

BEFORE THE CIVIL SERVICE COMMISSION FOR THE CITY OF SEATTLE

In Re the Appeal of::

ISRAEL GREGORIO

Appellant

vs.

SEATTLE PUBLIC UTILITIES

Respondent

CSC Appeal No. 99-01-012

**ORDER ON PETITION
FOR REVIEW**

Civil Service Commission Rule 8.10, STANDARD FOR COMMISSION REVIEW OF HEARING EXAMINER DECISION states the following:

The Commission shall reverse or modify a decision of the Hearing Examiner where the decision is based on a material error of fact; or the decision misapplies the Personnel Ordinance or rules or law; or it fails to do substantial justice. The party seeking review of the decision of the Hearing Examiner shall have the burden of showing error of fact or law.

The Seattle Public Utilities Department has filed a Petition for Review alleging five points of error in the Hearing Examiner's Findings of Fact, Conclusions of Law, and Decision. These are:

1. Appellant's appeal should have been dismissed as untimely;
2. The Hearing Examiner substituted her judgment for that of management, and, specifically, should have decided only "whether or not the Department had just cause (essentially, substantial evidence to reasonably believe [sic] the allegations are true) to discipline Gregorio";
3. It was error to find that another witness besides Tracy Rose (identified by the City as "the *only* witness in a position to hear the remark about the gun") was in a better position to hear the remark, but did not, and to conclude that, therefore, the remark was not made;
4. "It was error to consider whether Gregorio was justified in threatening to use a gun"; and
5. "[I]t was error to rescind rather than to modify the discipline."

Point 1 – Untimely Filing:

The Commission upholds the Hearing Examiner's analysis and decision.

The City contends that this appeal was not timely filed and formulates its argument for dismissal on the basis of two CSC Rules:

The first rule is CSCR 7.05, which states in part:

A notice of appeal shall be filed at the Commission offices within twenty (20) days after the date of the final notice from the department of the action that is the subject of the appeal....

The City argues that the appeal was not timely filed based on the date that it was received by the Commission and, therefore, should have been dismissed as untimely. The Executive Director, however, determined that the appeal was timely filed based on the inaccessibility of the Commission's offices and the earnest efforts made by the appellant to contact the Commission during the twenty day filing period.

CSCR 7.03 (1), however, which authorizes the Executive Director to make determinations of timeliness, states:

Upon a determination that the appeal is not timely, the Staff Assistant [Executive Director] shall issue a written order of dismissal with prejudice, setting forth the basis of the dismissal. Such orders may be appealed to the Hearing Examiner within twenty (20) days after the date of mailing said order.

Because the Executive Director determined that the appeal was timely filed, no formal order was issued. The CSC rules contain no procedures for appealing a determination that an appeal is timely filed, but it is reasonable to conclude that the same twenty (20) day time period for appealing the Executive Director's determinations of untimely filings to the Hearing Examiner, would hold for appealing determinations of timely filings. The letter to the appellant acknowledging his appeal was dated June 16, 1999. No appeal, or even letter of objection, was received from the City until August 13, 1999 at the first pre-hearing conference. Therefore, it is appropriate to conclude that the department, on its own, did not object to the Commission's acceptance of this appeal.

CSCR 7.05 (3), which establishes a framework for dealing with threshold issues states:

If an appeal on its face presents an issue as to the Commission's jurisdiction, the Staff Assistant [Executive Director] may refer the appeal to the Commission for a determination of the jurisdictional issue.

The Executive Director raised the matter of the timely filing of this appeal to the Commission at its June 24, 1999 meeting and the Commission agreed with and upheld the determination of the Executive Director, hence waiving the filing period under the authority granted by CSCR 1.05, which states:

...upon a showing that the purposes of the Charter and ordinances of The City of Seattle would be better served, the Commission may waive the requirements of any of these rules.

The authority to make this determination is supported by CSCR 7.02, which states:

The Commission reserves the authority to determine its own jurisdiction [emphasis added] and may do so upon a preliminary review (Rule 7.03(c)).

Had the issue not been raised to the Commission, or had the Commission not concurred with the Executive Director's determination, the hearing process would have been stopped pending an appeal by the appellant to either the Hearing Examiner or to the Commission.

The City's original Motion to Dismiss the appeal on the basis of a lack of timely filing was overruled by the Hearing Examiner in an oral decision at the first pre-hearing conference. The Hearing Examiner upheld the Executive Director's determination [with the concurrence of the Commission] that the rule could be waived if the purposes of the Charter and ordinances were not served.

The City argues that neither the Executive Director nor the Hearing Examiner "has the authority to extend this time limit." (Petition for Review p. 3. l. 10) The City errs in this logic. The Hearing Examiner is the Commission's designee (Seattle City Charter, Article XVI, Section 6) and acts with the authority of the Commission, subject to its review.

CSCR 10.05 (2), which the City argues expressly precludes both the Executive Director and the Hearing Examiner from extending the time for filing, in fact makes no mention whatsoever of the Hearing Examiner or the Commission, and it says nothing about denying the right of either entity to waive the requirement. If it did, it would exist in direct contradiction to the authority granted under CSCR 1.05, which allows the Commission to waive any of its rules.

Because the Commission upheld the determination of the Executive Director, which is within its jurisdiction, the Examiner acted appropriately in responding to the original Motion to Dismiss by determining that the Executive Director should be upheld and the filing period waived.

The City continues its argument for dismissal on the basis of timeliness utilizing a second rule, CSCR 10.05 (2), which states in part:

Any period of time except for the stated period of time set forth in Rules 7.05... may be extended by the Staff Assistant [Executive Director] for no more than fourteen (14) days upon written motion to the Commission and a showing of good cause.

While this rule does specifically preclude the Executive Director from extending the filing period, it does not prevent her from waiving it, pending an appeal to the Hearing Examiner and/or review by the Commission. In this case, both ruled prior to the start of the hearing process, and both were within their authority to do so. CSCR 10.05 (2) only deals with limitations of the authority of the Executive Director. It does not control the authorities of the Hearing Examiner and the Commission. CSCR 1.05 specifically grants to the Commission the discretion to determine whether the purpose of the Charter and ordinances would be better served by waiving any of its rules. That discretion is an extension of the mandates for all Commission functions as established in the Charter.

This view is supported by Article XVI, Section 6 of the Charter, which begins by stating, in part:

The Commission shall establish rules for its own operation. The Commission shall have the power to issue ...such remedial orders as it deems appropriate.

The City argues that the “appellant cannot demonstrate that the City’s charter and ordinances would be better served by waiving this deadline.” The Commission does not agree. Clearly, Article XVI, Section 6, contemplated a need for the Commission to have discretion in order to fully perform its duties.

Article XVI, Section 7 of the Charter states in part:

Any employee who is suspended or dismissed shall be entitled to an appeal to the Commission....

The Charter does not establish or require any filing deadlines. Rather, it guarantees rights.

CSCR 1.03 states in part:

The purpose of these rules is to assure that the personnel system in The City of Seattle is administered in accordance with the merit principles set forth in Article XVI, Section 4 of the Charter of The City of Seattle and that all proceedings before the Commission are conducted in an orderly, fair and timely manner.

The merit principles to which CSCR 1.03 refers contain a specific reference to “correction of inadequate performance, and separation of employees whose inadequate performance is not corrected.”

That is precisely why the appeal process is guaranteed. To say that the appellant cannot demonstrate that the City’s charter and ordinances would be better served by waiving this deadline is tantamount to saying that the Charter would have been better served if he had been made to suffer a disciplinary action (from which he was later exonerated) because the body to which he had appeal rights was (through no fault of his own) unavailable to him. This reasoning is completely adverse to the purpose of the Charter. Had the appellant simply failed to timely file, then he would have, by definition, waived his right to appeal. The appellant, however, did not waive his Charter mandated right to appeal. Rather, his efforts to do so during the filing period were thwarted by a course of events beyond his control.

Citing CSCR 1.05, the Hearing Examiner, in her Findings of Fact, Conclusions of Law, and Decision (p. 1, l. 14-18) correctly finds that:

...good cause was found [emphasis added] to accept the appeal after the expiration of the twenty-day period. It is found that the failure to file within the time period was not the fault of the appellant, but of the Commission, and should not be held against him. The purposes of the Charter would not be served if the appeal were not allowed.

CSCR 1.05 is an all inclusive rule which allows the Commission the discretion to, among other things, make determinations of jurisdiction and timeliness in order to fulfill the purposes mandated by the Charter with the authorities granted to it by the Charter.

The appellant's position causes him to be continually in transit. He does not work in an office, spends most of his time outdoors, does not have e-mail and is not within physical proximity to the Commission's offices. Hence, it is difficult for him to visit the CSC in person, except on his days off. The appellant notes this in his 8/20/99 response to the City's Motion to Dismiss. The difficulty with the Commission's telephone system was confirmed by the Executive Director in her letter to the appellant accepting his late filing and waiving the 20 day filing requirement. The appellant came to the Commission's office in person at the first possible opportunity after his unsuccessful attempts to make contact by telephone.

The appellant has clearly demonstrated that his initial efforts to contact the Commission were within the twenty day time period allowed for filing an appeal. The appellant's legitimate and earnest efforts, not the barriers to the success of those efforts, must be given the greater weight in determining whether the appeal was timely filed.

Arguments that the appellant had ample time to file during the twenty days available to him and, therefore, should have filed earlier than the twentieth day, are moot. The appellant had no obligation to file any earlier than between 4:59 and 5:00 p.m. on the twentieth day of his filing period. Appellant cannot and should not be penalized for utilizing the full time period allotted to him. Rather, he had every right [CSCR 2.07] to expect the Commission to be accessible until 5:00 p.m. on any regular workday, including the twentieth day of his filing period.

A poor precedent would be established if the appellant's appeal were ruled untimely. There are many foreseeable situations in which an untimely filing might legitimately occur. Under Civil Rule 60 (b)(9) *Unavoidable casualty or misfortune preventing the party from prosecuting or defending*; and 60 (b)(11) *Any other reason justifying relief from the operation of the judgment* the appellant's circumstance would likely result in a suspension of the required time for filing.

In this case, the inaccessibility of the Commission results in the same difficulty for the appellant as any other incident that would make the Commission offices inaccessible to him. Therefore, it is the appellant's efforts (which were within the filing period) and not the result of those ill-fated efforts, that must be granted full consideration. The effort to file was, in fact, timely.

The Commission affirms the Decision of the Hearing Examiner in her determination to waive the rule regarding timely filing. The fault was not with the appellant but rather with the Commission that the appellant was not able to file within the mandated 20 days. The effort made by the appellant to file within the twenty (20) day period, noted in his response to the original Motion to Dismiss, establishes just cause for the Commission to exercise the discretion granted under CSCR 1.05. To deny the appellant a hearing under these circumstances would result in a clear denial of the appellant's guaranteed rights, and the purpose of the Charter would not be served.

Point 2 – Hearing Examiner substituted her judgment for management's....

The Hearing Examiner's Findings of Fact, most specifically Fact #12, [testimony of Richard T. Johnson] demonstrates that the department did not pursue the full set of facts surrounding this incident. The fact that Johnson testified to having documented that the appellant might feel intimidated by the significant difference in size between himself and Ruiz, but that these remarks do not appear in any of the exhibits, and "may have been edited out" of his report, demonstrates that there is more involved in this case than the department has placed before the Commission

for review. Since the testimony of Johnson was not refuted, it can only be concluded that the Department's investigation was faulty. To have failed to discover important evidence relating to the event calls the investigation itself into question. To have (possibly) edited important information out of the investigator's report calls the disciplinary action into question.

The Commission upholds the findings and decision of the Hearing Examiner. There is nothing in the transcript that supports the allegation of the appellant's threatening behavior. Two witnesses testified regarding the appellant's alleged threat. One never heard him say the threatening words and the other alleges to have heard him say the threatening words, but claims that he was unable to hear any other part of the exchange except for the words in question. This speaks to the credibility of the witnesses and to the Department's ability to bear the burden of proof in administering this discipline. With the testimony of the witnesses in question, the department does not meet its burden of proof. The Hearing Examiner did not substitute her judgment for management's rather she ruled that the department did not have, as stated by Counsel in his Petition For Review, "substantial evidence to reasonably believe the allegations are true." By disagreeing with the discipline action sanctioned by the Department, in any appeal, the Hearing Examiner, by definition, substitutes her judgment for that of the Department. This is the test of the burden of proof which, in this case, the department failed to meet.

Point 3 – Error to find that another witness besides Tracy Rose (identified by the City as “the *only* witness in a position to hear the remark about the gun”) was in a better position to hear the remark, but did not, and to conclude that, therefore, the remark was not made.

The Commission upholds the Decision of the Hearing Examiner. The City is attempting to substitute *its* judgement for that of the Hearing Examiner, who is in the position of observing the witnesses and weighing their credibility. The City mis-characterizes the Hearing Examiner's Conclusions. There is no conclusion stating that the remark was *not* made. There was a Conclusion that the evidence relating to a reference to a gun was inconclusive, based upon the credibility of the witnesses and the context of the alleged remarks. The Decision includes the statement that the Hearing Examiner “cannot find by clear, cogent, and convincing evidence that the threat of use of a gun ever occurred.” Again, the Department failed to meet its burden of proof in the evidence and testimony presented to the Hearing Examiner.

Point 4 – It was error to consider whether Gregorio was justified in threatening to use a gun”


The Commission upholds the Hearing Examiner. There is no place within the Findings, Conclusions, and Decision in which the Hearing Examiner even implies that it would have been justifiable for Gregorio to threaten anyone with a gun. Discussion of a series of circumstances that may have led up to an alleged event, does not constitute justification for a provocation to threatening or violent behavior and, in no way do the Examiner's Findings, Conclusions and Decision express this view. Rather, the Examiner takes a strong position on the seriousness of such threats. Her conclusion quotes the City's Workplace Violence policy and she makes a statement in support of the City regarding the seriousness of this kind of threat: The City is correct to take the position that the threat of the use of a gun should be taken very seriously, and dealt with harshly. The City, however, failed to meet its burden of proof in showing that the appellant actually engaged in this specific behavior.

Point 5 – It was error to rescind rather than to modify the discipline.


The Commission upholds the Hearing Examiner's Decision to rescind the discipline rather than to modify it. It is clear that the Department failed to meet its burden of proof in this appeal. As such, the disciplinary action cannot be merely lessened. If the Department, for example, had fully investigated this event, found that the incident did occur but that there were mitigating circumstances, then the department, itself, might have chosen to modify its original discipline as a result of that investigation. Failing to meet its burden of proof at the Commission, however, does not make this option available when insufficient factual evidence was presented to show that the appellant ever actually engaged in the alleged behavior. Modifying the discipline, rather than rescinding it, would be the result of a conclusion that the appellant did engage in the alleged behavior. There is no clear, cogent evidence to show that this actually occurred.

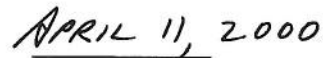
The Commission affirms the Hearing Examiner's Findings of Fact, Conclusions of Law, And Decision.

The Petition for Review is dismissed.


Nina A. Harding
Chairperson


Date


Kenneth M. Lowthian
Commissioner


Date


Ken Morgan
Commissioner


Date