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

Appeal No. 59-02

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

SUZY (SUE) RUBIO, Appellant

Department: DENVER HEALTH AND HOSPITAL AUTHORITY.

This matter comes before the Career Service Board on appeal by Suzy (Sue) Rubio (Appellant) filed March 19, 2002. Appellant, a Women, Infants and Children ("WIC") counselor, appeals a grievance she filed in response to the Agency's decision to decline her request for a bilingual pay differential adjustment. The Agency filed a Motion to Dismiss for lack of jurisdiction on April 10, 2002. Appellant responded to this Motion on April 22, 2002. Having reviewed these pleadings, the file, and the relevant case law, and being fully advised in the premises, the hearing officer now finds and orders as follows.

1. Appellant's failure to provide the date of the Agency's action in her grievance.

The Agency first argues that Appellant failed to provide the date of the action complained of in her grievance. The Agency alleges this was a violation of CSR 18-12. 1, which states in relevant part:

> Form: The grievance shall be presented in writing and shall be dated. It shall include the name and address of the grievant, the action which is the subject of the grievance, *the date of the action,* and a statement of the remedy sought...

(Italics added.) The Agency argues that this information is essential to determine whether Appellant's grievance was timely filed or not under CSR 18-12. 2.

In response to this argument, Appellant has provided a series of e-mail communications representing her repeated request to the Agency to provide her with written notice of its decision to decline her request for consideration for the bilingual pay differential. These correspondences are dated February 11 through February 15, 2002. On February 11, Appellant was informed via e-mail that the request would be denied. Appellant subsequently made several requests for written notice of this decision, which requests specifically state they are for the purpose of filing a grievance. On February 15, 2002, Appellant was informed that there would be no written notice, and telling her she was responsible for knowing the CSR Rules. Appellant then filed her

grievance on February 19, 2002, eight days after Appellant was notified that her request would be denied, and four days after the Agency informed her there would be no written notice.

The Agency is just as responsible as Appellant for knowing the CSR Rules. The Agency will not be allowed to stonewall Appellant by refusing to provide official written notice of what action was taken and when it was taken, then self-servingly claim she failed to follow the rules because she failed to include such information in her grievance. The hearing officer will not dismiss an appeal for an employee's failure to provide information contained in documentation the Agency refused to provide despite the employee's repeated requests. The hearing officer therefore finds Appellant's grievance was filed within ten days of actual notice of the Agency's decision and was therefore timely under CSR 18-12. 2. The hearing officer further concludes that Appellant's grievance includes sufficient information as to the nature of the Agency's decision to be in compliance with CSR 18-12. 1.

2. Appellant's failure to state a violation of the CSR Rules.

The Agency next argues that Appellant's appeal does not make a colorable showing of a CSR Rule violation. The Agency correctly argues that, absent such a showing, the hearing officer lacks jurisdiction over the case. The Agency points out that the CSR 9-110, governing pay for bilingual services, states as follows:

> A. When it is a requirement of the assignment to be bilingual, the Appointing Authority *may* request a pay adjustment. The CSA Director must approve all requests in advance for the differential pay based on a language skill.

(Italics added.) The Agency argues that the language of this option is clearly permissive and not mandatory, providing the appointing authority with the discretion to make a pay adjustment request, but not requiring it to do so. Because the appointing authority had the discretion to decline an application under the Rule, the Agency posits that its decision does not constitute a violation of a regulation, which is a requisite condition of jurisdiction under CSR Rule 19-10 d).

Appellant posits in response that she strongly disagrees with this interpretation because the clear intent of the regulations is to provide for fairness, and that only the Director of Personnel who promulgated the regulation would be able to clarify what he meant by use of the term "may."[1] She points out that CSR 9-110 is a new regulation and requests the Hearings Office to consult with Mr. Yearby in his intent in using the term "may."

The hearing officer cannot consult with anyone in the absence of representation of both parties to this case. However, she can look for guidance to existing case law addressing issues similar to the ones in this case. In In the Matter of the Appeal of Patricia Beer and Jan L. Obert, Appeals Nos. 318-01 and 319-01 (Dismissal entered 12/18/01), the appellants sought pay differentials under other recent changes in Rule 9, in that case under CSR 9-53. In that case, a new employee had recently been hired at a higher rate of pay, and the appellants filed an

[1] Appellant has also provided a memo from Personnel Director Jim Yearby, in which he again states that if the appointing authority identifies existing filled positions eligible for the bilingual pay differential, it "may" request the pay adjustment in accordance with the new CSR 9-110.

adjustment request as permitted under CSR 9-53. That new rule also states, similar to the language in the regulation at issue here, that the appointing authority "may" seek a pay adjustment if market conditions lead to the hire of a new employee at a higher rate of pay than existing employees.

During the hearing in Beer, Personnel Director Yearby was called to the stand and testified that he did not intend to create Hearings Office jurisdiction by promulgating CSR 9-53. The hearing officer suspended the proceedings and entertained arguments from both parties on why that case should not be dismissed for lack of jurisdiction. The Agency argued that the rule was permissive and not mandatory, and that therefore the hearing officer lacked jurisdiction over the issue. The appellants responded that the policy statement set forth in CSR Section 9-10 Policy, clearly demonstrates that the clear intent of the entire CSA personnel system is to provide fair compensation. That policy reads:

> The policy of the Career Service Board in recommending pay for employees in the career service is:
>
> a) To provide like pay for like work.
>
> b) To compensate employees at rates equal to generally-prevailing rates in the Denver Metropolitan area...

(Emphasis added.) Therefore, they argued, the hearing officer had jurisdiction because the Agency's refusal to seek a pay adjustment under CSR 9-53 constituted a violation of this policy declaration.

However, Mr. Yearby's testimony clearly established that the language of the regulation clearly intended to place the decision to seek such differential requests in the hands of the appointing authorities. The hearing officer adjourned the hearing and dismissed the Beer case based on that testimony. In light of the decision in Beer, she dismisses this case for similar reasons.

The question here is one of regulatory interpretation. When interpreting regulations, the hearing officer must look to well-established canons of construction. The hearing officer's role in interpreting a regulation is to give effect to the promulgator's intent. Negonsott v. Samuels, 507 U.S. 99, 104 (1993). It is presumed that the promulgating entity expresses its intent through the plain and ordinary meaning of the language it chooses. In interpreting a regulation, the court should always turn first to one cardinal canon of construction before all others: that the promulgator "says in a statute what it means and means in a statute what it says..." *See, e.g.,* United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-242 (1989).

The hearing officer "must read and consider the statutory scheme as a whole to give consistent, harmonious and sensible effect to all its parts." Charnes v. Boom, 766 P.2d 665, 667 (Colo. 1988); *see also* Bynum v. Kautzky, 784 P.2d 735, 738 (Colo. 1989). Statutory provisions should be construed as a whole, giving effect to each word and, where possible, harmonizing potentially conflicting provisions. Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co., 33 P.3d 799 (Colo. 2001). The plain and ordinary meaning of the term "may"

is that is it permissive, not mandatory as is the typical alternative regulatory term "shall." Mr. Yearby has already spoken to his use of the term "may" in the permissive sense in the interpretation of other changes he has made to Rule 9. In accordance with the above canons of construction, the hearing officer concludes with confidence that his intent in use of this word has been consistently permissive. Use of the term "may" in CSR Rule 9-110 thus implies that "may not" is also an option. The Agency's choice not to therefore does not constitute the necessary regulatory violation to create Hearings Office jurisdiction.[2]

The remaining issues raised in the Agency's Motion to Dismiss are clearly disputed issues of fact which are not appropriate for consideration in a Motion to Dismiss. Since the hearing officer lacks jurisdiction on other grounds, she does not reach or consider those issues in this Order.

ORDER

Based on the foregoing, this case is hereby DISMISSED WITH PREJUDICE for lack of jurisdiction.

Dated this 25th day of April, 2002.

Michael A. Lazzeta for
Joanna Lee Kaye
Hearing Officer for the
Career Service Board

[2]In Beer, the hearing officer further found that the policy statement in CSR 9-10 (above) specifically references the Career Service Board's pay recommendations, and does not itself create Hearings Office jurisdiction. *Accord,* In the Matter of Tamara Watkins, Appeal No. 186-00 (Dismissal entered November 3, 2000 by Robin R. Rossenfeld).