

DECISION

IN THE MATTER OF THE APPEAL OF:

JACEK BURGHARDT, Appellant,

vs.

CLERK AND RECORDER'S OFFICE,

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

INTRODUCTION

The Manager of the Denver Clerk and Recorder's Office (Agency) placed the Appellant on investigatory leave beginning May 26, 2011. Appellant alleged the adverse Agency action of placing him on investigatory leave was motivated by the Agency's unlawful discrimination on the basis of his religion and national origin. He also claimed he was placed on investigatory leave in retaliation for having reported official misconduct under City's Whistleblower Protection Ordinance. The Agency's investigation concluded with the assessment of a 10-day suspension against the Appellant on June 13, 2011. Appellant filed a second appeal, concerning the suspension, on June 16, 2011. The two cases were consolidated for hearing. Prior to hearing, the Appellant, through counsel, withdrew the first case, #32-11, including all claims therein. Hearing, on August 30, 2011, proceeded on the remaining 10-day suspension case, #36-11.

At hearing, the Agency was represented by Jennifer Jacobson, Assistant City Attorney. The Appellant was represented by Michael O'Malley, Esq. Agency Exhibits 1-8 were admitted without objection, and no other exhibits were offered by Appellant. The Agency called the Appellant as its witness, as well as Bridget Svalberg, Richard Dewar, and Stephanie O'Malley. Appellant called Marie Valencia as its only other witness. For reasons which follow, the 10-day suspension is AFFIRMED.

FINDINGS

The Appellant, Jacek Burghardt, is an Administrative Assistant III in the Recorder section of the Denver Clerk and Recorder's Office. The work area for the recording section is populated by open cubicles. For some time banter, teasing and gossip permeated the section. Burghardt's supervisor disciplined him in 2007 for making derogatory and insulting comments to a co-worker. [Exhibit 6]. Burghardt's work reviews constantly advised him to improve his co-worker

interactions. Deputy Clerk and Recorder Richard Dewar, while rating Burghardt's overall performance as "meets expectations," had written negative comments in Burghardt's past two work reviews, noting Burghardt's failure to amend his gossipy ways and offensive comments. [Dewar testimony; Exhibit 5-2; 5-5; 5-10;]. A previous supervisor, Jo Ann Keys, had also noted the same uncorrected behaviors in her evaluation of Burghardt's work. [Dewar testimony; Exhibit 5-25; 5-40]. [Exhibits 5-40; 5-33; 5-30; 5-28; 5-25; 5-18; 5-10; 5-2]. Keys required Burghardt to complete courses in interpersonal relationships.

On May 25, 2011, Burghardt was sitting in his usual work space, between two female co-workers. Addressing one of them [hereinafter referred to as "C"], he stated something close to "I heard your husband is having an affair with [name of a former co-worker]." Burghardt then asked C when her unmarried daughter was going to become pregnant. C was offended by the comments, particularly because the comments were the culmination of a continuing pattern of offensive comments and questions, and C had told him repeatedly to stop. The co-worker, sitting next to Burghardt and C, overheard Burghardt's remarks and C's response.

C approached a supervisor about Burghardt's comments, specifying she did not wish to see him punished, but only to receive assistance in having him stop what had become an unattenuated barrage of teasing, gossip, and hurtful comments which interfered with her work. The supervisor did not act on C's complaint. C then approached another supervisor who immediately reported the incident to Deputy Clerk and Recorder Richard Dewar. Dewar undertook an immediate investigation into the allegations, placing Burghardt on investigatory leave the same day as the incident, May 25, 2011. [Exhibit 1]. A pre-disciplinary meeting was held on June 10. Burghardt attended with his union representative, Ed Bagwell, who read a statement on behalf of Burghardt. [Exhibit 3]. The same day, the Agency issued its notice of a 10-day suspension. [Exhibit 4]. This appeal followed timely on June 16, 2011. The following analyzes each of the Career Service Rules (CSR) which the Agency alleged Burghardt violated on May 25, 2011.

ANALYSIS

16-60 A. Neglect of Duty

This rule is breached when an employee neglects to perform a job duty he knows he is supposed to perform. In re O'Meallie, CSA 92-09, 3 (6/18/10). Clerk and Recorder Stephanie O'Malley stated Burghardt breached this rule because his comments to his C were made during working hours, presumably at the expense of his work obligations. No evidence was presented, however, what work Burghardt failed to accomplish while he was engaged with C. The Agency's evidence suggests other duties were implicated, including that of customer service toward co-workers and his duty to maintain satisfactory working relationships with co-workers. Those duties are covered by more specifically-directed Career Service Rules, below. No further discussion is warranted under this rule.

16-60 L. Failure to observe written departmental or agency regulations, policies, or rules

To prove a violation of this rule, the Agency need only to prove that there was a written policy, Burghardt was aware of the policy, and he failed to follow the policy. In re Mounjim, CSA 87-07, 6 (CSB 1/8/09). The Agency cited the following language from its policy manual: "The Clerk and Recorder treats the subject of customer service very seriously... Customer service does not include any act of rude behavior or disrespect ... Each staff member of the Office of Clerk and Recorder is expected to offer kind and courteous service... to your co-workers." Exhibit 4-1, 4-2]. Burghardt replied alternatively that he had no notice his antics were offensive, and that his comments were not as alleged.¹

Notice. Burghardt acknowledged he received and was aware of the contents of the Agency's written policy manual which contained a prohibition against rude and disrespectful behavior toward co-workers. Consequently, he was on notice of the Agency's behavior policy. Second, he claimed no one told him, before receiving the letter in contemplation of discipline in this case, [Exhibit #2], that anyone was offended by his comments. [Burghardt cross-exam]. As noted above, several of Burghardt's work reviews (PEPRs) contained comments from supervisors stating that his gossip and hurtful comments remained problematic even after he was advised. For example, in Burghardt's 2010 PEPR, Dewar noted "[y]ou also allow yourself to become involved in office gossip and conflict." [Exhibit 5, p.2, top]. In his 2008-2009 PEPR, supervisor JoAnn Keys noted "Jack had difficulty establishing appropriate boundaries for communicating and working with a co-worker. Several conferences with Jack and subject employee were conducted to attempt to resolve those issues, without much success however." [Exhibit 5-25]. In Burghardt's 2007-08 PEPR, Keys stated

Jack was called out in conference on several occasions on customer-related issues, thereby failing to meet the standard of two or less complaints within the evaluation period... [including] October 2008 – Working relationship with co-workers... Self-examination and personal development will be key to redefining the image perceived by others including customers and co-workers to address handling personal conflicts/issues with co-workers away from view of the public and causing disruption on front counter.

[Exhibit 5-30; 5-33, 34].

¹ Burghardt also alleged C insulted him first, a kind of "she started it" defense. That allegation is addressed below in the section regarding the degree of discipline.

Further, Burghardt was disciplined in 2007 for making pejorative comments to a co-worker of Hispanic decent, stating, in front of other co-workers, "so how much does it cost your people to get cross the border these days? I know that's where you come from." [Exhibit 6-2; see also In re Burghardt, CSA 81-07 (3/28/08), reversed CSB 81-07(8/28/08)]. The PEPR comments and prior discipline demonstrate Burghardt was on notice that he was required to cease offensive comments to co-workers, as well as being on notice of the nature of those offensive comments.

Burghardt's 5/25 comments to C. Next, Burghardt claimed he did not use the words attributed to him on May 25, and what he did say was inoffensive. According to C, Burghardt and she were "just bantering, then he was telling me my husband was having an affair with a girl who left here. I asked him to stop and he came back with 'I wonder if your daughter is going to get pregnant,' or something like that. I just wanted someone to tell him to stop because he wasn't listening to me, but it went higher up." C testified Burghardt has made the affair comment "many times" but persisted so much that on May 25 it became "too much." [C testimony; Valencia testimony]. Burghardt replied neither statement was as alleged and his statements only expressed concern for C. He claimed his statements were "I hope you don't think your husband is having an affair" and "are you ready to be a grandmother?" Since the statements as alleged by each side are irreconcilable, the issue here is credibility. The following factors are determinative.

C readily admitted there was a culture of banter and gossip in the Agency; that she partook in that culture; that before Burghardt made his comment about her husband allegedly having an affair with a former co-worker, she may have made a provoking comment to him. On the other hand, C stated Burghardt's statements went beyond teasing and became hurtful, that she has told him repeatedly "shut up" without success; that by reporting his comments to two supervisors she wished him no harm, but simply wished him to desist because it was affecting her ability to do her work; and that she has tried to put barriers between her and Burghardt, such as a wall of flowers, or wearing headphones, in an attempt to reduce the banter. Finally, she testified she likes Burghardt, and finds him helpful at work, but that "he's like a teasing brother trying to upset you."

C's recollection rings much truer than Burghardt's denials for the following reasons: (1) C's attempts to limit Burghardt's persistent pestering were balanced by her admitted culpability as a participant in gossip; (2) she readily admitted she may have teased Burghardt first on May 25; and (3) C retained mixed emotions about Burghardt, even after he was derogatory toward her. In contrast, Burghardt

categorically denied participating in gossip and mean-spirited teasing. His denial was inconsistent with his insistence that a culture of gossip permeated the Agency. He denied making derogatory statements to C but, inconsistently, insisted she "started it," thereby inferring he at least participated. Finally, Maria Valencia, the co-worker next to C and Burghardt, affirmed C's version of the events and Burghardt did not rebut Valencia's testimony.

Valencia readily distinguished between the banter by her neighbors. She stated Burghardt's statements to C, including those on May 25, had recently become mean and hurtful; that C complained Burghardt hurt her feelings; that C wondered aloud why Burghardt's teasing had become mean-spirited; and that C rebuked Burghardt sternly as if to say "OK, that one is not funny." [Valencia testimony]. Valencia contrasted C's teasing of Burghardt as never hurtful or mean-spirited. She also overheard C asking a supervisor to be moved away from Burghardt because she could not concentrate on her work, in corroboration of C's recollection. [Valencia testimony and cross-exam]. There was no other evidence to indicate Valencia was anything less than entirely credible. Based in large measure on Valencia's credible testimony, it is more likely, by a preponderance of the evidence, that Burghardt's comments to C were rude and disrespectful in violation of Agency policy, and therefore in violation of CSR 16-60 L.

16-60 M. Threatening fighting with, intimidating or abusing employees or officers of City or any other member of the public, for any reason

O'Malley testified she found Burghardt in violation of this rule because his statements to C were intimidating and abusive. C's own description of Burghardt are not so grave. She described his comments variously as "offensive," and "nasty," but when pressed, revised her description of Burghardt's comments to "like a teasing brother trying to upset you." She also stated she likes Burghardt, and finds him helpful. [C testimony; cross exam]. In that context, C's descriptions of Burghardt's offending conduct do not rise to the level of fighting, intimidating, or abusing under the rule. This violation is not proven by a preponderance of the evidence.

16-60 O. Failure to maintain satisfactory working relationships with co-workers, other City employees or the public

As described in detail above, Burghardt's comments to C exasperated her to the point that she felt compelled to approach a supervisor about it, and when that supervisor failed to act, she complained to a different supervisor. She testified credibly that Burghardt's persistent needling and offensive comments prevented her from performing her work. For reasons stated above, Burghardt's denials were less credible. If Burghardt felt C made offensive comments to him first and, for purposes of this rule, those comments were destructive to their working relationship, he was free to take his complaint to a supervisor. The important point is Burghardt's

comments must be viewed under Career Service Rules separately from any made by C. Teasing by co-worker A of another co-worker B, which persists even after B clearly asks A to desist, and causes B to seek a supervisor's intervention, constitutes a violation of CSR 16-60 O.

16-60 R. Discrimination or harassment of any employee or officer of 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 any employee may be disciplined and the imposition of such discipline does not constitute an admission that City violated any law.

Under this rule, discrimination and harassment are actionable for derogatory comments based on gender, marital, or any other protected status. The Agency claimed Burghardt was in violation of this rule for both comments to C on May 25: "I heard your husband is having an affair with [name of a former Agency employee];" and "when is your daughter going to get pregnant?" In order to prove discrimination under federal law, an appellant would have to prove he or she was a member of a protected class under local, state, or federal law, that the Agency took an adverse action against her, and that the adverse action and her protected class were closely connected. In order to prove harassment under federal law, an appellant would have to prove either severe or pervasive conduct of which the Agency had or should have knowledge and a connection to a protected status. Career Service Rules broaden the scope of prohibited activity to all employees, and to a broader range of conduct, including, pertinently here, derogatory comments [CSR 16-60R]. Nonetheless, the element of demonstrating a connection between wrongful conduct and some protected status remains. Thus, the Agency must prove Burghardt made derogatory comments and the comments were derogatory because of C's protected status. That the statements were derogatory has already been amply established, above. The Agency claimed C's protected status was both that of her gender and her marital status.²

With respect to gender, Burghardt's first statement, "I hear your husband is having an affair..." while conceivably slanderous, or defamatory toward C and her spouse, does not connect the derogation with C's gender, any more than if Burghardt had stated "I hear your son, cousin, nephew, friend, or father is having an affair." Burghardt's second statement, "when is your daughter going to get pregnant?", does not engender a protected status of C. No violation is found under this rule.

² O'Malley testified the protected status involved was sexual orientation and gender; however, considering all the other evidence, and Appellant's failure to move for dismissal of that claim at the end of the Agency's case, it is clear O'Malley's reference to sexual orientation discrimination was intended as gender discrimination.

DEGREE OF DISCIPLINE

In assessing discipline, appointing authorities are directed to consider the severity of the offense, the employee's past record, and the penalty most likely to achieve compliance with the rules. In re Sawyer and Sproul, CSA 33-08, 17 (1/27/09).

A. Severity of the proven violations

Without considering his past record, likelihood of compliance, and other contextual attributes, the proven violations in this case were not egregious. The direct target of Burghardt's derogatory remarks on May 25 was not devastated, rather she seemed more annoyed, and appeared to be bothered more by Burghardt's persistence than what he said, because he interfered with her work. Burghardt's co-workers appear to like him, and find him to be knowledgeable and helpful, despite his tendency to make inappropriate remarks and engage in gossip. The most egregious violations - threats, abuse, and discrimination – were not proven.

B. Past record

In addition to the present case, Burghardt was also suspended in 2007 for making derogatory remarks. Two different supervisors have advised him through informal counseling and formal comments in his past PEPRs that he needed to be far more sensitive in his verbal repartee.

C. Likelihood of compliance.

Despite the Agency's past advisements, comments, and discipline, Burghardt has continued to engage in the same conduct that resulted in a four-day suspension in 2007. On a positive note, both co-workers who testified in this case stated Burghardt's department has improved since this case started. It is a concern, however, that throughout this case, including during hearing, Burghardt continued to point out misbehavior by others, while failing to acknowledge his own wrongdoing. In his "apology" letter, [Exhibit 3], Burghardt claimed he was simply misunderstood, negating his "sincere apology." He repeatedly denied past wrongdoing, claiming he would have been absolved if he had been allowed to dispute his earlier PEPRs. Consequently, the likelihood of future compliance remains unknown.

D. Burghardt's claim regarding comparative discipline.

One of Burghardt's principal contentions was there was a culture of gossip in the Agency, yet others were not punished, or punished less severely. The Career Service Board recently re-emphasized that discipline, under the Career Service Rules is not comparative, rather each case stands on its own merits, ³ [In re Napoli

³ Presumably, with some exceptions such as an appellant claim of indirect discrimination, where comparative behaviors and

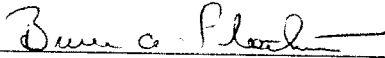
, CSA 74-10, 4 (CSB 8/18/11). In other words, Career Service Rules do not provide for a comparative standard, such as in tort law, where the penalty for wrongdoing may be partially or entirely offset by the wrongs of the opposing party. Even if there were such a standard, Burghardt provided no evidence others were not punished or punished less severely for similar conduct.

In view of Burghardt's continued failure to heed the Agency's requirement that he curb harmful gossip and derogatory comments, the Agency's choice to suspend Burghardt for 10 days was reasonably related to the proven violations, his past history, and the likelihood of reform. O'Malley's decision was not clearly excessive, and was based substantially upon considerations supported by a preponderance of the evidence. In re Owens, CSA 69-08, 8 (2/6/09), citing In re Mounjim, CSA 87-07, 18 (7/10/08), and In re Delmonico, CSA 53-06, 8 (10/26/06).

ORDER

The Agency's suspension of Burghardt for 10 days, beginning June 13, 2011, is AFFIRMED.

DONE September 20, 2011.



Bruce A. Plotkin
Career Service Hearing Officer

comparative adverse actions are integral to Claim.

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition Career Service Board to review this DECISION, in accordance with the requirements of CSR 19-60 through 19-80, within fifteen calendar days after the date this order is delivered as stated in the attached certificate of delivery. **Please note the 15-day deadline begins from the date sent from the Hearings Office, not the date you receive it.** Career Service Rules are available as a hyperlink at <http://www.denvergov.org/jobs/PublicNoticesandAnnouncements/CareerServiceAuthorityRuleRevisions/tabid/433593/Default.aspx>

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.

CERTIFICATE OF DELIVERY

I certify that, on September 20, 2011, I delivered a correct copy of this DECISION to the following, in the manner indicated:

| | |
|--|--------------|
| Mr. Jacek Burghardt, jaceksburghardt@gmail.com | (via email); |
| Michael O'Malley, Esq., Michaelomalleylaw@hotmail.com | (via email); |
| Ms. Kathy Hand, Kathy@legalnavigators.net | (via email); |
| City Attorney's Office at Dlefilng.litigation@denvergov.org | (via email); |
| HR Services, HRServices@denvergov.org | (via email). |

