

**HEARING OFFICER, CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO**  
Appeal No. 87-09

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**EFREM CARTER,**  
Appellant,

vs.

**DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,**  
and the City and County of Denver, a municipal corporation, Agency.

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**I. INTRODUCTION**

The Appellant, Efrem Carter, appeals his dismissal from the Denver Sheriff's Department (Agency) on September 18, 2009, for alleged violations of specified Career Service Rules and Agency regulations. A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on January 8, 2010. The Agency was represented by Jennifer Jacobson, Assistant City Attorney, while the Appellant was represented by Eric James, Esq. Agency exhibits 1-5 were admitted. The Appellant offered no additional exhibits. The following witnesses were called to testify for the Agency: the Appellant; Deputy [REDACTED]; Deputy [REDACTED]; Deputy [REDACTED]; [REDACTED]; Deputy [REDACTED]; Deputy Manager of Safety Mary Malatesta. The Appellant testified on his own behalf, and also called Deputy [REDACTED] during his case-in-chief. For reasons stated below, the Agency's decision to dismiss Mr. Carter from employment is AFFIRMED.

**II. ISSUES**

The following issues were presented for appeal:

- A. whether the Appellants violated any of the following Career Service Rules: 16-60 E.3; L; M; N; or O;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss him conformed to the purposes of discipline under CSR 16-10.

### III. FINDINGS

Efrem Carter was a deputy sheriff at the Denver County Jail for three years. The primary duties of a deputy sheriff are the care, custody, and control of inmates. Carter was familiar with the Agency's rules of conduct. On April 5, 2009, while on duty in building 12, Carter made a joking announcement on the public address system, using words similar to "if you can guess your building officer's sexual orientation, you will get a free phone call." Deputies ██████, and ██████ saw Carter make the announcement. In addition, Deputies ██████, ██████ and ██████ heard the announcement and recognized Carter's voice. One deputy was offended by the announcement. The five witness-deputies agreed deputies occasionally joked around by using the public address system to make non-business announcements. All agreed, however, they had never heard a deputy joke about sexual orientation before, and found it inappropriate, and potentially dangerous, as such information can undermine a deputy's authority with inmates. Carter acknowledged the potential danger. [Carter interview, Exhibit 8 CD, track 3 @ 12:55]. As if to highlight the matter, several inmates inquired about whom the comment was made. [█████ testimony]. Prior to this incident, each of the witnesses enjoyed a good working relationship with Carter. None of the witnesses are close friends outside work.

A few minutes after Carter's sexual orientation announcement, music was played on the intercom. ██████ complained to Sgt. Hitchcock that the music was bothering inmates, but said nothing about the sexual orientation comment preceding the music. Later the same day, Carter was called to a Sgt. Hitchcock's office. Hitchcock, referring only to the music, told Carter not to play around on the intercom. Carter replied "it wasn't me" and offered to find out who was using the intercom inappropriately. He later reported to his superiors that Deputy ██████ made the sexual orientation announcement. ██████ was a new, probationary employee at that time.

One week after the sexual orientation announcement, Carter, believing ██████ had reported the sexual orientation comment, approached ██████ when they were alone and asked ██████ why he told SHitchcock about the incident. When ██████ did not answer, Carter insisted "█████, I'm talking to you, man, why did you rat me out like that?" [Carter testimony]. Hitchcock learned of that encounter and called in Carter to have him explain the incident. Carter appeared with his representative, Deputy Herrera. Carter acknowledged making the ratting out comment to ██████.

An Internal Affairs investigation was opened regarding the public address incident. Carter and Herrera sought out ██████. They found ██████ talking with his representative. Carter and ██████ asked ██████'s representative to leave so they could speak to ██████ alone. After ██████'s representative moved away, Carter told ██████ "I know where your priorities lie, you'd better watch your back." Carter also contacted ██████ the following day, April 13, about the April 5 public announcement. ██████ was intimidated and threatened by Carter's statements.

Carter also contacted [REDACTED] after the incident. Carter told [REDACTED] to give a false statement to Internal Affairs, specifically, to tell IA he [REDACTED] did not know who made the April 5 sexual orientation announcement. After Hitchcock ordered Carter not to discuss the incident with anyone, Carter telephoned [REDACTED] at least twice, and left a text message for him. [REDACTED] did not respond to the subsequent phone or text messages.

Carter was interviewed by Internal Affairs on April 29. He denied making the April 5 sexual orientation announcement. At hearing, Carter also denied making the announcement, and testified he observed Deputy [REDACTED] make the sexual orientation announcement on April 5. [Carter testimony].

A pre-disciplinary meeting was held on September 3, 2009. Carter attended with a representative. He denied having made the sexual orientation comment, admitted asking [REDACTED] why he "snitched," and denied harassing or intimidating any witness to the investigation. [Exhibit 1-4; Exhibit 7].

On September 18, 2009, the Agency terminated Carter's employment. [Exhibit 1]. Carter then filed this appeal timely on October 2, 2009.

#### IV. ANALYSIS

##### A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10A.1.a., as a direct appeal of a dismissal. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

##### B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to dismiss the Appellant complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

##### C. Career Service Rule Violations

**1. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to... 3. Lying to superiors... with respect to official duties, including work duties, disciplinary actions...**

At issue here are three Agency allegations that Carter lied to superiors: (a) in denying he made the April 5 sexual orientation announcement on the Building 12 intercom; (b) in denying he attempted to intimidate [REDACTED] after he believed [REDACTED] reported

him as having made the sexual orientation announcement; (c) in denying he told ██████ to lie to IA. This rule almost always requires an analysis of credibility.

In determining credibility, the quality of testimony is controlling, not the number of witnesses. Consequently, even though five witnesses identified Carter as having made the offensive public announcement, and only Carter denied it, the truth may not be decided simply by the number of witnesses for each side.

Factors to consider in evaluating the credibility of a witness include: whether the witness had an opportunity to see or hear the events about which he testified; whether the testimony was plausible; whether the testimony of the witness was consistent with other testimony or evidence; whether there was a motive to collude or fabricate testimony; whether the witness had a bias, hostility, or some other attitude that affected the truthfulness of the testimony; whether the witness hoped for or expected to receive a benefit for testifying; whether the witness had an interest in the outcome of the case<sup>1</sup>; and whether a witness had been convicted of a crime or has engaged in criminal conduct;<sup>2</sup> Kinney v. People, 187 P.3d 548 (Colo. 2008); AMJUR Witnesses §1003-1007 (2009).

a. Sexual Orientation Announcement. Carter did not challenge the credibility of any of the witnesses against him. ██████ and ██████ directly observed Carter make the sexual orientation announcement. ██████, ██████ and ██████ recognized the voice on the intercom as that of Carter. Their testimony, even discounting ██████' testimony,<sup>3</sup> was plausible, and corroborated by testimony of each other. Most importantly here, these Agency witnesses had a good relationship with Carter and had no close friendship with each other, thus eliminating the likelihood of bias or, conversely, a motive to collude against Carter. Finally, none of the Agency witnesses had an interest in the outcome of this case.

On the other hand, Carter's recollections were inconsistent. During his initial interviews, he stated he did not know who made the April 5 announcement, [Malatesta testimony; Exhibit 8], but later identified ██████ as the speaker. [*Id.*]. Carter has an obvious interest in the outcome and an inherent motive - the preservation of his job - to fabricate the identity of the person who made the April 5 announcement. The testimony of ██████, ██████, ██████, and ██████, for reasons stated here, was more compelling than that of Carter. Consequently, I conclude the Agency's determination, that Carter lied to superiors about the identity of the person who made a sexual orientation announcement on April 5, 2009, is supported by a preponderance of the evidence.

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<sup>1</sup> An appellant always has an interest in the outcome of the his case, although the interest may or may not affect the truthfulness of the testimony.

<sup>2</sup> With respect to an appellant, prior convictions or criminal conduct are not evidence of CSR violations in the present case or evidence the appellant is a person who is disposed to break rules, but convictions or prior bad conduct may be considered to evaluate the appellant's truthfulness. FRE 609; CRS §13-90-101

<sup>3</sup> See below at discussion under IV C. 1. c.

b. Carter's statements to [REDACTED].

Unlike the disagreement above, Carter and [REDACTED] largely agree on the words exchanged between Carter and [REDACTED] on April 12 and 13. The disagreement, for purposes of this rule violation, is whether [REDACTED] was reasonably intimidated by Carter telling him "why did you rat me out" and "you better watch your back." [REDACTED] claimed the encounter was intimidating, while Carter denied trying to intimidate [REDACTED].

Carter agreed he said "[REDACTED], I'm talking to you, man, why did you rat me out like that?" They were alone at the time. [REDACTED] had already indicated to Carter his unwillingness to talk about Carter's concerns, and Carter insisted with a preface that is patently aggressive, "I'm talking to you," followed by a question – "why did you rat me out" - that a reasonable recipient, under the circumstances, could interpret only as attempted intimidation, not a simple request for information. Since the statement was intimidating, Carter's denial is a violation of this rule.

In addition, Carter and [REDACTED] disagree whether Carter told [REDACTED] "I know where your priorities lie, you'd better watch your back." Resolving the discrepancy is also a question of credibility. In that regard, the following circumstances are relevant. Carter did not deny [REDACTED] was reticent to report him; nor did Carter dispute that [REDACTED] reported Carter's comments only because he felt intimidated and threatened; most importantly, [REDACTED] had nothing to gain and much at risk - to be labeled a "snitch" - for reporting Carter, while Carter had little to lose and much to gain by denying his comments to [REDACTED]; [REDACTED] had no bias or other basis to fabricate his testimony; finally, there was nothing in [REDACTED] demeanor or answers at hearing to suggest he was not sincere. For these reasons, [REDACTED] testimony that Carter's said to him "you'd better watch your back" is more convincing, by a preponderance of the evidence, than Carter's denial. Consequently, Carter was dishonest in violation of CSR 16-60 E., when he denied to his superiors that he attempted to intimidate [REDACTED].

c. Carter's contact and attempted contacts with [REDACTED].

Carter did not dispute that he contacted [REDACTED] about the April 5 sexual orientation announcement. They diverge over whether Carter told [REDACTED], in essence, to lie to Internal Affairs about the incident.

If Carter's version of the events on April 5 was correct, [REDACTED], not Carter, made the sexual orientation announcement. If Carter was truthful, then [REDACTED] would have a motive to claim Carter made the announcement, since [REDACTED], particularly as a probationary employee, would face discipline for dishonesty. However, for reasons stated above, it is likely, that Carter made the announcement, principally based upon the direct observations of other witnesses who had no motive to lie. Consequently, I find the Agency's proof is sustained, by a preponderance of the evidence, that Carter lied to IA when he denied he asked [REDACTED] to lie to IA about who made the April 5 sexual orientation announcement.

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

The Agency claimed the Appellant violated the following written policies.

Denver Sheriff Department Rules and Regulations

200.4 Deputy Sheriffs and employees shall not depart from the truth, knowingly make misleading statements or falsify any report, record, testimony or work related communication.

The same facts which establish a violation of CSR 16-60 E. also establish a violation of this Agency rule and, consequently, establish a violation of CSR 16-60 L.

200.13 Deputy Sheriffs and employees shall not disobey, neglect, or refuse to obey, an lawful order of a supervisor.

After Hitchcock ordered Carter not to discuss the case with anyone, Carter tried unsuccessfully to contact [REDACTED]. While Carter's attempted contact violated other Agency and Career Service Rules, a failed attempt to disobey a lawful order is not a violation of this rule.

200.15 Deputy Sheriffs and employees shall not willfully or intentionally display any disrespectful, insolent or abusive language or behavior towards any supervisor, department employee...

Carter's admonitions to fellow employee [REDACTED], accusing him of "snitching" or "ratting," and to "watch your back" were inherently disrespectful and abusive. It was determined, above, that Carter's denial he made such statements was unreliable. Consequently, Carter violated this departmental rule.

Denver Sheriff Department Orders

D.O. 1530.1 Internal Affairs Bureau

7. Procedure

(D) When a Deputy Sheriff or Civilian becomes aware that he/she is the subject or witness of an investigation, he/she shall not discuss their testimony or participation relating to the investigation, except with his/her attorney or a member of the Internal Affairs and Civil Liabilities, until the case is closed.

[REDACTED] stated Carter approached him approximately April 23, 2009, and told him to lie to Internal Affairs about the identity of the announcer.<sup>4</sup> Carter denied telling

<sup>4</sup> [REDACTED] interview with IA took place on May 7, 2009. At that time [REDACTED] said Carter approached him "approximately

██████ to lie, stating he told ██████ only to tell the truth to IA. It was established, above, that Carter did make the April 5 announcement, and that Carter had a good relationship with ██████ so that ██████ had no reason to fabricate who made the announcement. Since ██████ did not make the sexual orientation announcement, as alleged by Carter, and he had no other motive to cause trouble for Carter, then ██████' testimony, that Carter told him to lie to IA, is more credible than Carter's denial. Carter acknowledged he was the subject of an investigation by telling ██████ to lie to IA. For these reasons, Carter's discussion with ██████ about the IA investigation into the April 5 sexual orientation announcement violated this Departmental Order.

#### D.O. 2420.1 Sexual Harassment

#### 4. Definition and Examples:

A. Definition: the Denver Career Service authority Rules and Regulations, Section 15-102, defines sexual harassment as any unwelcome sexual advances, requests for sexual favors, *or other verbal or physical contact of a sexual nature*<sup>5</sup> when:

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment.

There are two types of sexual harassment: quid pro quo—where submission to harassment is used as the basis for employment decisions; and hostile environment—where harassment creates an offensive working environment. In re Norman-Curry, CSA 28-07 and 50-08, 10 (2/27/09), citing Hicks v Gates Rubber Co., 833 F. 2d 1406, 1413 (10th Cir. 1987).

The first form does not apply here. The issue is whether Carter's public announcement may be considered as having created a hostile work environment for Deputy ██████.

A hostile work environment occurs when an employee is subjected to comments of a sexual nature, offensive sexual materials, or unwelcome physical contact as a regular part of the work environment. Generally, a single incident will not be considered hostile environment harassment unless it is outrageous conduct. See, e.g. Hicks, *supra*. Since all witnesses agreed the announcement was a unique occurrence, it cannot be considered pervasive. There was no evidence the comment was so outrageous that, alone, it created a hostile environment. ██████ taking offense at the comment is insufficient to establish a hostile work environment. The Agency failed to prove this claim.

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two weeks ago" and asked him to lie to IA. [Exhibit 6-24; ██████ testimony]. Two weeks before May 7 was April 23.  
<sup>5</sup> Emphasis added by the Agency.

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

█████ testified he felt threatened and intimidated when Carter told him "I heard you tried to rat me out last week, I know where your priorities lie, you'd better watch your back." Those statements are inherently menacing, unless the context was joking or otherwise non-threatening. Carter denied making any threatening statements to █████. Thus, the issues are whether Carter spoke those or similar words and, if so, in what context. Here, as above, credibility is paramount. The determinative circumstantial evidence is as follows.

Carter acknowledged he asked █████'s representative to step away before talking to █████. Carter also admitted asking █████ why he "snitched," and did not claim the comment was joking. █████ and Carter had no previous bad encounters or other reason to undermine the other. The most telling circumstantial evidence is that █████ risked retaliation for "snitching," a powerful disincentive to fabricate Carter's statements, while he had nothing to gain by lying. In light of these circumstances, it is likely, by a preponderance of the evidence, that █████ spoke truthfully when he testified Carter intimidated and threatened him. Based upon these factors, the Agency proved Carter violated this rule by preponderant evidence.

**8. CSR 16-60 N. Intimidation or retaliation against an individual who has been identified as a witness, party, or representative of any party to any hearing or investigation relating to any disciplinary procedure, or any violation of a city, state, or federal rule, regulation or law...**

The questions under this rule are whether the IA investigation was already underway when Carter approached █████ or █████, and if so, whether Carter intimidated either of them. The rule does not contemplate attempted intimidation that is unsuccessful.

Malatesta testified Carter's attempts to contact █████ after the IA investigation was underway were attempts to intimidate him. [Malatesta testimony]. However, unlike █████, █████ did not feel intimidated by Carter. The Agency failed to prove Carter violated this rule with respect to █████.

While it has already been proven that Carter intimidated █████, this rule also contemplates that the intimidation or retaliation took place during the course of an investigation. Carter was ordered to be interviewed by IA on 4/15/09, [Exhibit 6-16].

However, it was unclear whether Carter was aware, or should have been aware, the investigation was underway when he intimidated [REDACTED] on 4/12/09. Therefore a key element of this violation is not established.

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

The same evidence that established Carter violated CSR 16-60 M., by threatening and intimidating [REDACTED], establishes a violation of this rule. Having established that Carter violated Career Service Rules 16-60 E., L., M., and O., what remains is to determine whether dismissal was an appropriate degree of discipline under CSR 16-20.

**V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

**1. Severity of the established offenses.**

The original incident underlying this case, Carter's offensive public announcement on April 5, would not, in itself, have resulted in termination. [Malatesta testimony].<sup>6</sup> It was only after Carter lied about the incident to superiors, and attempted to influence and intimidate witnesses, that the Agency found cause to terminate him. *Id.* The Denver Sheriff's Department has established that dishonesty by a deputy will be met with severe sanctions. [Malatesta testimony; *In re Weeks*, CSA 26-09, 7 (7/20/09), *aff'd on other grounds*, *In re Weeks*, CSB 26-09 (12/23/09); *In re Rogers*, CSA 57-07 (3/18/08)]. Where dishonesty occurs, as was proven in this case, as an attempt to subvert an investigation, enormous resources must be employed to elicit the truth, honest employees are subjected to close and undoubtedly uncomfortable scrutiny, and a core value of the agency is undermined.<sup>7</sup> When also considering Carter's attempts to influence witnesses, and considering his attempt to implicate an innocent co-worker, [REDACTED], Malatesta's conclusion, that this was an egregious violation of Department and Career Service Rules, is justified. "The cover up was worse than the crime." [Malatesta testimony]. Had Carter been successful in implicating [REDACTED], it could have been disastrous to [REDACTED]' career.

<sup>6</sup> Malatesta was the decision maker for discipline. [Exhibit 1].

<sup>7</sup> Malatesta recently stated "one of the things we require – that has to be the basis for our functioning as a Department of Safety and the Sheriff's Department – is being able to rely on the complete honesty of our deputies." *Weeks, supra*. Malatesta's statements about her approach to discipline in this case were consistent with her statements in previous cases.

2. Prior discipline.

Carter received a verbal reprimand in 2008 for abuse of sick leave. [Exhibit 4]. Malatesta appears not to have considered this prior offense. [see Malatesta testimony]. He was suspended for five days in 2007 for use of excessive force. Malatesta considered this prior discipline, [i/d], however, the seriousness of the proven offenses was sufficient, even without considering Carter's past discipline, to impose dismissal.

3. Penalty most likely to achieve compliance.

Through the date of hearing, Carter continued to deny he made the April 5 sexual orientation announcement, and continued to deny that he attempted to subvert the Agency's investigation. Malatesta was justified in finding, therefore, that a lesser penalty would have been unlikely to correct the offending behaviors.


The Hearing Officer must not disturb the Agency's determination of the severity of the discipline unless it is clearly excessive or based substantially upon considerations not supported by a preponderance of the evidence. In re Weeks, CSB 26-09 (12/23/09). Malatesta's decision was corroborated by: a preponderance of the evidence; her determination of credibility; Carter's past record; and the (lack of) likelihood that Carter would reform. Malatesta's detailed recitation of the Agency's investigation, audio and video interviews of witnesses, Carter's prior disciplinary history, recommendations from division chiefs and independent monitor, and consideration of the full range of penalties, further demonstrated the degree to which she scrutinized the underlying bases of her findings. Since Malatesta's decision to dismiss Carter was based upon a preponderance of the evidence and was not clearly excessive, her determination of discipline must be sustained.

**VI. ORDER**

A. The Agency's termination of the Appellant's employment on September 18, 2009, is **AFFIRMED**.

B. The testimony in this case raises concern about the possibility of reprisal for "snitching." In order to ensure witnesses are protected from potential repercussions for their testimony, I order, *sua sponte*, the redaction of witness names from the published materials. The case file, which contains many references to witnesses, shall be sealed for the same reason.

DONE February 17, 2010.

  
Bruce A. Plotkin  
Hearing Officer  
Career Service Board