

ORDER DENYING AGENCY'S MOTION TO DISMISS FOR LACK OF JURISDICTION

STUART SHAPIRO, Appellant,

v.

DEPARTMENT OF LAW,

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

This is an appeal of an alleged violation of the City's Whistleblower Protection Ordinance (WPO). DRMC § 2-100. The WPO prohibits a supervisor from imposing, or threatening to impose, any adverse employment action on an employee in response to the employee's disclosure of information about any official misconduct. DRMC § 2-108(a).

Under the WPO, adverse employment actions include, pertinently here, direct and indirect discipline or penalties, including, transfer, reassignment, adverse performance evaluation, withholding of work, denial of compensation or benefit, or the threat of any such discipline or penalty. DRMC § 2-107(b). The WPO charges the Career Service Board and its hearing officers with granting appropriate relief, including reinstatement, back pay, restoration of benefits, seniority rights, and expunging records of any retaliatory adverse employment action made in violation of § 2-108.

The Agency filed a motion to dismiss this appeal, arguing the appeal should be dismissed for reasons including: failure to specify a remedy; lack of jurisdiction based on Appellant having suffered no adverse action; and for the lack of hearing office jurisdiction to grant any remedy requested by Appellant, including ordering the transfer of Appellant, disciplining his former supervisor, and ordering the Agency to make staffing or policy changes.

Appellant claimed multiple adverse actions¹ followed his disclosures of official misconduct (i.e., that facts and law did not support a specified settlement by the City), and waste of city funds (i.e., an unprecedented \$3.25 million settlement which allegedly harmed taxpayers). He stated, in response to the Agency's motion, that: a specified remedy is not required by the WPO; the Hearing Office may grant several remedies under the WPO; and the Hearing Office's jurisdiction was expanded by the WPO to include remedies beyond those stated in Career Service Rule (CSR) 19-55.

The Agency replied the Hearing Office's jurisdiction is limited only to remedies specified in the WPO, none of which is available to Appellant. It also argued many of Appellant's allegations are time-barred under the statute.

¹ Claimed adverse actions included: threats to terminate employment, threat of discipline, extended investigatory leave, restricting communication with co-workers and other employees, threatening contempt if Appellant did not resign, terminating, then rescinding termination, making false statements in the termination letter, publicizing the termination to co-workers, removing giving lowering performance ratings, lost pay raises, diminishing mentor and resource status, denying attendance at Agency events, and isolating Appellant from other employees. [Appellant Response to Motion to Dismiss].

In an agency motion to dismiss prior to hearing, statements in the appeal must be viewed in the light most favorable to the Appellant, all Appellant's assertions of material facts must be accepted as true, and the motion to dismiss must be denied unless it appears beyond doubt that the appellant cannot prove the facts, as he alleges them, would entitle him to relief. In re Muller, CSA 48-08 (7/24/08); see also Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. App. 1996).

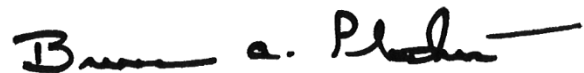
To the extent the Agency's motion requests dismissal of this appeal based on Appellant's failure to state a claim under the WPO, Appellant's averments, above, cite allegations of official misconduct and waste of city funds pursuant to DRMC 2-107(d). Further, Appellant's averments cite that, following those disclosures, he was placed on investigatory leave, threatened with termination, terminated (later rescinded), transferred, lost pay, benefits, and status of his position. In the light most favorable to Appellant, these averments establish retaliatory acts pursuant to DRMC 2-108(a).

Next, with respect to Hearing Office jurisdiction, DRMC § 2-109 grants the Career Service Board and its hearing officers jurisdiction to hear complaints of whistleblower violations. See also CSR 19-10 A.1.f. Because Appellant claims he suffered adverse employment actions, as defined by the ordinance, for reporting official misconduct, jurisdiction is established under the WPO and the Career Service Rules. The Agency's motion to dismiss does not appear to contest the establishment of a claim under the WPO, or the jurisdiction of the Hearing Office over Whistleblower claims, but rather the lack of any remedy as specified by Appellant.

Despite Agency's claim to the contrary, remedies under the WPO are not limited to those specified in the ordinance. Rather, if a violation of the WPO is found, hearing officers are required to order "appropriate relief." DRMC § 2-109. Relief sought by Appellant includes restoration benefits and status, seniority rights, and the expunging of records, all named remedies under the WPO. Thus, even without addressing the appropriateness of those proposed remedies not specified under the WPO, at least some of the relief requested by Appellant clearly falls within the ambit of the WPO. Consequently, it does not appear beyond doubt that Appellant's claims, as alleged, would not entitle him to any relief under the WPO.

For the aforementioned reasons, the Agency's motion to dismiss is denied. All prehearing deadlines set forth in the March 23, 2016 order remain in effect.

DONE April 26, 2016.



Bruce A. Plotkin
Career Service Hearing Officer

I certify that on April 26, 2016, I delivered a correct copy of this Order to the following, via email:

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