

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 104-09

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ERIC COTTON, Appellant,

vs.

DEPARTMENT OF AVIATION,

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

The hearing on this appeal was held on April 6 and 7, 2010 and concluded on August 6, 2010 before Hearing Officer Valerie McNaughton. Appellant appeared at 9:11 am, shortly after the hearing commenced at 8:30 am, having waived his right to be present for that period through his attorney, Michael O'Malley, Esq. On August 6, 2010, Appellant was not present by agreement of the parties. The Agency was represented by Assistant City Attorney Andrea Kershner. Ken Greene, Deputy Manager of Maintenance at DIA, served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following decision and order:

I. STATEMENT OF THE APPEAL

Appellant Eric Cotton was an Equipment Operator in the Field Maintenance Division of the Department of Aviation (Agency). This is his appeal of his termination dated Nov. 27, 2009. The parties stipulated to the admission of the Agency's Exhibits 1-3 and 5-7. The Agency's Exhibits 4, and 10 - 19 and Appellant's Exhibits A and B were admitted during the hearing. On motion of the Agency, Exhibit 17 was ordered sealed as to personnel matters regarding employee Chuck Cabral, without objection. The testimony of Chief Information Security Officer Brian Monroe was ordered sealed on the basis of airport security issues on motion of the Agency, and without objection by the Appellant.

The issues presented by this appeal are:

1) Did the Agency establish that Appellant violated the cited section of the Career Service Rules (CSR), and

2) Was termination justified under the CSR's disciplinary rules?

II. FINDINGS OF FACT

Appellant was hired in February 2007 as an Equipment Operator at the Denver International Airport with the Department of Aviation (Agency). His duties included working on a spall crew, maintenance, trash removal, and runway and taxiway repair. On November 27, 2009, the Agency dismissed Appellant following an investigation and pre-disciplinary meeting for three actions which it contends violated Career Service Rules: 1) an altercation between Appellant and a co-worker; 2) solicitation of a DIA patron; and 3) accessing the DIA network while on investigatory leave.

1. August Incident with Coworker

On Aug. 29, 2009, Appellant and his assigned crew were patching holes using a concrete mixer. The last mix of the shift was too wet for the intended purpose. Crew member Miguel Martinez told Lead Worker Chuck Cabral that he was responsible for the soupiness of the mix. Appellant did not hear that exchange. Appellant observed that Rich Feudner had been mixing earlier that evening, and so he told others that Mr. Feudner had made the bad mix.

The next night at approximately 8:15 pm, Appellant emerged from the locker room at the Maintenance Control Center and walked down the hallway towards the lunch room. [Exh. 18]. Three employees, including Mr. Feudner, were standing and talking next to the vending machines on the right side of the hallway. Mr. Feudner said to Appellant, "Thanks for fucking ratting me out last night." Appellant told him he deserved it for making the mix. Mr. Feudner took a step toward Appellant, and said, "I don't like people talking shit about me and not having their facts straight." Appellant likewise took a step forward and replied, "Don't get in my face." Mr. Feudner countered, "I'm already in your face. What are you going to do about it? What are you going to do about it? What are you going to do about it?" Appellant said, "Let's go talk to the supervisor." The two went to the office of Paul Cothran, where they both filed grievances against one another. [Testimony of Mr. Feudner, Appellant; Exhs. 17-5, 17-15.] Mr. Cothran took written statements from the employees who were in the area during the incident, and gave one himself. [Exhs. 17-3 to 17-18.]

On Aug. 31, 2009, Appellant and Mr. Feudner were placed on investigative leave and surrendered their airport security badges. Both employees were instructed not "to access the computer in their shop until further notice." [Exh. 17-44, 17-45.] After completion of the investigation, Deputy Manager Dan Brown issued a one-day suspension to Mr. Feudner for his conduct during the incident.

2. Solicitation of Money from Airport Patron

Senior Human Resources Professional Diana Smith conducted the investigation into the August confrontation between Appellant and Mr. Feudner. Ms. Smith and Jeff Bartleson interviewed eleven employees and received nine written statements. [Exhs. 17-20 to 17-44.] During the interview of Equipment Operator Jeff Kiefer, Human Resources learned for the first time that Appellant had asked a passenger for \$20 for driving him around the parking garage to find his car. Mr. Kiefer reported the incident on Apr. 6th to their supervisor Mr. Cothran, and asked not to be paired with Appellant in the future. Mr. Cothran then informed his supervisor, Operations Supervisor Alex Ortiz, who in turn told Assistant Director Bill Nuanes. When asked about the incident, Appellant told Mr. Nuanes that he was kidding. The Agency took no disciplinary action against Appellant at that time on the basis of that incident. [Testimony of Messrs. Cothran and Nuanes; Exhs. 17-25, 17-26, 17-34.]

3. Accessing City Computer Network During Investigatory Leave

While Appellant was still on investigatory leave based on the August incident, he was invited to a Sept. 30th interview for a vacant Operations Supervisor position. Because the terms of his investigative leave did not permit Appellant to be in the employee areas of the airport without a badge, Field Maintenance Support Technician Gay Johnson escorted Appellant to the interview room. When Ms. Johnson noticed Appellant was not behind her, she retraced her steps and found Appellant at a computer. He explained that his email box was full and he needed to check his email. Ms. Johnson responded, "I'm just supposed to escort you." Appellant became upset, and said, ["w]hy are you treating me like an outsider? I should just leave." Appellant then followed Ms. Johnson to the interview room.

Based on the above incident, Ms. Smith asked airport information security if either Appellant or Mr. Feudner had accessed their DIA network accounts since they were placed on investigative leave. Lead investigator Randy Burton informed her that Appellant checked his email seven times between Sept. 3rd and Oct. 2nd. Ms. Smith's request for an update on Oct. 27 yielded one more email access on Oct. 20th, and six incidents in which Appellant opened the full DIA desktop environment. A final check on Nov.

18th showed seven more log-ins to the DIA desktop, the last one dated Nov. 6, three days after the pre-disciplinary letter was mailed to Appellant. Later that day, Appellant's employee account was disabled. [Exh. 4.] DIA Chief information Security Officer Brian Monroe testified that Appellant connected to the DIA network seven times from an external computer, and sent emails and attachments out to other computers. "Some of those sessions went on for hours." Equipment Operators such as Appellant have very minimal network access, but an employee can cripple a system by sending out emails with huge attachments.

Appellant testified that when he was given the letter placing him on investigatory leave, he asked Mr. Nuanes what he should do if he had questions about what's going on. Mr. Nuanes told him, "Just give us a call, contact us, and we'll get your questions answered."

By presenting it to me that way, I didn't take it as a way of saying no or yes. It was like a fine line. I understood the letter to say one thing; but when I asked him about it, he said another, so in taking a look at it . . . it was more of a, 'If you have questions, we'll take care of them', despite what the letter said. . . . That's why I like to ask a lot of questions just in case there is any grey area. I felt there was a lot of grey area.

[Testimony of Appellant, 4/6/10, 2:32 pm.]

Appellant called Ms. Smith within the first week of his leave, and contacted Mr. Nuanes by phone a few times thereafter. He also called Maintenance Control in October to retrieve his inhaler from his locker, and emailed and phoned employees at DIA Human Resources and Accounting during the course of his leave. Appellant testified that he believed Mr. Nuanes' comment implied that email contact was also permissible. He accessed his email account to keep his inbox from getting too full, deleting messages he did not need, and forwarding the rest to his home. Among the latter were exchanges about the City's craft fair and the employee purchase program. [Exhs. 15, 16.] [Testimony of Appellant, 4/6/10, 2:32 pm.]

4. Disciplinary Decision

On Nov. 3, 2009, the Agency sent Appellant a pre-disciplinary letter based on three allegations: the April request for \$20 from a passenger, the August confrontation with Mr. Feudner, and Appellant's use of the DIA network while on investigative leave. At the Nov. 17th pre-disciplinary meeting, Appellant appeared with his representative, Ed Bagwell of the Teamsters

Union, before Mr. Greene and Dan Brown, the previous Deputy Manager. Appellant acknowledged that there was "an exchange of words" with Mr. Feudner in August. He also admitted he asked an airport patron for money, but stated he was joking. Appellant conceded that he remotely checked his City e-mail multiple times during his investigatory leave. [Exh. 7]. Appellant had no prior disciplinary history.

On Nov. 27, 2009, Mr. Greene rendered the decision to terminate Appellant. He based his decision on the pre-disciplinary letter, Appellant's statements during the pre-disciplinary meeting, and his own visit to the hallway in the Maintenance Center where the confrontation occurred. Based on his observation of the hallway, Mr. Greene found that Mr. Feudner initiated the confrontation and took one step toward Appellant. Appellant then headed straight in Mr. Feudner's direction, and they faced each other about three to six inches apart. Mr. Greene believed that conducting their discussion six inches apart in the ten-foot hallway constituted intimidation. He found that under the circumstances, Appellant's response to Mr. Feudner that he "deserved it" was intimidating and threatening behavior under Executive Order 112. He also concluded that Appellant intimidated Mr. Feudner during this incident by raising his voice. Mr. Greene testified that he believed Mr. Feudner's statement, "I'm already in your face. What are you going to do about it? What are you going to do about it? What are you going to do about it?", was not a violation of the executive order on violence in the workplace. [Testimony of Mr. Greene, 4/7/10, 4:40 pm.]

Mr. Greene concluded that both men were the aggressors, and that Appellant had engaged in a threat of violence by virtue of intimidating and hostile actions, in violation of his performance standards, Executive Order 112, CSR §§15-110 and 16-60 M, and Aviation Dept. Policy No. 2016. Finally, Mr. Greene assumed that Mr. Feudner felt intimidated and threatened by Appellant, and that the working relationship between the two would be harmed by Appellant's untrue accusation.

As to the second incident, Mr. Greene found that Appellant neglected his duties, was careless, and failed to do assigned work for more than two hours by failing to notify his supervisor that he had completed his work, and using that time to drive an airport patron around the garage to assist him in finding his car. He also believed that Appellant misused his official position by soliciting a tip from the patron. Mr. Greene found that the behavior constituted a failure to meet his performance standard to maintain collaborative working relationships with external customers.

The third and final action leading to the discipline was Appellant's use of the airport internet during his investigatory leave. Mr. Greene found that

Appellant willfully disobeyed the Aug. 31 order not to access his shop computer, as stated in the letter placing him on investigatory leave. [Exh. 5.] Mr. Greene found that the order was clearly communicated in the letter. He considered the order reasonable based on the inherent security risk posed by employees accessing the airport network without authority, regardless of the nature or intent of their access.

Mr. Greene briefly considered a one- or two-month suspension, but quickly rejected that alternative penalty based on the number of serious incidents committed by Appellant within a short period. He deemed the interaction with the airport patron a blatant violation of the airport's expectations of employees. Mr. Greene believed Appellant could have avoided the conflict with Mr. Feudner, and viewed Appellant's access to the airport internet as an intentional violation of a direct order.

III. ANALYSIS

In this de novo hearing, the Agency bears the burden to establish that Appellant violated the Career Service Rules cited in the disciplinary letter by a preponderance of the evidence, and that the level of discipline was within the range of discipline that can be imposed under the circumstances. In re Gustern, CSA 128-02, 20 (12/23/02); Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975).

1. Neglect of duty under § 16-60 A.

The Agency found that Appellant neglected his duty when he picked up the patron and drove around looking for patron's car for approximately two hours without notifying his supervisor of his whereabouts, instead of requesting a new assignment.

To sustain a violation under CSR 16-60 A, an agency must establish that an employee failed to heed an important work duty, resulting in significant potential or actual harm. In re Lottie, CSA 132-08, 2 (3/9/09). The Agency must have communicated the duty in such a manner that a reasonably astute employee would be aware of that duty. In re Mestas et al., CSA 64-07, 21 (5/30/08).

Here, Appellant admitted that he drove the patron around looking for his vehicle for about two hours. [Exh. 7]. At the hearing, he asserted that lead worker Chuck Cabral told the Equipment Operators that helping patrons was part of their job. [Testimony of Appellant, 4/6/10]. He also contended that, once they completed their trash assignment, they were permitted to go anywhere at DIA as long as they remained available to respond to their

supervisor's calls.

The Agency did not present evidence that Appellant failed to complete his assigned trash duty or other work. The Agency asserted instead that Appellant neglected his duty to check in with his supervisor and request a new assignment once he had finished his work. Mr. Greene presented the only evidence about this duty, and he was not himself employed in the division at the time of this incident. Mr. Greene testified that Mr. Brown informed him when he began the job that the general practice was for employees to call in for a new assignment after completing a task. [Testimony of Mr. Greene, 4/7/10; Testimony of Messrs. Nuanes, Morin, 8/6/10]. That evidence does not establish that calling in was an important work duty. Moreover, there is no evidence that Appellant's failure to call in resulted in significant potential or actual harm. I find that the Agency failed to prove Appellant neglected his duty under this rule in failing to call his supervisor after finishing his assigned work.

2. Carelessness in performance of duties under § 16-60 B.

Carelessness occurs when an employee performs a duty poorly and deviates from an exercise of reasonable care, resulting in potential or actual significant harm. In re Mestas et al., CSA 64-07, 31 (5/30/08); In re Mounjim, CSA 87-07, 5 (7/10/08).

The Agency found that Appellant was careless in his performance of duties because he drove the patron around for two hours instead of using more efficient methods to locate his car. The Agency argues that Appellant knew DIA had a Parking Facilities department that could have provided assistance, but he did not refer the customer to it. However, the Agency presented no evidence that Appellant's duty of customer service, a part of every airport employee's job, included a duty to refer all customers to the Parking Facilities office, or that his failure to do so was carelessness in performing customer service. Further, the Agency presented no evidence that Appellant performed his trash or other duty carelessly as a result of not calling his supervisor or referring the customer to Parking Facilities.

Since the Agency did not prove that Appellant performed a duty poorly, or that he failed to exercise reasonable care in aiding the patron, the Agency failed to establish that the Appellant was careless in the performance of his duty, in violation of CSR § 16-60 B.

3. Unauthorized operation of City equipment under § 16-60 D.

The Agency found that Appellant violated this rule based Appellant's

access of the DIA network and computer system on seventeen occasions from Sept. 3 to Nov. 6, 2009, despite the Aug. 31st order prohibiting use of his work computer while on investigatory leave. [Exh. 5].

Appellant admitted he accessed his email account on the cited occasions, but stated he believed Mr. Nuanes authorized those uses based on his statement that Appellant could call or contact him if he had questions about the investigatory leave process. Mr. Nuanes' statement was not ambiguous, and did not give implied permission for Appellant to contact DIA through its network for his personal emails while on leave. Appellant chose to misinterpret the remark in order to make use of the City network for his own convenience. Even though the language in the letter does not clearly ban anything but use of the shop computer, Appellant's testimony made it apparent that he understood that order to mean he was prohibited from any contact with the Agency except to obtain answers to his questions about the leave. Appellant's testimony made it clear that he intentionally failed to seek clarification by asking questions to clarify "the gray area" of permissible contacts, and that he failed to ask those questions in order to access his email account for his personal use. I find that Appellant used City property without authorization on seventeen occasions, in violation of CSR § 16-60 D.

4. Using official position for personal profit or advantage under § 16-60 F.

Violation of this rule requires proof of a significant link between one's official position and seeking an advantage to which one is not otherwise entitled. In re Sawyer and Sproul, CSA 33-08, 9 (1/27/09), citing In re Mergl, CSA 131-05, 4 (3/13/06). This rule requires proof of actual use of one's official position for personal gain. In re Catalina, CSA 35-08, 8 (8/22/08).

The Agency found that Appellant violated this rule based on his April demand for money from an airport patron for his help in finding the patron's vehicle. The evidence is undisputed that Appellant told the customer his services would be \$20, and that he was not entitled to money in addition to his salary for performing his duty of customer service. It is also clear that it was Appellant's position as an airport employee that gave him the opportunity to make that demand. The rule prohibits use of an official position to obtain profit or advantage, and it is violated by the act of requesting such an advantage on the basis of that official position. Contrary to Appellant's argument, the rule does not require that an employee actually receive the requested advantage. See In re Catalina, CSA 35-08, 8 (8/22/08). Therefore, the Agency proved that Appellant violated CSR § 16-60 F.

5. Failing to comply with supervisor's orders under § 16-60 J.

Failure to comply with a lawful order is established by proof that a supervisor communicated a reasonable order to a subordinate, and the subordinate violated the order under circumstances demonstrating willfulness. In re Owens, CSA 69-08, 4 (2/6/09).

As stated above, Appellant admitted he accessed his email account during his investigatory leave. I have found that he made a conscious choice to interpret Mr. Nuanes' invitation to answer questions about his leave as implied permission to contact the Agency via the DIA network, despite the clarity of that invitation. Appellant avoided asking Mr. Nuanes a direct question about use of his email in order to preserve his later argument that he was confused by conflicting instructions. In fact, Appellant made full use of the opportunity to call Agency officials to get his questions answered, but then went beyond that limitation by using his employee email account and the DIA network a total of 17 times over a two-month period, despite the written order forbidding that use. Appellant's heated statement, "[w]hy are you treating me like an outsider?", demonstrated that he felt entitled to use City property during his investigatory leave, despite the August order. I find that Appellant intentionally failed to comply with a direct order not to make contact with the City or use the City network, in violation of § 16-60 J.

6. Failing to meet standards of performance under § 16-60 K.

An employee's failure to meet established standards of performance is proven by evidence of a prior-established standard, clear communication of that standard, and an employee's failure to meet that standard. In re Mounjim, CSA 87-07, 8 (7/10/08.)

The Agency contends that Appellant failed to meet the following performance standards: 1) maintaining collaborative working relationships with external and internal customers, 2) treating all persons with respect, 3) using a positive approach to resolve issues, 4) dealing with anger in a mature manner, and 5) cooperating with others to ensure the organization's success. [Exh. 2-1, 2-2.]

Here, the Agency presented the testimony of numerous co-workers which stated that their relationship with Appellant was not collaborative, based in large part on Appellant's practice of criticizing their work and reporting their mistakes to their lead worker, Mr. Cabral. However, the pre-disciplinary letter gave Appellant no notice that this behavior was the subject of the discipline, and therefore the testimony may not be used to support this discipline.

The Agency presented no evidence other than speculation that the relationship with the airport patron was affected adversely. As to the remaining performance standards, the Agency presented only conclusory statements that Appellant's actions failed to meet them, and so they do not support a finding that Appellant violated this rule.

7. Failure to observe written departmental policies under § 16-60 L.

An agency establishes an employee's failure to observe a regulation by proving notice to an employee of a clear, reasonable, and uniformly enforced policy, and that the employee failed to comply with the policy. In re Mounjim, CSA 87-07A, 6 (1/8/09); In re Norman-Curry, CSA 28-07 and 50-08, 5 (2/27/09).

The Agency alleges that Appellant's actions during the August confrontation violated two Agency regulations: Policy 2016 prohibiting violence in the workplace, and the Airport Personnel Manual requiring employees to treat co-workers with respect, and forbidding "threatening, offensive, vulgar, loud or abusive language." [Exh. 2-2.]

The Agency determined that Appellant was an aggressor because he approached within six inches of Mr. Feudner. Mr. Greene interpreted the remark, "[y]ou deserved it", as intimidating and threatening. However, the statement in context was indisputably an attempt at explaining Appellant's report to Mr. Cabral the previous evening. Moreover, Mr. Feudner initiated the angry exchange, swore at Appellant, and attempted to incite a physical response by repeatedly stating, "[w]hat are you going to do about it?" after telling Appellant, "I'm already in your face." Appellant acted appropriately and with restraint in suggesting that they should go to the supervisor. In doing so, Appellant defused the situation from further escalation.

A threat is an expression of an intent to inflict imminent harm. See In re Katros, CSA 129-04, 7 (3/16/05). Airport Policy 2016 prohibits behavior that is reasonably perceived to be intimidating, threatening or hostile. The Agency presented no evidence that Appellant's statement that Mr. Feudner "deserved it" was accompanied by any menacing gestures or other actions from which one could infer an intent to inflict imminent harm. If the Agency's proposed interpretation is adopted, it would expand this rule to forbid any arguments or strongly-phrased disagreements between co-workers. The plain meaning of the policy does not support such an interpretation.

The Agency also found that the above comment was intimidating to Mr. Feudner. The evidence showed that Mr. Feudner responded aggressively by stepping toward Appellant, and stated he didn't like people "talking shit"

about him. When Appellant told him not to get "in my face", Mr. Feudner told him he was already in his face, and asked him several times what he was going to do about it. In short, Mr. Feudner displayed no objective signs that he was intimidated. A reasonable person in Mr. Fender's position may have perceived that the comment, "[y]ou deserved it", indicated annoyance or defensiveness, but would not have felt intimidated by this relatively mild rejoinder. See In re Katros, CSA 129-04, 8 (3/16/05); In re Owens, CSA 69-08, 6 (2/6/09). I find no support in the evidence for the Agency's conclusion that Appellant violated Policy 2016.

The Agency did not present any evidence that Appellant violated the general standards set forth in the Airport Personnel Manual. The only use of vulgarity or offensive language in the exchange was by Mr. Feudner.

8. Threatening, fighting with or intimidating employees under § 16-60 M.

This rule is violated by words a reasonable person would consider threatening or intimidating. In re Katros, CSA 129-04, 8 (3/16/05), citing Metz v. Dept. of Treasury, 780 F.2d 1001, 1002-3 (Fed. Cir. 1986). For the reasons given in the above section, I also find that the Agency failed to establish Appellant threatened, fought with, or intimidated any employees.

9. Failure to maintain satisfactory working relationships under § 16-60 O.

This section is violated by conduct that an employee knows or reasonably should know will be harmful to coworkers or the public, or will have a significant impact on the employee's working relationship with them, as measured by a reasonably objective standard. In re Burghardt, CSB 81-07A, 2 (8/28/08).

The Agency supported its finding that Appellant violated this rule by Appellant's demand for money from an airport passenger. Mr. Greene concluded that the comment was a failure to maintain collaborative working relationships with external customers. The Agency proffered only its speculation that the remark would have significantly impacted the relationship between customer and airport employee. The evidence on this issue is disputed: Appellant claimed the atmosphere was light-hearted, while Mr. Kiefer stated the customer was tense and worried. Mr. Greene accepted Appellant's version of events that the demand was made in jest. Based on the absence of a complaint from the patron, and the Agency's own failure to impose any discipline when it first learned of the incident, I conclude that the remark did not violate this rule.

10. Conduct violating the Rules and Executive Orders under § 16-60 Y.

Finally, it is asserted that Appellant's actions during the August exchange with Mr. Feudner violated Executive Order 112 and CSR § 15-110 prohibiting violent behavior.

Violence is defined in Executive Order 112 as

- (a) the actual or attempted: physical assault, beating, improper touching, striking, shoving, kicking, grabbing, stabbing, shooting, punching, pushing, rape, use of a deadly weapon; or
- (b) the actual or attempted: threatening behavior, verbal abuse, intimidation, harassment, obscene telephone calls or communications through a computer system, swearing at or shouting at, stalking.

Executive Order No. 112, § 3.0.

The Agency found that Appellant's statement, "[y]ou deserved it", was intimidating and threatening. For the same reasons as articulated above, I find that the statement was neither intimidating nor threatening. There is no evidence that Appellant's actions were perceived to be threatening by Mr. Feudner or anyone else present in the area. In contrast, Mr. Feudner swore at Appellant and attempted to provoke him into a violent physical response, without success. Appellant reacted by reporting the incident to his supervisor and filing a grievance, which alleged that Mr. Feudner threatened and intimidated him. [Exh. 17-3.] That response conforms to the standards set forth in the Career Service Rules for a non-emergency situation where an employee believes he has been threatened or subjected to violence. § 15-111.

CSR § 15-110 A. prohibits "intimidating, threatening or hostile behaviors", among other actions not relevant here. The Agency did not support its allegation under § 15-110 with any additional evidence. On this evidence, the Agency failed to establish a violation of either Executive Order 112 or CSR § 15-110.

11. Appropriateness of Penalty

The Career Service Rules require that "the degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record." In addition, the Agency "shall impose the type and amount of discipline he or she believes is needed to

correct the situation and achieve the desired behavior or performance." § 16-20.

Here, the Agency based its penalty determination on three pieces of information: the pre-disciplinary letter, Appellant's comments during the pre-disciplinary meeting, and Mr. Greene's observations during his examination of the hallway where the angry exchange took place.

It is noteworthy in this case that Mr. Feudner, the initiator of the August incident, was given a one-day suspension for his part in the same event. While this was imposed by Mr. Brown and not Mr. Greene, the Agency gave no explanation for the sharp difference in the severity of the penalties given the greater culpability of Mr. Feudner. Appellant had no previous discipline, and the evidence is silent as to whether Mr. Feudner had any prior discipline.

The decision-maker in this case also failed to read the twenty witness statements gathered by the investigation into this incident. The witness statements confirm an important fact: that Mr. Feudner and not Appellant initiated the angry exchange. In the absence of that information, Appellant's supervisor testified that he believed Appellant initiated the conversation, and Mr. Feudner was simply defending himself. [Testimony of Mr. Cothran, 4/7/10, 10:35 am.] Director of Field Maintenance Ron Morin, who imposed the investigatory leave, also assumed Appellant was the instigator. [Testimony of Mr. Morin, 8/6/10, 2:19 pm.] Mr. Greene did not speak to the prior supervisor to determine why there was no discipline imposed based on the April incident when it was first reported to Appellant's supervisor and manager.

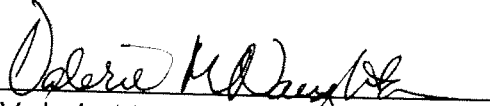
Most importantly, the decision-maker failed to take into consideration the employee's past record, an essential element of progressive discipline in determining the level of discipline to be imposed. From the evidence presented, it cannot be determined what weight was given to each of the three incidents leading to discipline. Since I have found that Appellant violated three out of ten of the rules asserted in the disciplinary letter based on his conduct in two of the three allegations, that analysis is crucial to the imposition of the appropriate penalty. In light of the absence of consideration of these facts, I must conduct a separate penalty hearing in order to complete a de novo determination on the appropriateness of the penalty imposed.

The Agency has offered and presented additional evidence regarding Appellant's conduct after his termination. [Agency's Motion to Exclude Appellant from the Hearing and Atchs. A – D; Exh. 20.] That evidence may be relevant to the issue of the appropriateness of reinstatement. Both parties will be permitted to present evidence on this issue.

ORDER

The penalty phase of this appeal shall be set for hearing by agreement of the parties.

Done this 18th day of October, 2010.


Valerie McNaughton
Career Service Hearing Officer