

8/28/08

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 81-07 A

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JACK BURGARDT,

Appellant/Respondent,

vs.

CLERK AND RECORDER'S OFFICE, City and County of Denver,

Agency/Petitioner.

This matter is before the Career Service Board ("Board") on the Agency's Petition for Review. Having reviewed and considered the full record before it, the Board **REVERSES** the Hearing Officer's Decision of March 28, 2008, on the grounds outlined below.

I. BACKGROUND

On November 1, 2007, Appellant made the following remarks to two Hispanic coworkers: "How much does it cost for your people to get across the border these days?" and "Oh come on, Tina, how much is it costing your people to get across the border these days, because you know that's how you got here." Appellant's coworkers were shocked and upset about the comments, and later in the day, one of the coworkers complained to her supervisor. The Agency conducted an investigation and concluded that a four day suspension was appropriate given the nature of the misconduct, the importance of the policy being enforced, and Appellant's recent three day suspension for violating office policy regarding use of unauthorized software.

The Hearing Officer reversed the disciplinary action. Even though Appellant's comments were "wrongful in the context of the workplace" and "harmful" to his coworkers, nevertheless, the Hearing Officer concluded that Appellant was not "at fault" for his conduct because he did not intend to harm his coworkers and, because he grew up in Poland, he did not fully appreciate the cultural differences in this country, or the kind of remarks that would be considered offensive. The Hearing Officer found that Appellant did not violate any career service rules.

II. FINDINGS

A. Erroneous Rules Interpretation

The Agency maintains that the Hearing Officer erroneously interpreted Career Service Rules 16-60 O. and 16-60 R., and the Board agrees. CSR 16-60 O. provides that an employee may be disciplined for failure to maintain satisfactory working relationships with coworkers, other City employees, or the public. While the parameters of this rule may not be easy to define, it is clear the Hearing Officer interjected an element of proof that is not required by the plain language of the rule.

First, the Hearing Officer concluded that CSR 16-60 O. is violated by "conduct an employee knows, or should have known in the exercise of good judgment, is harmful to the trust and goodwill needed between employees to accomplish the agency's mission." Decision, p. 5. However, in the very next sentence of her decision, the Hearing Officer created a different test for determining a violation of the rule: 1) wrongful conduct toward a coworker; 2) committed with intent or knowledge of its wrongfulness, and 3) causing harm to a coworker relationship. Not only are these standards in conflict with each other, but more importantly, there is no requirement under CSR 16-60 O. that an employee must act with a specific intent to cause harm.

The Board finds that CSR 16-60 O. is violated by conduct that an employee knows, or reasonably should know, will be harmful to coworkers, other City employees, or the public, or will have a significant impact on the employee's working relationship with them. The employee's conduct is measured against a reasonably objective standard: would a reasonable person standing in the place of the employee have known that his conduct would be harmful to another person or have a significant impact on his working relationship with that person? Similarly, while a coworker's reaction to the conduct is one factor to consider in assessing harm or impact, that assessment also involves a reasonably objective standard: would a reasonable person standing in the place of the coworker have found the employee's conduct harmful or significantly impacting their working relationship?

Having established this standard, the Board cautions that a violation of CSR 16-60 O. does not encompass every minor disagreement, every slight, every misunderstanding, or every offensive remark that occurs in the work environment. The conduct must rise to the level of causing harm or having significant impact and each case must be assessed on its own facts. Depending upon individual circumstances, a single incident of misconduct may be enough to reach this threshold, while the harm to the coworker or impact on the relationship does not necessarily require a showing that the employee and coworker would be incapable of working together in the future. See, *In re Strasser*, CSA 44-07 (CSB 2/29/08).

Additionally, the Board finds that CSR 16-60 O. gives City employees adequate notice of the type of conduct for which they may be disciplined. The rule imposes no more and no less than the requirement that employees conduct themselves with the

civility, respect and sensitivity of a reasonably prudent person who is working with a diverse mix of people in a government agency.

Under the correct interpretation of CSR 16-60 O., the Board finds that Appellant failed to maintain a satisfactory working relationship with his coworkers. A reasonable person in Appellant's position would have known that his comments were likely to offend and cause harm to his coworkers, particularly his second comment. That remark was not just idle curiosity about the cost of crossing the border; rather, it accused Appellant's coworker, in the presence of at least one other coworker, of coming to this country illegally. Appellant's coworkers were understandably upset by the remarks, and, any reasonable person who heard the comments would have found them offensive and insulting.

Similarly, the Hearing Officer misinterpreted CSR 16-60 R., which provides as follows:

Discrimination or harassment of any employee or officer of the 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 an employee may be disciplined and the imposition of such discipline does not constitute an admission that the City violated any law. (emphasis added).

After citing a series of cases in which the Supreme Court established an "objective standard of reasonableness" for determining harassment under Title VII, the Hearing Officer concluded that a single incident of misconduct under CSR 16-60 R. required the Agency to prove that Appellant intended his comments to be derogatory. This rule has no requirement that derogatory statements or conduct must be accompanied by derogatory intent, nor does it require an agency to prove a violation of state or federal anti-discrimination laws. Under a reasonably objective standard, the Board finds that Appellant's comments violated CSR 16-60 R.

B. Policy-setting Precedent

While policy-setting precedent is often cited as a ground for appeal to the Board, few cases involve the kind of precedent that will actually impact future disciplinary actions throughout the City. This case is the exception.

The Board is troubled by the Hearing Officer's decision not to hold Appellant accountable for his own actions. Specifically, the Hearing Officer found that Appellant was not "at fault" for his inappropriate remarks because he grew up in a foreign country (even though he has lived in the United States for the past 13 years), and did not fully

appreciate cultural differences or the kinds of comments that might be deemed offensive. However, a lack of awareness as to cultural differences does not excuse inappropriate conduct in the workplace. All City employees, regardless of where they were born or what experiences they may have had prior to working for the City, have an obligation to know the conduct required of them under the career service rules.

Moreover, by finding that Appellant did not know the kind of comments that might be deemed offensive in the workplace, the Hearing Officer's decision implies that an employee must be informed of every conceivable act of misconduct under the career service rules before disciplinary action may be imposed. Here, Appellant was not only aware of City policies prohibiting discrimination and harassment, he received training on those policies. Contrary to Appellant's belief, the City is not required to provide him with a comprehensive list of every comment that would be considered offensive or derogatory in the workplace.¹ It is the employee's obligation to use common sense and good judgment in applying the training he has received to his own conduct in the workplace.

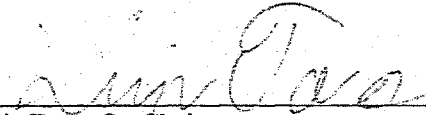
And finally, absolving Appellant of responsibility for his own actions would encourage the creation of different standards of conduct based on perceived differences in culture, upbringing, background, personal experiences, or purported ignorance of what is expected in the workplace. An employee who grew up in a fishing village in Alaska is held to the same standards of conduct as an employee from inner-city Baltimore, or rural Oklahoma; those standards apply equally to all City employees.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision, dated March 28, 2008, is **REVERSED**, and the disciplinary action imposed on Appellant by the Agency is **AFFIRMED**.

SO ORDERED by the Board on August 21, 2008, and documented this
28th day of August, 2008.

BY THE BOARD:



Luis Toro, Co-Chair

¹ During his opening statement, Appellant stated: "The City doesn't provide any classes which teach you what you're supposed to say, what you're not supposed to say." (Transcript, 12:15-19).