, the purpose of this Article VII is to eliminate the possibility or the threat of any adverse employment action that may be taken against any City and County employee for reporting such information to appropriate reporting authorities.

Sec. 2-107. Definitions

As used in this Article VII:

- (a) “Appropriate reporting authority” means any officer, board or commission, or other person or entity vested with legal authority to receive, investigate, or act upon reports of official misconduct by officers and employees of the City and County, including, by way of example:
 - (1) The mayor and members of the mayor’s cabinet;
 - (2) The city council, any committee of the city council, and individual members of the city council;
 - (3) The auditor and the audit committee;
 - (4) The board of ethics;
 - (5) The district attorney and other law enforcement agencies; or
 - (6) The appointing authority for the officer or employee who is alleged to have engaged in the official misconduct that is the subject of the report.
- (b) “Adverse employment action” means any direct or indirect form of employment discipline or penalty, including, but not limited to, dismissal, suspension, demotion, transfer, reassignment, official reprimand, adverse performance evaluation, withholding of work, denial of any compensation or benefit, layoff, or threat of any such discipline or penalty.
- (c) “Employee” means any employee of the City and County of Denver within the meaning of § 1.2.11 of the charter.

- (d) "Official misconduct" means any act or omission by any officer or employee of the City and County that constitutes:
- (1) A violation of law;
 - (2) A violation of any applicable rule, regulation or executive order;
 - (3) A violation of the code of ethics as codified in article IV of this chapter 2, or any other applicable ethical rules and standards;
 - (4) The misuse, misallocation, mismanagement or waste of any city funds or other city assets; or
 - (5) An abuse of official authority.
- (e) "Supervisor" means any person who is authorized to recommend or to impose any adverse employment action upon an employee.

Sec. 2-108. Retaliation prohibited.

- (a) Except as provided in subsection (b) of this section, no supervisor shall impose or threaten to impose any adverse employment action upon an employee on account of the employee's disclosure of information about any official misconduct to any person.
- (b) The protections afforded by this Article VII shall not apply to any employee:
- (1) Who discloses information that the employee knows to be false or who discloses information without regard for the truth or falsity thereof;
 - (2) Who discloses information in a manner prohibited by law including, by way of example, information that is prescribed as being confidential by law; or
 - (3) Who otherwise discloses information in bad faith.
- (c) It shall be the obligation of an employee who wishes to disclose information under the protection of this Article VII to make a good faith effort to provide to an appropriate reporting authority the information to be disclosed prior to the time of its disclosure. The protection of this Article VII shall not extend to reports of official misconduct that are made anonymously.

Sec. 2-109. Remedies.

(a) Employees in the career service. Any employee in the career service may file a complaint with the career service board or its designated hearing officer alleging a violation of section 2-108 within thirty (30) days of the alleged retaliatory adverse employment action. The complaint shall be processed in accordance with the rules of the board governing employee appeals; provided, however, that the employee shall not be required to pursue a complaint or grievance within the employee's department or agency prior to appealing the alleged retaliatory adverse employment action to the board or its designated hearing officer. In addition to the foregoing procedure, any employee who is otherwise contesting a disciplinary action before the board or its designated hearing officer in accordance with the rules of the board may defend against the disciplinary action upon a showing by the employee that the disciplinary action constitutes a violation of section 2-108. In either event, if the board or the designated hearing officer finds that a violation of section 2-108 has occurred, the board or the hearing officer shall order appropriate relief on behalf of the employee including, but not limited to, reinstatement, back pay, restoration of all benefits and seniority rights, and the expunging of the records of any retaliatory adverse employment action made in violation of section 2-108.

(d) Sanction against supervisors. Upon a determination by the career service board or its designated hearing officer, the civil service commission or its designated hearing officer, or an appointing authority that a violation of section 2-108 has occurred, any supervisor who committed the violation shall be subject to appropriate disciplinary action by the supervisor's appointing authority, up to and including termination from employment.

Sec. 2-110. Posting Required.

All departments, agencies and other appointing authorities of the City and County of Denver shall post and maintain, in one or more prominent locations accessible to employees of the department or agency, a notice of the rights and protections afforded to employees by this Article VII. The notice shall be in a form approved by the city attorney.

This Appendix is provided for informational purposes and is not considered a part of the Rules.