

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

Appeal No. 66-04

AMENDED DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

MICHAEL R. ESPINOZA, Appellant,

Agency: Department of Public Works, Parking Management Division, and the City and County of Denver, a municipal corporation.

This Decision and Order is amended to correct minor punctuation errors, the appeal number and Appellant's mailing address.

The hearing in this appeal was held on September 15, 2004 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented himself. The Agency was represented by Assistant City Attorney Robert D. Nespor. Having considered the evidence and arguments of the parties, the Hearing Office makes the following findings of fact, conclusions of law and enters the following decision:

FINDINGS AND ANALYSIS

This is an appeal of a five-day suspension of Appellant Michael Espinoza, a Vehicle Boot Investigator with the Parking management Division of the Department of Public Works (Agency). The suspension imposed on May 3, 2004 was administered for violations of Career Service Rules (CSR), the Revised Municipal Code of the City and County of Denver (R.M.C.), Executive Order 112, and City Charter § C5.25-2. The timely appeal asserts that his suspension was in violation of the Career Service Authority (CSA) disciplinary rules and requests reversal of the suspension.

I. NATURE OF DISCIPLINE

Appellant was suspended for five days based upon the appointing authority's conclusion that he violated the above rules by harassing two citizens in separate incidents on February 20 and 23, 2004 while on duty in a city boot vehicle.

The pre-disciplinary letter asserted the following as to the incident of February 20th. A female citizen came to a complete stop behind Appellant's parking enforcement van, which was double parked on Warren Street near Pearl Street. The driver and two other cars behind her honked at the van, which did not move. The two cars passed the driver and the van. The woman passed the Appellant's van and parked at the curb in order to record the van's license number. Appellant approached the woman's car on

foot in an aggressive manner; yelling, waving and swearing. The woman locked her car doors at his approach. While taking her license number down, he yelled that he would send her a parking ticket for \$150 and cite her for several city ordinance violations so that the ticket would exceed \$150. The woman drove away, and Appellant followed her for a few blocks until she pulled into a rectory parking lot. When she got out of her car to walk to the church, Appellant continued to yell at her, stating that he had her license number, knew where she lived, and would give her a \$150 parking ticket. [Exh. 2, p. 3.]

The pre-disciplinary letter asserts the February 23rd incident likewise arose when Appellant's van was stopped in the street. On that date, according to the letter, a passing driver yelled at Appellant to be more considerate. The Agency asserts that Appellant yelled back, stating that he must be high, and threatened to call the police. The driver, Gilbert Tang, told him he could call whoever he wanted to. Mr. Tang then observed that Appellant picked up his van radio. Appellant then followed Mr. Tang to a parking place near his office. Mr. Tang observed Appellant from his office window talking to his supervisor Darrell Delimont when a patrol car pulled up. Mr. Tang went outside and heard Appellant telling the police officer that Mr. Tang had hit his van. Mr. Tang denied the accusation. After the men inspected both vehicles, it was concluded by the officer that no accident had occurred. [Exh. 2, pp. 3 – 4.]

The Agency charged Appellant with violations of the following subsections of CSR § 16-50 A., Discipline and Termination:

(1) Gross negligence or willful neglect of duty,

(3) Dishonesty, including but not limited to: . . . lying to superiors . . . with respect to official duties, . . . using official position or authority for personal profit or advantage; or any other act of dishonesty not specifically listed in this paragraph,

(17) Conduct which violates the Charter of the City and County of Denver or R.M.C. § 2-51 requiring employees to conduct themselves within the spirit and letter of the ethics code,

(18) Conduct violating Executive Order 112 prohibiting workplace violence, and

(20) Other unspecified conduct.

Appellant was also charged with violations of the following subsections of CSR § 16-51 A., Causes of Progressive Discipline:

(4) Failure to maintain satisfactory working relationships with the public,

(5) Failure to observe departmental regulations; specifically, intimidating, threatening or hostile behaviors in any Denver work location, in violation of Public Works regulation 1.A., and failure to conduct himself with courtesy and helpfulness to the public, in violation of departmental regulation 1.G,

(6) Carelessness in the performance of his duties, and

(20) Other unspecified conduct.

At the pre-disciplinary meeting held on April 19, 2004, Appellant participated without a representative and provided a written statement in response to the allegations. [Exh. 4.] As to the February 20th incident, Appellant's statement claims the following: Appellant was stopped in the street and waved the cars behind him to pass. The woman directly behind him did not move, causing another driver to yell at her in an insulting manner to get out of the street. The woman finally passed him, and narrowly missed the van's front end as she pulled into a tow away zone at the curb. Appellant said he approached her vehicle with ticket book in hand and asked her to move on because she was parked illegally. The woman then drove away without checking traffic. Shortly thereafter, Appellant said, he saw the same driver getting out of her car in a nearby parking lot. She yelled at Appellant to stop following her, and said, "You're harassing me!" Appellant denied harassing her, and told her that he had not given her a \$60 ticket for parking in the tow away zone. The woman raised her voice again, and Appellant left the area. Appellant's verbal statement at the pre-disciplinary meeting was consistent with his written response. [Exh. 4, p. 1.]

As to the February 23rd incident, Appellant's written statement asserted that he was stopped on South Ogden Street when a gray pickup truck approached the van and sped past him so closely that the left side mirrors made contact. Appellant stated that the driver made an obscene gesture and swore at him to get out of the road. Appellant called dispatch, relayed information about the incident, and requested notification of his supervisor, the safety official and the police regarding the accident, in accordance with departmental policy. Appellant followed the truck to an apartment building parking lot and waited for his supervisor. When Mr. Delimont arrived, they both observed scrape marks on the truck's mirror. The police officer concluded that no accident occurred, but Appellant believed that this meant only that no serious damage had occurred. [Exh. 4, p. 23.]

In imposing a five-day suspension, the Agency considered Appellant's statements and his past disciplinary history, which included four disciplinary actions within the previous five years. [Exh. 2, pp. 4, 5.]

II. ISSUES

1. Whether the Agency proved that Appellant committed violations of the Career Service Rules by a preponderance of the evidence, and

2. If so, whether the five-day suspension imposed was reasonably related to the seriousness of the offenses in question in conformity with CSR § 16-10.

III. EVIDENCE

A. February 20th Incident

The undisputed facts relating to the Feb. 20th incident are that Appellant was stopped in the west-bound lane of traffic on Warren Street. A driver, Laura Taylor-Manzanares, stopped behind him, then passed him and parked in a no-parking zone. Appellant got out of his van and approached her car with his ticket book in hand. Mrs. Taylor-Manzanares pulled away and drove a few blocks west. Appellant followed her in his van. At some point during this encounter, an angry exchange took place between the two, during which Mrs. Taylor-Manzanares accused Appellant of following her, and Appellant made a reference to a parking citation.

The Agency offered the statement of Alvin Howard, Director of Human Resources at the Department of Parks and Recreation, who had taken a statement from Mrs. Taylor-Manzanares on Feb. 23rd based on her belief that Appellant was an employee of Parks and Recreation. Mrs. Taylor-Manzanares told Mr. Howard that Appellant yelled that he had her license plate number, would get her home address, and would send her a parking ticket for \$150. She then asked Mr. Howard if he thought Appellant would be crazy enough to come to her house. [Exh. 5.] Mr. Howard repeated that recollection of their conversation during his testimony.

The Agency also presented Mrs. Taylor-Manzanares' undated written statement, which was received by the Agency after Mr. Howard wrote his letter summarizing their conversation. [Exh. 6.] Her statement gave the following version of the event: Appellant was parked in the lane with the engine off, eating his lunch. She passed him, and pulled over to take his license plate number down. Appellant jumped out of the van and walked quickly toward her car while recording her license number. She locked her vehicle and drove forward. Appellant got in his van and followed her for a few blocks. When Mrs. Taylor-Manzanares got out of her car to seek refuge at a church rectory, Appellant drove beside her, waved a book he claimed were city ordinances, and yelled at her that he had her license number, knew where she lived, and would send her a \$150 ticket by mail for violating certain ordinances.

The latter statement differs in one important respect from her earlier conversation with Mr. Howard. During their conversation, Mrs. Taylor-Manzanares did not relate that Appellant had said he knew where she lived. It appears from the evidence that the citizen recalled Appellant's words as more threatening of her personal safety as her fear escalated. Since Mr. Howard's statement was given closer to the event than Mrs. Taylor-Manzanares' own statement, it is concluded that it is the more accurate.

Appellant's written statement and testimony gave this version of the event: After a female driver passed him and parked in a no-parking zone, he approached her with ticket book in hand and suggested she move or she would be getting a parking citation. She then drove out of the parking space. He saw her again getting out of her car in a church parking lot as he was driving slowly to continue on his route. She asked him to stop following and harassing her.

In his statement, Appellant said he replied, "I am not harassing you ma'am and in fact I did not issue you a citation for being parked in the no parking zone which would have been a \$60 ticket." [Exh. 4, p. 1.] His testimony was slightly different. He recalled at the hearing that he responded by saying that he was not harassing her, because she would not be receiving a ticket for the parking violation, and it would not be mailed. It is concluded that Appellant did mention mailing the ticket, which led Mrs. Taylor-Manzanares to believe that he had her address. That thought caused her to fear that Appellant would come to her house.

Appellant testified that he thought the citizen was upset because she believed she would be getting a ticket. He left, deciding to cut his losses by foregoing any further exchange with her. Appellant never learned the woman's name until given a copy of Exhibit 6 in preparation for this hearing.

B. February 23rd Incident

The undisputed facts related to this event are as follows: Appellant was in the lane of traffic on South Ogden Street when a driver of a pickup truck, Gilbert Tang, passed him, driving north on Ogden. As he passed, Mr. Tang angrily complained that Appellant was in his way. Appellant angrily replied, then picked up his radio to call the police. Mr. Tang drove on and parked in a parking lot, where he crossed the street and went into the apartment building at 77 South Ogden. Appellant followed, and waited in the parking lot. Appellant's supervisor Darrell Delimont and a police officer later joined Appellant. Mr. Tang came out of the building. Appellant accused Mr. Tang of hitting his van. After inspecting the van, the officer ruled that no accident had occurred.

Mr. Tang testified by phone. He recalled that he was driving north on Ogden Street when he encountered Appellant's van in the middle of the street. Two cars ahead of him went around the van. When he did the same, he yelled over to the van's driver to be more considerate and move the vehicle out of the street. The van's driver, who was Appellant, appeared startled, jumped up, grabbed his radio and threatened to call the police. Mr. Tang replied that he should "get the damn van out of the street", and drove forward to his work location at 77 South Ogden Street.

Appellant's written statement said that Mr. Tang approached from the opposite direction at a higher than normal rate of speed. The vehicle's left mirrors made contact. Appellant turned away, then looked through his mirror at the retreating truck. The driver made an obscene gesture and swore at him to get out of the road. Appellant then called dispatch to report the accident.

Appellant testified consistently with his written statement, but added that after Mr. Tang's truck clipped his mirror, he told Mr. Tang to stay there. Mr. Tang replied that he would not, and he drove away.

Appellant testified that he believes that some citizens complain of the work ethic of citizen employees, and he was disappointed that his supervisors took the side of strangers in order to give weight to the discipline rather than believe a proven employee's statement as to the events. He testified further that he would not threaten an elderly woman such as Mrs. Taylor-Manzanares because he was raised to show respect to his elders.

IV. ANALYSIS

Appellant was charged with eleven separate violations of disciplinary and other work rules. The City Charter requires that the facts at issue in a Career Service appeal must be determined *de novo*. C5.25(4). Such a determination requires an independent fact-finding hearing and the resolution of factual disputes. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975.)

A. Performance of Duties

Appellant is alleged to have been both negligent and careless in the performance of his duties in violation of CSR § 16-50 A. (1), prohibiting gross negligence, and CSR § 16-51 A. (6), prescribing carelessness in the performance of duties.

In support of its argument that Appellant's behavior was in violation of his performance standards, the Agency presented Public Works regulations 1.A, which require that an employee refrain from intimidating, threatening or hostile behaviors in any work location, and 1.G, mandating that an employee conduct himself with courtesy and helpfulness to the public.

The evidence is clear that Appellant engaged in angry exchanges with two members of the public within the space of three days. While I do not find that Appellant threatened Mrs. Taylor-Manzanares, I conclude that his angry manner and words caused her obvious distress and fear. His failure to recognize her emotional state displayed poor judgment that constituted carelessness in the performance of his duties. The incident with Mr. Tang also showed an angry outburst that led to his failure to investigate the facts before reporting an accident. As a result, official time was wasted and Appellant appeared to accuse a member of the public of causing damage to a city vehicle. These incidents together constitute gross negligence in the performance of duties, which included courteous and helpful treatment of the public, in violation of CSR § 16-50 A. (1), and carelessness in the performance of duties in violation of CSR § 16-51 A. (6). For the same reasons, I conclude that the Agency has established that Appellant violated CSR § 16-51 A. (5), failure to observe departmental regulations 1.A and 1.G.

B. Dishonesty with Respect to Official Duties

The Agency supports its allegation of dishonesty by the evidence of Appellant's accident report made on February 23rd. Appellant reported that his mirror had been hit without checking the mirror. The report was motivated by Appellant's anger toward Mr. Tang for his critical comment about Appellant's obstruction of traffic. All objective evidence is consistent that the mirror had not been hit, based upon the police officer's action ruling that no accident occurred, and the testimony of Mr. Delimont and Mr. Tang that they observed no damage on either vehicle. Appellant testified only that he saw scratches on his mirror. However, he agreed with the officer at the time that "no accident occurred." The evidence is clear that Appellant reported an accident in order to use his official position for private advantage: here, to obtain revenge upon a member of the public who had startled and angered him. Thus, Appellant's behavior violated CSR § 16-50 A. (3).

C. Violation of City Charter Ethics Code

Anderson Moore testified that Appellant was charged with a violation of the ethics code based on his belief that Appellant had threatened Mrs. Taylor-Manzanares. Because I do not find that a threat was made by Appellant, it is therefore concluded that the Agency has not established a violation of CSR § 16-50 A. (17) or R.M.C. § 2-51 by a preponderance of the evidence.

D. Violation of Executive Order 112

The Agency asserts that Appellant was guilty of threatening, intimidating or abusing employees in violation of CSR §§ 16-50 A. (18), Executive Order 112, CSR § 16-51 A. (5) and Public Works regulations 1.A and 1.G prohibiting intimidating, threatening, or hostile behavior, and failing to treat the public with courtesy and helpfulness. The sole evidence supporting this charge is that Appellant followed Mrs. Taylor-Manzanares and said, "I know where you live." I have found that the statement was not made. I also conclude that Appellant did not follow the citizen after their first encounter. Appellant proceeded in the same direction in the performance of his regular duties when he again observed Mrs. Taylor-Manzanares. Appellant made no comment to her until she asked him to stop following and harassing her. While his comments were ill-advised in the face of the citizen's emotional accusations, they were neither threatening, intimidating or hostile in nature. It is therefore concluded that this charge is unsupported by the evidence.

E. Failure to Maintain Satisfactory Work Relationships with the Public

Based upon the above findings that Appellant had angry exchanges with two members of the public within the space of three days, it is concluded that Appellant violated CSR § 16-51 (4), Failure to maintain satisfactory work relationships. The testimony of Mr. Tang and Mrs. Taylor-Manzanares indicate that Appellant lost his temper on both occasions, and allowed his emotion to cloud his judgment by unnecessarily prolonging the unpleasant encounters. That behavior interfered with his ability to maintain a working relationship with the public in order to continue to perform

his job, which requires the cooperation of the motoring public. For that reason, it is found that the Agency has established that Appellant violated CSR § 16-51 (4).

F. Other Unspecified Conduct

Because I have found that the Agency has proven the Appellant committed violations of specific Career Service Rules, I do not reach the issue of whether Appellant violated either CSR § 16-50 A. (20) or 16-51 (11).

V. PENALTY

The sole remaining issue is whether a five-day suspension is reasonably related to the seriousness of the offence, taking into consideration Appellant's past disciplinary record, in compliance with CSR § 16-10.

Discipline is reasonably related to the seriousness of an offense if it is within the range of reasonable alternatives available to a reasonable, prudent agency administrator. GUSTERN, 128-02, at 20 (decision dated 12-28-02.), *citing Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo.App. 1986.) Discipline is not excessive if it is substantially based on considerations that are supported by a preponderance of the evidence. GUSTERN, *id.*

Appellant's past record included five disciplinary actions within the past five years, one of which involved the making of derogatory and threatening comments to a co-worker. Anderson Moore, the appointing authority who imposed the discipline, testified that he considered the number of Appellant's past disciplinary infractions, and the need to impose progressive discipline in order to impress upon Appellant the need to conform his conduct with the requirements of the position based on regulations known to the Appellant. He added that he recognized Appellant's great qualities as a dependable, productive and skilled worker, but that he could not ignore the evidence of Appellant's failure to disengage with two members of the public over such a short period of time.

Appellant argues that the severity of the penalty was influenced by certain internal work communications in May 2003, December 2003 and January 2004, which had a negative impact on the disciplinary decision. Appellant does not claim that the Agency retaliated against him on any unlawful basis. An agency is not required to disregard everything it knows about an employee in order to impose fair discipline. In any event, I find that the events were remote in time, and the appointing authority was not influenced by the earlier communications.

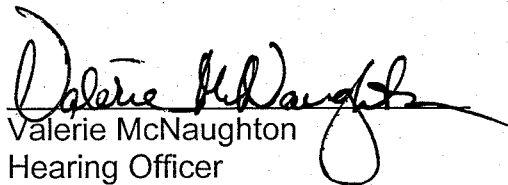
It is found that the penalty imposed was consistent with the purposes of progressive discipline to correct inappropriate behavior and performance under CSR § 16-10. The Agency proved that Appellant committed two instances of inappropriate conduct. Appellant had been given three verbal reprimands and one written reprimand for past infractions. The Agency was reasonable in its conclusion that progressive

discipline required the imposition of more severe penalties for these incidents of inappropriate behavior toward the public.

ORDER

The Agency's discipline of Appellant dated May 3, 2004 is AFFIRMED.

Dated this 8th day of
December, 2004.


Valerie McNaughton
Hearing Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this 9th day of December, 2004, addressed to:

Michael Espinoza
11620 Irma Drive
Northglenn, CO 80233

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail, this 9th day of December, 2004, addressed to:

Robert Nespor
Assistant City Attorney
Litigation Section

Anderson Moore
Department of Public Works

