

**HEARING OFFICER, CAREER SERVICE BOARD,  
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 120-03

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**RICHARD CHAVEZ**, Appellant,

Agency: DEPARTMENT OF SAFETY, COMMUNITY CORRECTIONS DIVISION,  
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

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A hearing in this matter was held by Hearing Officer Joanna Lee Kaye on November 12, 13, 14, 17, 20 and 24, 2003 in the Career Service Authority Hearings Office, and on site at the Division of Community Corrections on December 8, 2003. Assistant City Attorney Robert A. Wolf represented the Department of Safety, Division of Community Corrections (Agency). Community Corrections Division Director Thomas O. Moore served as advisory witness for the Agency. Richard Chavez (Appellant) was present and was represented by John Mosby, Esq. At the close of the hearing, the Hearing Officer requested written Closing Arguments, which the parties have submitted.

**MATTER APPEALED**

Appellant, a Probation Officer in Community Corrections, appeals the Agency's decision to dismiss him for allegedly filing a false police report against his supervisor, and for various other alleged acts of failing to maintain satisfactory relationships with co-workers.

For the reasons set forth below, the Agency's action is **AFFIRMED**.

**ISSUES**

1. Whether the pre-disciplinary meeting was sufficient to protect Appellant's due-process rights.
2. If so, whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the actions alleged.
3. If so, whether the actions shown constitute cause to discipline Appellant.

4. If so, whether Appellant's dismissal is reasonably related to the seriousness of the offenses in question.

### FINDINGS OF FACT

Based on the evidence presented at the hearing, the Hearing Officer finds the following to be fact:

1. Appellant was a Probation Officer (PO) in the Agency's Pretrial Services Division (Pretrial) since 1998. The function of PO's is to gather demographic data and criminal histories on all new arrestees and make bond recommendations to judges in Courtroom 12T. The PO's arrive in Courtroom 12T at 5:00 a.m. to collect and return the data to the administrative staff in Pretrial. They then research the information and return to Courtroom 12T for the 10:00 a.m. docket to advise judges of the bond recommendations. The nature of the work and the small size of the staff require the employees to work closely and efficiently together under critical time constraints, to make decisions affecting the lives and liberty of citizens. Therefore, the ability of the employees to function as a team is essential in Pretrial.
2. The offices for Pretrial are located on the third floor of 200 West 14<sup>th</sup> Avenue. Courtroom 12T is located in the City and County Building, which is across the street from Pretrial.
3. At the time of his dismissal, Appellant worked with two other PO's in Pretrial. These were Leroy Adams (Adams) who began in 1996, and Lora Abeyta (Abeyta) who began in 1998 shortly before Appellant. There were also two Administrative Assistants, K. Ely Tannenbaum (Tannenbaum) and Selena Quintana (Quintana). Appellant's supervisor was Virgil Robinson (Robinson).
4. With one exception, Appellant's co-workers each described Robinson as behaving in a professional manner, and treating Appellant no differently than he treated any other employee. The one witness described Robinson as swearing at Appellant on multiple occasions. This employee transferred from the Agency in 2000, and refused a proposed transfer back to the Agency because she believed Robinson was a "demon."
5. Appellant was suspended in May of 2001 for a period of five days for preparing bond recommendations for relatives on two occasions. After his return, Appellant's fellow employees perceived a change in Appellant's general behavior and attitude. He started acting suspicious of everyone, locking his door just to go to the bathroom (see, Exhibit 2). Appellant threatened to sue the Agency and its employees in the presence of Quintana and Adams on one occasion. This left them with the impression Appellant intended to retaliate against his co-workers for the suspension action.

6. During the two years previous to Appellant's dismissal, Abeyta found Appellant's demeanor toward her to be generally intimidating, aggressive, hostile and confrontational. Appellant raised his voice at her many times, and she saw him interact with other employees inappropriately during staff meetings. Abeyta observed Appellant engaging in what she called "venting episodes" (see, Exhibit 1).
7. During 2001 and the first half of 2002, Adams observed Appellant blaming others for his own mistakes on multiple occasions. He observed that when other employees pointed out errors in Appellant work, Appellant responded it was somebody else's fault, or that others were deliberately trying to cause him to make the mistakes. Adams observed Appellant denying errors Robinson had discovered when reviewing the PO's' work. Adams observed that interchanges between Robinson and Appellant frequently ended in "shouting matches."
8. On July 24, 2001 Adams was on vacation, as was announced on the schedule board for a month. Appellant and Adams typically rotated to assure coverage. Abeyta and another employee observed Appellant in the office that day and asked him why he was not in Courtroom 12T. Appellant lost his temper, raised his voice, accused Quintana and Adams of "always covering" for one another and not telling Appellant anything, and insisted that someone should have told him he had to be in court (Exhibit 1).
9. On February 14, 2002 Quintana wrote a memo to Robinson detailing behaviors by Appellant that were disturbing to her. Quintana stated that during previous weeks she had started to feel unsafe in Appellant's presence. Appellant became unduly harsh with her after she brought up a mistake he had made in his paperwork. Quintana stated that Appellant "glares and stares" at her, spoke to her in a rude sarcastic manner whenever she declined his offers of assistance, and became angry when things did not go the way he wanted them to. Quintana felt that he was retaliating against his fellow employees for his suspension (Exhibit 2).
10. On March 22, 2002, Quintana detected an error in Appellant's paperwork. When she brought this to Appellant's attention, he took the paperwork and insisted that he would change the mistakes in the computer database, despite Quintana's admonishments that this was a violation of procedure. Appellant then told Quintana in a "harsh tone" with a raised voice that he knew she was keeping track of all his mistakes just to report them to Robinson. Quintana felt this accusation was unjust and felt intimidated by Appellant's harsh reaction to her. Quintana wrote a memo to Robinson detailing this event on March 23, 2002 (Exhibit 3).
11. In May of 2002 Appellant transferred to the Denver Sheriff's Department on a probationary assignment. Appellant did not pass probation and returned to Pretrial in October of 2002.
12. Adams had grown to mistrust Appellant by the time of his transfer to the Sheriff's Department. When Adams learned that Appellant was to return from the Sheriff's

Department, he told Robinson he did not want to work with Appellant and did not want him to return to Pretrial.

13. Courtroom 12T operates seven days a week, requiring Pretrial to provide bond recommendations on Saturdays and Sundays. At the time of his dismissal, Appellant and Tannenbaum (who was hired in December of 2002) were the only two employees assigned to work weekends.
14. During the late Spring of 2003, Robinson determined that there were efficiency issues with the weekend team's work methods. He arranged to come to work on Saturday, May 17, 2003 to hold a meeting with weekend staff. He directed Quintana to come to work that day as well to review Tannenbaum's work methods.
15. Robinson's office area includes two rooms, an office and a conference room. These two rooms are separated by a wall with a single doorless portal in the middle of the wall (Exhibits D-34 through D-36). The office and the conference room each have their own doors leading into the hallway. As one approaches Robinson's office area from the hallway, the door on the right leads into his office (main office door), and the door on the left leads into his conference room (conference door) (see, Exhibit D-33). The conference room is 10 ½' by 12' with a four-foot diameter hexagonal table in the middle, surrounded by four chairs.
16. Quintana, Tannenbaum and Robinson all gathered in the conference room adjoining Robin's Office at 6:15 a.m. on May 17. Appellant was still in Courtroom 12T. Robinson began the meeting with Quintana and Tannenbaum, who both observed Robinson's demeanor to be normal and businesslike during this part of the meeting. (See, Exhibit 6.)
17. Robinson left the meeting briefly at 6:30 to go retrieve Appellant, who had returned from Courtroom 12T. They went back to Robinson's conference room. Quintana was sitting in the chair at the conference table closest to the conference door, with her back to the door. Robinson sat in a chair just inside the portal adjoining the office rooms (to Quintana's right). Tannenbaum sat directly across from Robinson (to Quintana's left). When Appellant came into the conference room he sat in the chair directly across the table from Quintana, facing the door to the hallway.
18. Robinson began speaking to the meeting participants about the morning docket. Quintana took notes as Robinson spoke (Exhibit 6). Robinson asked Appellant a question about procedure and Appellant responded incorrectly. Robinson stated he was incorrect, and repeated the question. Appellant responded by saying, "Don't raise your voice at me! If you are going to raise your voice I will just leave and do my work." Quintana and Tannenbaum observed that Robinson was not raising his voice. Robinson responded, "Don't tell me what you're going to do, this is my agency and you will do as I say. We are having a meeting to get weekends straightened out and I need full cooperation." Quintana and Tannenbaum observed Appellant raising his voice and arguing with Robinson, as though Robinson was

acting threatening and hostile toward Appellant. However, Tannenbaum and Quintana both observed Robinson's demeanor to be normal and businesslike, and Appellant's reaction to be unwarranted, unjustified and inappropriate. Robinson held up his hand toward Appellant in a stopping gesture, and told him to just listen and not interrupt. Appellant said "don't point at me" and continued to repeatedly interrupt Mr. Robinson as he spoke. Neither Quintana nor Tannenbaum saw Robinson point his finger at Appellant. Both observed that Robinson began raising his voice in attempt to talk over Appellant's interruptions and get control of the meeting (Exhibit 6). Appellant stated "Don't threaten me Virgil!" Robinson responded, "I'm not threatening you, I'm telling you to answer my simple questions and keep your comments to yourself." Appellant replied, "I'm going to leave and do my work." Appellant rose from the table and began to leave. Robinson got up as well and told Appellant if he left it would be insubordination. Quintana observed Robinson to be upset by this time. (See, Exhibit 6.)

19. Appellant walked quickly by Robinson, who moved back into the portal a little to get out of Appellant's way. Appellant went to the door immediately behind Quintana's chair, which leads from the conference room to the hallway. He opened the door and rapidly walked through it. Robinson slammed the door behind Appellant. He then yelled after Appellant through the closed door, "Go on get the hell out." Quintana turned and looked at the door as Appellant opened it, and saw Appellant holding his right shoulder. Appellant stated that Robinson hit him with the door, and said he was leaving. (See, Exhibit 6.)
20. Robinson, Quintana and Tannenbaum are certain that the door slammed shut straight into its frame. They neither saw nor heard the door strike or bounce off of any object before slamming shut into the door frame.
21. Quintana and Robinson have certain been since the incident occurred that Appellant exited through the conference door. From Quintana's seat she would have seen Appellant exit through the portal leading to the main office door. Quintana did not observe Appellant walk through the portal toward the main office door. She observed Appellant walking past her toward the conference door. Quintana's back was facing that door at the moment it slammed shut as she continued to write down the unfolding series of events (See, Exhibit 6).
22. Tannenbaum's recollections of which door Appellant exited have been inconsistent. (See, Deposition of Ely Tannenbaum taken September 4, 2003, Exhibit D-37, pp. 33-40; *cf.*, Tannenbaum's testimony at hearing.) Tannenbaum could not see the main door from his seat at the conference table based on where the table was located during his deposition on September 4, 2003 (see, Exhibit D-37, pp. 83-87).
23. Tannenbaum's recollection about witnessing Appellant leave through the door and the door slamming shut after he was outside the office has been consistent. There was never any question in his mind that the door did not hit Appellant.

24. Appellant left the office immediately after the incident. He went to Police Headquarters, arriving there shortly after 6:30 a.m. He asked an officer at the front desk to make a police report, but was told he would have to wait until the investigators arrived at 9:00 a.m. Appellant did not want to wait and returned to Courtroom 12T. When he arrived there, Sargent Carrie Medina, who was manning the front desk, noticed he appeared shaken up and was breathing hard. Medina asked Appellant what was wrong. Appellant told Medina that he had gotten into an altercation with his supervisor had had tried to report an assault, but that the police would not take the report until later. Medina called dispatch and requested an officer. Shortly thereafter a police officer arrived and Appellant left with him to return to Pretrial.
25. Officers Trent Tatum (Tatum) and Scott Murphy (Murphy) arrived at Pretrial a few minutes after 7:15 a.m. to question Robinson about an assault reported by Appellant. Quintana and Tannenbaum were near Robinson's office when the officers arrived. Quintana and Tannenbaum found this very upsetting because they believed Robinson had done nothing to warrant a police report.
26. The officers interviewed Robinson, Quintana, Tannenbaum and Appellant. Robinson readily admitted slamming the door, but said he did not intend to injure Appellant and did not believe he had injured Appellant.
27. Tatum observed a general red mark on Appellant's arm, but felt the mark lacked the definition that would indicate he had been hit by the door. Tatum tried to discourage Appellant from pressing charges against Robinson because based on the witnesses' statements, Tatum felt that proving Robinson intended to injure Appellant would be very difficult. Appellant insisted that Robinson intended to slam the door and injure Appellant, and felt that he could prove it because, as Tatum recalled Appellant saying, there was "a lot of history" involved.
28. Based on Appellant's insistence that he could prove in court that Robinson intended to injure him, Murphy issued Robinson a General Sessions Summons and Complaint (Exhibit D-5). Appellant and the officers then left the building.
29. Adams was called into work to cover for Appellant. When Adams arrived he found Appellant gone, but his work was not done. Adams finished Appellant's work but was late for the 10:00 a.m. docket in 12T.
30. Robinson called his supervisor, Community Corrections Division Director Thomas O. Moore, to tell him about the incident and charges against him. Moore went into the office later that morning and spoke with Quintana, Tannenbaum and Robinson. The three employees told Moore similar versions of the morning's events. They all expressed concerns about working with Appellant in the future because they felt he had filed a false police report and they were afraid of Appellant. Moore asked them to prepare written statements of the morning's events. All three employees did so (Exhibits 8, 9 and 13).

31. Robinson was very upset that the officers had come into his office and served him right in front of his staff. He called Moore and expressed concern about the effect of all this on his reputation, the confidence of his subordinates, and his ability to supervise. Moore told Robinson that until the incident was resolved, he should not be in the office at the same time Appellant was. This made it largely impossible for Robinson to supervise his employees (See, Exhibit 8).
32. Tannenbaum had no prior problems with Appellant and did not mind working alone with him on weekends until the incident of May 17, 2003 occurred. However, Tannenbaum found the events of May 17, 2003 traumatic and disturbing. He no longer trusted Appellant and was afraid to work with him. He was upset that Robinson could not be present in the office if Appellant was at work, because he believed Appellant had filed a false police report against Robinson, causing major disruption to the office. Tannenbaum called Robinson at home on the night of May 17, 2003 to relay these sentiments (see, Exhibit 14.)
33. Tannenbaum and Quintana arrived at work on Sunday, May 18, 2003 with the understanding that Adams would be the PO on duty that day. Appellant arrived and sent Adams home. This upset Quintana and Tannenbaum because they did not want to work alongside Appellant without a supervisor present.
34. Moore called Appellant at work on Sunday, May 18, 2003 and instructed him to prepare a written statement of the incident of the previous morning, and why he had abandoned his post. Appellant did so (Exhibits 10 and 11). In both of his statements, Appellant asserts that Robinson began yelling at Appellant, stood over him pointing his finger at Appellant's face as he remained seated, and that he left the meeting because he feared for his safety. Appellant also asserts that the door slammed into his arm and bounced back at Robinson.
35. Appellant was not scheduled to work May 19 and 20, 2003.
36. On the morning of Tuesday, May 20, 2003, Abeyta, Quintana and Adams requested a meeting with Robinson, to express their reluctance about working with Appellant when he returned to work the following day. Tannenbaum called in sick, stating that he was very upset by the event on May 17, 2003, and that he might be out the rest of the week to seek counseling because the incident upset him so much. Robinson told the employees the situation was being addressed and they needed to report to work as scheduled. He called Moore and informed him of the employees' concerns. Moore documented this conversation in his memo dated May 19, 2003 (Exhibit 12, p. 2)
37. Moore called Manager of Safety Tracy Howard, and told him that he was contemplating disciplinary action against Appellant. Howard instructed Moore to conduct an investigation, and report back to him. Moore then sent Howard a

memorandum memorializing his involvement thus far in the events surrounding the incident of May 17, 2003. (Exhibit 12.)<sup>1</sup>

38. On May 21, 2003 at 5:30 a.m. Robinson received a phone call from Quintana and Tannenbaum at work, stating that Appellant was at work on the third floor and they were uncomfortable being there with him. He told them they were permitted to go to the lobby and wait for him to arrive. Robinson phoned Moore and told him he intended to go into the office to handle the situation. Moore told Robinson that under the circumstances Robinson should not be in the office with Appellant either, and to wait to take any action until Moore himself arrived. Robinson agreed to wait in the lobby with Quintana and Tannenbaum (Exhibit 16).
39. Moore arrived at 6:15 a.m. and found Quintana, Tannenbaum and Robinson waiting in the lobby. Moore had all three employees accompany him to his office on the third floor, and asked them why they were afraid to work with Appellant. The employees stated they were intimidated and feared further retaliation from him. Moore asked them to write statements explaining why they did not want to work with Appellant (Exhibits 14, 16, and 17). While Moore requested that the employees put the statements in writing, he did not make any suggestions as to the contents of the statements, other than to refer to the complaints the employees themselves had already expressed to him verbally.
40. After speaking with Quintana, Tannenbaum and Robinson, Moore called Abeyta, and later Adams, into his office on the morning of May 21, 2003. He asked each of them to describe their feelings about working with Appellant. Both expressed similar complaints about working with Appellant. Moore asked both of them to prepare written statements setting forth their feelings about working with Appellant. Both employees did so (Exhibits 15 and 18). While Moore requested the employees put the statements in writing, he did not make any suggestions as to the contents of the statements other than to refer to the complaints the employees themselves had already expressed to him verbally.
41. Quintana described Appellant as engaging in threatening, hostile and intimidating behavior, and "ongoing retaliation" (Exhibit 13). Tannenbaum described "feelings of distress and personal insecurity after the incident" which was an "obviously vindictive, sneaky, false allegation" (Exhibit 14). Adams described feeling unsafe working with Appellant, "like we have to walk on eggshells" (Exhibit 15). Robinson expressed being "upset, frustrated and irate that I was charged with a totally blatant and false accusation," and no longer feeling safe around Appellant (Exhibit 16). Quintana further described feeling uncomfortable working with Appellant for over a year, and requesting a supervisor present at all times due to feeling threatened and intimidated after the incident (Exhibit 17). Abeyta described feeling uncomfortable and unsafe working with Appellant for the past two years due to Appellant's having "blown up" on many occasions, feeling like walking on eggshells, feeling "extremely

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<sup>1</sup> Because Moore added to a memorandum he began on May 19, 2003, this is the date on the memo, but there is information in the memo concerning events which happened after that date.

uncomfortable," feeling "threatened" and "refusing" to work with Appellant (Exhibit 18).

42. After speaking with all the employees, Moore called Appellant into his office and told him the other employees were fearful of working with him. Moore told Appellant he "had no other choice" but to place Appellant on administrative leave pending resolution of the situation.
43. Moore prepared a memorandum to Howard with the written statements attached. He recommended to Howard that "immediate and permanent action" be taken against Appellant to "remove him from our office." (Exhibit 19.)
44. As the head of a large agency, it is impracticable for Howard to conduct all pre-disciplinary meetings himself. He regularly delegates this responsibility to his managers. Howard designated Moore to act on his behalf, conduct a pre-disciplinary meeting and then make a recommendation as to the appropriate course of action.
45. Moore is a personal friend of Prosecution Practice Group Manager James C. Thomas (Thomas). As the manager, Thomas will occasionally review cases that involve police or fire employees that are brought to his attention. Moore called Thomas and told him of the allegations pending against one of his employees by another, and asked what the disposition of the criminal charges would be. Thomas agreed to give this case a review and told Moore they could no longer discuss it after that. During this discussion Moore made no reference to any preferred outcome of the criminal charges.
46. Thomas assigned Investigator David Perry to interview the witnesses and the victim (Appellant) in the case. Appellant first told Perry that the door bounced off his arm and back at Robinson. Then Appellant told Perry that the door hit his arm as it slammed shut. Perry found these statements to be inconsistent. (Exhibit 21.)
47. After reviewing the information Perry gathered and written statements by the witnesses to the event, Thomas determined that there was insufficient evidence to press charges against Robinson. He moved that the charges against Robinson should be dismissed. He informed Appellant of this decision by letter of June 9, 2003 (Exhibit 23).
48. The Agency prepared a letter informing Appellant of its Contemplation of Disciplinary Action dated June 10, 2003 (Exhibit 24). The letter detailed the events of May 17, 2003, and included allegations that Appellant's actions over time have led employees to become reluctant or refuse to work around Appellant. Appellant was not provided with the written statements by the employees gathered during the

investigation, and neither Appellant nor his attorney asked for any supporting documentation for the employee complaints.<sup>2</sup>

49. A pre-disciplinary meeting was held on June 25, 2003 to allow Appellant to present his side of the story to respond to the allegations in the pre-disciplinary letter. Present were Appellant and his attorney, Moore, and Assistant Director Greg Mauro. During the meeting, Moore represented to Appellant and his attorney that Howard, not Moore, was the decision-maker in this case. Appellant's counsel demanded the right to be heard by the decision-maker in order for the decision-maker to make credibility determinations. (See, Exhibit D-15, pp. 6-7.)
50. Neither Appellant nor his attorney ever contacted Howard directly after the pre-disciplinary meeting. Moore did not tell Howard that Appellant's counsel had demanded a pre-disciplinary meeting in front of the appointing authority.
51. After the pre-disciplinary meeting, Moore felt that in order to preserve critical Agency operations, he had no alternative but to recommend dismissal to Howard because Appellant's co-workers were extremely reluctant or refused altogether to work with him.
52. Howard considered all the written statements, including Appellant's, and Moore's recommendation of dismissal. Howard had two main reasons for electing to follow Moore's recommendation. The first concern was the police report Appellant had filed against his supervisor. Based on the documentation gathered during the investigation, Howard concluded this report was made in bad faith and was false. Howard's second concern was the fact that the other employees were either extremely reluctant or refused to continue working with Appellant in a demanding team environment.
53. The Agency prepared a letter dated July 18, 2003, notifying Appellant of its decision to dismiss him (Exhibit 25). Howard signed this letter. Appellant timely appealed on July 21, 2003 (Exhibit 26).

## DISCUSSION

### 1. Preliminary Matters

#### *a. The Hearing Officer has jurisdiction over this case.*

The Hearing Officer finds she has jurisdiction to hear this case as a dismissal pursuant to CSR 19-10 b), which states as follows in relevant part:

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<sup>2</sup> The letter also included allegations of errors in Appellant's work, also without supporting documentation. After the pre-disciplinary meeting, Appellant and his attorney asked to review the files allegedly containing the work errors mentioned in the pre-disciplinary letter, and Appellant was provided two separate occasions to review the files in question. The Hearing Officer has disregarded the issue of errors in Appellant's work because Howard placed very little weight on the issue, looking at it as an afterthought that was not determinative in his decision to discipline Appellant.

## Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in dismissal... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

### ***b. Burden of Proof.***

The City Charter, C5.25 (4) and CSR 2-104 (b) (4) require the Hearing Officer to determine the facts of the case "*de novo*." This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.) In *de novo* administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. This means that the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

The Agency responsible for disciplining a career-status employee bears the burden of showing cause for the disciplinary action. CSR 5-62. The Hearing Officer must also find the severity of discipline is reasonably related to the nature of the offense in question, in light of the employee's past record. CSR 16-10; see, Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

## **2. The pre-disciplinary procedures sufficiently afforded Appellant due process.**

- a. The pre-disciplinary procedures were adequate, although the pre-disciplinary meeting was conducted by a designee of the appointing authority where the appointing authority was the decision-maker.***

Appellant argues that he had a due-process right to notice and a pre-disciplinary meeting *with the decision-maker* (as opposed to a designee) before being disciplined. He asserts that in order to make credibility determinations, the individual who conducts the pre-disciplinary meeting must also be the one who assesses the employee and make the disciplinary decision. In this case, Moore conducted the pre-disciplinary meeting, and Howard made the disciplinary decision based on Moore's recommendations. Appellant posits that during the pre-disciplinary meeting, he demanded the right to be heard by the decision-maker, but that this demand was ignored. Appellant argues that his due-process rights were therefore violated.

The hearing officer disagrees. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the United States Supreme Court held that in determining the extent of process due, the court must balance (1) the

private interests of the employee in retaining employment, (2) the governmental interest in the expeditious removal of unsatisfactory employees, and the avoidance of undue administrative burdens, and (3) the risk of erroneous termination. Upon weighing these considerations, the Court concluded that:

The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 546. Citing Loudermill, the Colorado Court of Appeals stated the following in University of Southern Colorado v. State Personnel Board, 759 P.2d 865, 867 (Colo. App. 1988):

[T]he pre-termination hearing, though necessary, need not be elaborate. The formality and procedural requisites for such hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. Cleveland Board of Education v. Loudermill, *supra*, quoting Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). Such hearing need not definitively resolve the propriety of the discharge but should be an initial check against mistaken decisions, essentially a determination of whether there are reasonable grounds to serve as a basis for the discharge. Cleveland Board of Education v. Loudermill, *supra*.

Under the above case law, broad latitude is afforded to government agencies in setting their own pre-disciplinary procedures.

The procedural requisites for disciplinary actions in the Career Service are set forth in the CSR rules. The requirements in Loudermill are reiterated in CSR 16-30, which states that the purposes of the pre-disciplinary meeting are to allow the employee to correct errors in the Agency's information, and tell his side of the story. These are the only requirements in the rules and case law.

Furthermore, CSR 1, which defines "appointing authority," states: "...Such an official may designate an agent to act for him as an appointing authority. CSR 16-30 A. further states: "Before an employee with career status is suspended, involuntarily demoted or dismissed, the appointing authority *or designee* shall hold a pre-disciplinary meeting..." (*Italics added.*) These rules clearly and specifically permit an appointing authority to appoint a designee to conduct this meeting. There is no indication anywhere in the CSR rules that an appointing authority cannot have a designee conduct the pre-disciplinary meeting, and then act on the recommendations of the designee.

It is also clear from the case law that the government interests in expediting such proceedings must be weighed against the interests of the employee. In this case, Howard testified that as the head of such a large Agency, he cannot possibly directly

hear every pre-disciplinary meeting. He regularly appoints designees to hold the meetings for him and make recommendations. In the absence of any case law or rules prohibiting this, the legitimate concerns of the size of the Agency and Howard's need to delegate this responsibility deserve weight.

Finally, under the City Charter the Hearing Officer is responsible for making credibility determinations *de novo* at the subsequent hearing. This appeal is sufficient to cure any flaws in the pre-disciplinary process. See, University of Southern Colorado, above. The Hearing Officer concludes that the form of the pre-disciplinary meeting did not violate Appellant's due-process rights.

***b. The pre-disciplinary procedures were adequate although the Agency failed to provide the identity of its witnesses and copies of their statements.***

Appellant further argues that the Agency's failure to provide him with the names of witnesses and their statements before the pre-disciplinary meeting violated his due-process rights. Again, the Hearing Officer disagrees.

Citing Loudermill, the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987) further stated that

The constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence.

Id. at 265. The Colorado Court of Appeals has since specifically applied the standards set forth in Loudermill (*above*) and Brock (*above*) in Fishburn v. Bailey, 868 P.2d 1143, (Colo. App. 1993). In that case, several public employees argued that the agency's refusal to provide the names of witnesses during the pre-disciplinary meeting, despite their request for this information, violated their due-process rights. The Court disagreed, stating:

...contrary to plaintiffs' suggestion, Brock does not stand for the proposition that procedural due process requires a public employer to disclose the names of witnesses or to provide access to copies of witness statements prior to the termination or suspension of a tenured employee.

In Appellant's case, he was provided a pre-disciplinary notice that included a detailed description of the incident of May 17, 2003, in addition to the following statements.

Over the course of time, your actions and attitude toward your co-workers have caused your co-workers to refuse to work with you. You have caused your co-workers to fear being around you and to dislike working with you. Examples of your conduct contributing to your co-workers' concerns include, but are not

limited to... your speaking to them in demeaning, insulting and derogatory manners, your open defiance of your supervisor, as well as your constant blaming of them for mistakes you have made...

Appellant was provided a copy of this letter before the pre-disciplinary meeting. Yet unlike the plaintiffs in Fishburn (*above*), Appellant did not ask for the names of witnesses against him, or for more substance of their complaints than had already been provided. Even if he had, the case law is clear that the Agency would not have been obligated to provide this information. The Hearing Officer finds that the substance of the complaints was sufficiently relayed in the pre-disciplinary letter.

Therefore, the Hearing Officer concludes that the pre-disciplinary process in this case was adequate, and that Appellant's due-process rights have been provided for in the overall process to include this appeal.

**3. The Agency has shown by a preponderance of the evidence that Appellant filed a false report.**

Appellant asserts the Agency has not shown by a preponderance of the evidence that Appellant filed a false report. Appellant argues that the witnesses against Appellant concerning the incident of May 17, 2003 lack credibility for several reasons. As explained below, the Hearing Officer disagrees.

***a. The Hearing Officer finds the corroborating testimony of other witnesses to the meeting of May 17, 2003 more persuasive than Appellant's version of events.***

There are several aspects of Appellant's claims concerning the meeting on May 17, 2003 that the Hearing Officer finds less credible than the mutually corroborating testimony and reactions of the other three witnesses.

Of the four witnesses in the room during the meeting, everyone but Appellant testified that Appellant started overreacting to Robinson as though Robinson was being aggressive and raising his voice, when in fact Robinson was doing nothing of the sort. Everyone but Appellant asserts that it was Appellant who began inappropriately raising his voice. Of the four witnesses, only Appellant claims that Robinson stood first and was looming over Appellant with his finger in Appellant's face as Appellant was seated. The other witnesses indicated that Robinson put his hand out to gesture for Appellant to stop talking over him, and that Robinson did not point his finger at Appellant. Robinson testified that he stood up only in response to Appellant's standing up, then moved back to let Appellant by. During his deposition Tannenbaum said Robinson stood up and moved back to let Appellant pass. Quintana testified that Robinson stood up after Appellant got up and started toward the door.

The most persuasive evidence was Tannenbaum's reactions to the events. Whereas Appellant asserts that Quintana and Robinson have negative personal histories with Appellant which calls question to the credibility of their testimony,

Tannenbaum had no prior negative history with Appellant. Yet he was certain from the beginning that Appellant's reaction to Robinson was exaggerated, contrived and unjustified by Robinson's management of the meeting. Tannenbaum's extreme emotional reaction attests to the credibility of his testimony. What he had observed so disturbed him that he resisted working around Appellant, despite the absence of any prior negative history. He even contemplated seeking counseling over the whole incident the following week.

The Hearing Officer is persuaded that the accounts of the other three witnesses are mutually corroborative and more persuasive than Appellant's. The Hearing Officer concludes that Appellant exaggerated his version of events during the meeting to create an appearance of aggressiveness on Robinson's part, in order to justify his defensive reaction. The Agency has therefore shown by a preponderance of the evidence that Appellant violated CSR 16-50 A. 7), refusing to comply with his supervisor's orders, and CSR 16-51 A. 4), failure to maintain satisfactory relationships with co-workers.

***b. Appellant left the meeting on May 17, 2003 through the conference door.***

Appellant argues that he left out of the main office door, and that therefore neither Quintana nor Tannenbaum could have seen whether the door slammed into its frame or hit him first. In support of this position, he points to Tannenbaum's inconsistent testimony about which door Appellant used. The Hearing Officer is unpersuaded.

It is true that Tannenbaum changed his testimony on this issue. The deposition was taken on September 4, 2003. It began in a location other than the conference room. During the deposition, Appellant's counsel asked Tannenbaum whether Appellant exited the "main office door," and Tannenbaum stated yes (see, Exhibit D-37, p. 34). The deposition was then moved to the conference room. Tannenbaum admitted that he could not see the main office door from where he was sitting on May 17, 2003 (see, Exhibit D-37, pp. 83-87).

During his testimony at the hearing, Tannenbaum stated that he was mistaken about this, and stated that Appellant had to have exited the conference door because he saw it so clearly.

Appellant asserts that the inconsistencies in Tannenbaum's testimony require the changed testimony to be disregarded under Burn v. Board of County Com'rs of Jackson County, 330 F.3d 1275 (C.A.10 (Kan) 2003), and Franks v. Nimmo, 796 F.2d 1230 (10<sup>th</sup> Cir. 1986). The Hearing Officer disagrees. These cases are part of a line of decisions in which the issue is whether conflicting statements were an attempt to create a "sham fact issue" in order to overcome a Motion for Summary Judgment. There is no such Motion being considered in this case. Under the City Charter, the Hearing Officer must determine Tannenbaum's credibility *de novo* based on all the evidence. His testimony will either stand or fall based on that determination.

The Hearing Office finds credible Tannenbaum's assertion that he watched Appellant leave through the conference door. She rejects Appellant's arguments for several reasons. First, the Hearing Officer is not persuaded that Tannenbaum's testimony during the deposition was very reliable. In his Closing Argument, Appellant carefully chose several quotes from the deposition which, taken out of context, tend to suggest that Tannenbaum was certain about this issue during the deposition. However, a careful reading of the surrounding pages indicates that Tannenbaum was anything but certain about where people were located during the incident, and a number of other issues. See, Exhibit D-37, pp. 33-40. When first asked the question of which door Appellant and Robinson entered through, his response was uncertain. Only after leading questions by Appellant's counsel did he get Tannenbaum to focus on the main office door as opposed to the conference door. Through this portion of the deposition as well as the rest of it, Tannenbaum repeatedly reminded counsel that it had been three months since the incident, that Tannenbaum had been shaken up by the incident, and that his memory was very unclear about certain details, particularly details about where he and others were during the incident.

However, Tannenbaum has been consistently certain that he saw the door Appellant stepped through slam directly into the frame, and that it did not hit Appellant. (See, Exhibit D-37, pp. 39, 69-72, 75-76, 85.) His consistent certainty that he directly witnessed Appellant's exit is corroborated by his extremely negative emotional reaction to Appellant's false report against Robinson. Thus, while the change in Tannenbaum's statement is troubling, the Hearing Officer finds Tannenbaum's testimony about his extreme distress over what he witnessed, and his sudden, extreme mistrust toward Appellant, to be highly credible, corroborating evidence of the reliability of his claim that he clearly witnessed Appellant's exit from the office.

The Hearing Officer therefore concludes it more likely than not that Appellant left through the conference door, as opposed to the main office door, for several reasons. First, of the four meeting participants, only Appellant claims to have left through the main office door. Quintana and Robinson have both consistently maintained that Appellant left through the conference door. Tannenbaum now credibly asserts this was the case, as set forth above. The Hearing Officer finds these accounts mutually corroborative and more persuasive than Appellant's claim to the contrary.

Appellant asserts that Quintana could not possibly have seen Appellant leave through the conference door since her back was to that door. However, what is impossible is that Appellant left through the portal without Quintana seeing him do it from where she was sitting. Furthermore, the door she claims Appellant used was no more than four feet directly behind her. The Hearing Officer concludes that Quintana can bear credible witness to the fact that Appellant exited through that door when it was so close to her, even though her back was to it.

Also, both Robinson and Tannenbaum maintain that Robinson moved back to let Appellant by. From where Robinson was, moving back placed him in the portal, blocking that passage and making it less likely that Appellant exited that way.

Finally, Quintana turned and saw Appellant holding his arm when he opened the door to say that Robinson hit him. She could not have seen this if Appellant had been standing in front of the main office door rather than the conference door.

Appellant asserts in his Closing Argument that the Officer Tatum, a "completely unbiased witness," was "able to discern that the door used by Appellant to leave the office was the 'office' door as opposed to the 'conference room' door. The Hearing Officer is unpersuaded that this issue was even brought up during the police interviews. There is no indication on the summons (Exhibit 7) or elsewhere that the issue of which door was ever discussed. On the contrary, Tatum testified that he "believed" it was the main office door, but that he did not have a "clear recollection of that day." This is hardly persuasive testimony by an individual who neither observed the incident nor documented this issue.

***c. Appellant was not injured when Robinson slammed the door.***

The Hearing Officer finds Appellant's account of his alleged injury resulting from the door slam unpersuasive for several reasons.

First, of the four meeting attendees, only Appellant claims that the door bounced off his body the first time Robinson slammed it, then Robinson slammed it shut again. The other three witnesses have consistently asserted from the beginning that the door slammed immediately into its frame and bounced off of nothing.

Further, Appellant asserts that he had a bruise for at least a day or two from where the door hit him. Under cross examination, he was asked why he did not take any photographs or go to the doctor in order to document and treat this wound. Appellant claimed that he did not take any such actions because he was so shaken up by the incident that he was not thinking about having to prove anything in court.

Yet Officer Tatum testified the only reason the officers issued the summons to Robinson was because Appellant insisted that he could prove this case in court. The Hearing Officer finds this assertion completely contradictory to Appellant's excuse for failing to document the alleged wound.

The Hearing Officer further finds Tatum's description of the red mark he viewed suspicious. Tatum felt that the mark he observed lacked a certain definition he would have expected to see based on Appellant's description of what caused it. Tatum's demeanor clearly indicated he himself was suspicious about what caused the red mark.

Finally, Tannenbaum had no prior history tending to bias him against Appellant, yet he maintains that Appellant was clearly out in the hall when the door slammed shut.

Once again, the Hearing Officer finds Appellant's claim that the door hit and injured him is exaggerated and lacking in credibility. The Agency has shown by a preponderance of the evidence that Appellant was not struck or injured in any way by

the door as Robinson slammed it. Therefore, the most reasonable conclusion to be drawn here is that the police report he filed was specious. This action is in violation of CSR 16-50 A. 3), dishonesty, including falsifying official records, CSR 16-50 A. 8), threatening, fighting with, or abusing co-workers, and CSR 16-51 A. 4), failure to maintain satisfactory relationships with co-workers.

Appellant's abandonment of his post that morning was therefore unjustified. This action was in violation of CSR 16-50 A. 15), engaging in strike, sabotage or work slowdown.

**4. The Agency has shown that over time, Appellant failed to maintain satisfactory working relationships with his co-workers in a demanding environment where teamwork is mandatory.**

At the time of his dismissal, Appellant worked with two other PO's, Abeyta and Adams, and two administrative assistants, Quintana and Tannenbaum. With the exception of Tannenbaum, the employees' reactions to the incident of May 17, 2003 did not arise in isolation. They had already made multiple complaints about Appellant's demeanor, attitude and work habits over a two-year period prior to that. Complaints from Abeyta (Exhibit 1), Adams (Exhibit 5), and Quintana (Exhibits 2 and 3) have arisen at different times for different reasons. Yet the employees commonly, repeatedly express similar feelings of fear, intimidation, lack of trust, having to walk on eggshells, and reluctance to work with Appellant. The statements and testimony of these witnesses is mutually corroborative evidence of the Agency's claim that his actions contributed significantly to an environment in which reasonable employees were justified in their extreme reluctance or refusal to work with Appellant. Tannenbaum, the only employee with no prior complaints against Appellant, joined the ranks of those who refused to work with Appellant after the incident of May 17, 2003.

Appellant argues that Moore directed the employees to submit written statements indicating their reluctance or refusal to work with Appellant. However, his request came *after* the employees themselves had already verbally indicated as much to him. Moore's request was merely that the employees memorialize in writing the sentiments they had already expressed. The Hearing Officer therefore finds this allegation unpersuasive. The weight of testimony and evidence establishes that the employees individually arrived at their own conclusions about their extreme reluctance or refusal to continue working with Appellant, because of his pattern of failing to maintain satisfactory working relationships in violation of CSR 16-51 A. 4).

Appellant contends that Robinson dislikes Appellant. He asserts that Robinson has exhibited hostility toward Appellant over the past several years, and has fomented hostility toward Appellant on the part of his co-workers.

The Hearing Officer is unpersuaded by Appellant's assertion that his disciplinary action was the result of Robinson's fomenting. While Appellant insists that Robinson has singled him out for negative treatment for a long period of time, Appellant's claim is

virtually the only evidence of this. With the exception of one witness who identified Robinson as a "demon," none of the other employees could identify any different treatment of Appellant by Robinson. That employee left the Agency in 2000. The others credibly stated their complaints were genuine and denied being encouraged to complain about Appellant by anyone else. The written statements and complaints resulted from Appellant's own inappropriate actions both on and before May 17, 2003, not any actions on Robinson's part. Finally, while Robinson was one of the parties to the meeting on May 17, 2003 and therefore filed a written statement about the incident, he had no direct role in the decision to take disciplinary action in this case. As the person complaining that Appellant filed a false report, the Agency's consideration of his complaints was appropriate, and his version of events was further corroborated by the other two witnesses to the incident in question.

#### **5. Severity of the discipline.**

In determining the appropriateness of a given disciplinary action, the test is whether the severity of discipline is "reasonably related" to the seriousness of the offense, taking into consideration the employee's past record. See, CSR 16-10. To be reasonably related, the discipline chosen must be "within the range of reasonable alternatives available to a reasonable, prudent agency administrator." See, Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo. App. 1986). In determining the reasonableness of the discipline, the Hearing Officer therefore will not substitute her judgment for that of the Agency unless the discipline is clearly excessive, or is substantially based on considerations that are unsupported by a preponderance of the evidence.

Howard testified that there were two main reasons he chose dismissal in this case. The first concern was that Appellant had filed a police report against his supervisor, which Howard concluded was made in bad faith and was false. Howard's second concern was the effect this incident had on the work morale of Pretrial, and the fact that Appellant's co-workers had stated either extreme reluctance or refusal to continue working with him.

The Hearing Officer has reviewed the evidence in this case *de novo*. She has made credibility determinations that lead her to conclude that it is more likely than not Appellant engaged in the acts which form the basis of the Agency's disciplinary action. The Agency's decision was based substantially on allegations it has shown by a preponderance of the evidence.

The Hearing Officer finds that Appellant's contrived, insubordinate behavior and false report during the incident of May 17 in itself justifies dismissal. Furthermore, the prior chronic complaints against Appellant by his co-workers are significant for several reasons. First, they tend to further corroborate the Agency's version of Appellant's inappropriate conduct on May 17. Second, the nature of the work in Pretrial, and the small size of the staff, require the employees to work closely and efficiently together under critical time constraints, to make decisions affecting the lives and liberty of

citizens. Therefore, the ability of the employees to work as a team is essential to the mission of the organization.

The totality of this evidence, when taken together, supports Howard's assertion that he had no other choice but to remove Appellant from the unit. The Hearing Officer therefore concludes that the decision to dismiss Appellant was within the range of reasonable alternatives available to the Agency.

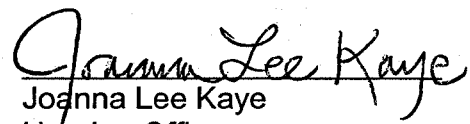
### CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to hear this case and render a decision.
2. Appellant's due-process rights were not violated by the pre-disciplinary meeting.
3. In demonstrating by a preponderance of evidence that Appellant engaged in the CSR violations alleged, the Agency has shown cause to discipline Appellant.
4. Dismissal was within the range of reasonable alternatives available to the Agency.

### DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to dismiss Appellant is AFFIRMED.

Dated this 5<sup>th</sup> day of January, 2004.

  
Joanna Lee Kaye  
Hearing Officer  
Career Service Board

**CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the U.S. mail, Postage prepaid, this 5<sup>th</sup> day of January, 2004, addressed to:

John Mosby  
621 17<sup>th</sup> Street, #925  
Denver, CO 80293

Richard A. Chavez  
18183 E. Amhurst Drive  
Aurora, CO 80013

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the interoffice mail, this 5<sup>th</sup> day of January, 2004, addressed to:

Robert A. Wolf  
Assistant City Attorney  
Employment Law Section

Alvin LaCabe  
Department of Safety

Fred J. Oliva  
Denver Sheriff's Department

A handwritten signature in cursive script, appearing to read "V. Grand", is written over a horizontal line.

**AMENDED CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 10 day of January, 2004, addressed to:

John Mosby, Esq.  
621 17<sup>th</sup> Street, #925  
Denver, CO 80293

Richard A. Chavez  
18183 E. Amhurst Dr.  
Aurora, CO 80013

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** depositing same in interoffice mail, this 6 day of January 2004, addressed to:

Robert A. Wolf  
Assistant City Attorney  
Employment Law Section

Alvin LaCabe  
Department of Safety

Fred J. Oliva  
Denver Sheriff's Department

V. Gamado