

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

SEP 20 2007

Appeal No. 72-06

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FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

CATHRYN DIAZ,

Appellant/Petitioner,

vs.

DENVER ZOOLOGICAL FOUNDATION, and the City and County of Denver, a
municipal corporation,

Agency/Respondent.

This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record on appeal and **AFFIRMS** the Hearing Officer's Decision, dated January 19, 2007, and Supplemental Decision, dated May 25, 2007, on the grounds outlined below.

I. FINDINGS

A. Discrimination Claim

Because Appellant was dismissed from her employment, the Hearing Officer had jurisdiction to hear this appeal under CSA 19-10 A, and implicit in this jurisdiction is the authority to hear and decide all evidence relevant to that dismissal, including a claim that the dismissal was motivated by unlawful discrimination. While the Hearing Officer expressed some confusion about the procedural requirements of bringing discrimination claims under CSR 19-10 A. and CSR 19-10 B., she correctly permitted Appellant to introduce evidence in support of her claim of discrimination. Appellant, however, bore the burden of proof on that claim and the Board finds that she failed to meet that burden.

The Board notes that the witnesses who were called in support of Appellant's discrimination claim were the same witnesses she called in a prior disciplinary appeal before the same Hearing Officer in April 2006. (CSA Appeal No. 13-06). In that case, the Hearing Officer rejected Appellant's claim that her suspension was motivated by

racial discrimination; nevertheless, the Hearing Officer permitted Appellant to present essentially the same evidence in her dismissal appeal.

Over the Agency's objection, the Hearing Officer admitted into evidence the April 2006 testimony of Mike Hernandez on the issue of whether Appellant's supervisor, Carol Flohr, was prejudiced against Appellant. (Ex. P). In addition, Mr. Hernandez testified by telephone in the present disciplinary appeal, even though he only worked with Appellant and Ms. Flohr for a short time three years before Appellant's dismissal. His belief that Ms. Flohr was prejudiced against Appellant was based on the fact that Ms. Flohr restricted Appellant's personal telephone use during work hours.

Eva Santovena was permitted to testify that in April 2006 she was late in retrieving a package from the Operations Department and one day after her testimony in support of Appellant in the prior disciplinary action, she was informed that she would no longer need to retrieve packages from Ms. Flohr's department. On cross-examination, Ms. Santovena admitted that this change in job responsibilities was advantageous to her. (Tr. 1:148-149). The Hearing Officer determined that Ms. Flohr's criticism of Ms. Santovena was based upon her failure to pick up a package in a timely manner, not race, and the subsequent removal of this job responsibility by Ms. Santovena's supervisor was intended to avoid future conflict with Ms. Flohr. The Board finds that the Hearing Officer's finding that this incident does not demonstrate that Ms. Flohr harbored racial prejudice against Hispanics in general or Appellant in particular is not unsupported by the evidence.

Appellant testified that she believed Ms. Flohr disliked her because she was Hispanic. Her belief was based on her observation in 2004 that a Caucasian employee, Chris Ball, made mistakes similar to hers, but was not disciplined. However, Mr. Ball was a probationary employee, still learning his job (Tr. 2: 63-64), and therefore he and Appellant were not similarly situated for purposes of comparison in a discrimination claim. Appellant also claimed Ms. Flohr told her and Mr. Hernandez that "it would be a difficult time to be unemployed." (Tr. 2:4-5). The Hearing Officer was entitled to find that this evidence was not sufficient to prove racial discrimination.

The Board finds that the Hearing Officer was entitled to find on the evidence that the dismissal decision was not motivated by discrimination and her decision is not unsupported by the record.

B. Performance Issues

The Agency terminated Appellant based upon a precipitating incident that occurred on June 23, 2006, as well as continued unsatisfactory performance outlined in her dismissal letter. (Ex. 1). At 8:30 a.m. on Friday, June 23, 2006, Ms. Flohr advised Appellant that Mr. Radcliffe was expecting a FedEx package containing a live snake and that he would like to be notified as soon as it arrived. Ms. Flohr checked with Appellant several times during the day to see if it had arrived. At 2:20 p.m., Ms. Flohr saw a box on Appellant's desk addressed to Zoo Curator Rick Haeffner (Mr. Radcliffe's

supervisor), and asked Appellant to call Mr. Radcliffe to see if this could be his box. Mr. Radcliffe confirmed it was the South American snake he had been expecting. The box had been logged in at 1:25 p.m., and the one hour delay in delivery did not cause any harm to the reptile.

Appellant testified that as soon as the box arrived, she called Mr. Haeffner and left a message for him, even though she knew he was out until Sunday. Mr. Haeffner testified that he checked his messages on Sunday when he returned to work and found no voice message from Appellant. A forty-eight hour delay in caring for the snake could have been harmful.

In addition to this incident, the record contains numerous examples of Appellant's mistakes and unsatisfactory work performance: Ex. 8, 9, 10, 11, 12, 13, 14, 15, 17, 20. One exhibit in particular shows critical mistakes after three drafts were reviewed by Ms. Flohr and returned to Appellant for corrections. (Ex. G.) At the hearing, Appellant steadfastly refused to acknowledge that her performance needed improvement, (Tr. 2: 41-42), despite being disciplined eight times over the past four years, including three recent suspensions for performance problems. (Ex. 1-4). Based on the evidence in the record, the Agency's termination of Appellant's employment is justified and consistent with the principles of progressive discipline.

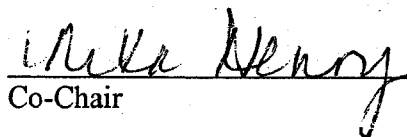
II. ORDER

IT IS THEREFORE ORDERED that Appellant's Petition for Review is **DENIED** and the Hearing Officer's Decision of January 19, 2007 and Supplemental Decision of May 25, 2007 are **AFFIRMED**.

SO ORDERED by the Board on September 6, 2007, and documented this

20 day of September, 2007.

BY THE BOARD:



Co-Chair

Board Members Concurring:

Tom Bonner
Ashley Kilroy
Luis Toro
Kit Williams

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the foregoing **FINDINGS AND ORDER**, postage prepaid, this 20th day of September, 2007 to:

Mark Bove, Esq.
730 17th Street, Suite 635
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And **VIA INTEROFFICE MAIL** this 20th day of September, 2007:

Robert A. Wolf, Assistant City Attorney
City Attorney's Office, Dept. 1108

Leslye Bileau
Denver Zoological Foundation

CSA Hearings Office ✓

Deborah Saraceno