

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

Appeal Nos. 77-03, 134-03 and 167-03

DECISION

IN THE MATTER OF THE CONSOLIDATED APPEALS OF:

ODILIA LEAL-MCINTYRE, Appellant,

Agency: Department of Safety, Denver Police Department, and the City and County of Denver, a municipal corporation.

The hearing in these consolidated appeals commenced on August 31, 2004, continued on September 1, 2004, and concluded on September 2, 2004 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Teri Dalbec, Esq. The Agency was represented by Assistant City Attorney Robert Nesor. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision:

FINDINGS AND ANALYSIS

At all times relevant herein, Appellant Odelia Leal-McIntyre was an Administrative Support Assistant III (ASA III) in the Identification Bureau of the Denver Police Department. This is a consolidated appeal of a written reprimand and one-day suspension dated May 16, 2003 (Appeal No. 77-03; hereafter #77-03), a below expectations Performance Evaluation Program Report (PEPR) dated June 24, 2003 (Appeal No. 134-03; hereafter #134-03), and Appellant's dismissal dated October 16, 2003 (Appeal No. 167-03; hereafter #167-03).

Appellant stipulated to the admissibility of all of the Agency's exhibits, which were admitted without objection. [# 77-03, Exhs. 1 – 21; # 134-03, Exhs. 1 – 6; and # 167-03, Exhs. 1 – 4.] As to Appeal No. 77-03, Appellant's Exhibits C, E – F, M – Q and S were admitted without objection. Exhibit D was admitted over the Agency's objection. The Agency stipulated to the admissibility of all of Appellant's tendered exhibits in Appeal No. 134-03, which were Exhibits A – G. Exhibits A, C – I, O, and S – U in Appeal No. 167-03 were admitted without objection. The remaining exhibits were not offered into evidence.

I. Appeal No. 77-03

On May 8, 2003, Appellant was given a written reprimand and one-day suspension for several incidents from February to April 2003. On May 16, 2003,

Appellant appealed the denial of her grievance of that discipline on the bases of violation of the Career Service Rules governing discipline and leave and sexual orientation discrimination.

On that same day, Appellant also appealed the denial of her grievance which challenged the assignment of ASA IIIs to process all requests for fingerprints. [# 76-03.] The hearing officer issued an order to show cause which directed Appellant to demonstrate that fingerprinting had become an essential duty within the meaning of Rule 7, or that she had requested an audit of her position to challenge inclusion of fingerprinting duties. The appeal was dismissed as abandoned after Appellant failed to respond to that order. [# 76-03, Dismissal Order dated Aug. 27, 2003.]

The May 8th suspension and reprimand were imposed based on the following events:

1) On February 20, 2003, Appellant sent an e-mail to her supervisors which was critical of fingerprint technicians for not doing their job, and stated her intention to discontinue fingerprinting duties;

2) On March 11, 2003, Appellant left the job without permission after an incident with a fingerprint technician, related that she wouldn't be back until her supervisor "took care of things"; and took sick and vacation days off on March 12th and 13th;

3) On April 2, 2003, Appellant left a parolee in the lobby for 45 minutes in violation of policy, refused to process a fingerprint request, called a co-worker an "asshole", loudly accused other employees of laziness, and left work before her shift was over;

4) On April 3rd, 4th, and for four hours on the 7th, Appellant failed to report for work; and

5) On April 8th, Appellant stated that she would not perform fingerprinting duties until her grievance on that matter had been answered. [# 77-03, Exh. 2.]

The Agency charged Appellant with violating the following Career Service Rules:

1. CSR § 16-50 A. (7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.

2. CSR § 16-51 A. (4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public, and

3. CSR § 16-51 A. (11) Conduct not specifically identified herein may also be cause for progressive discipline.

In determining the discipline to impose, the Agency considered Appellant's two previous disciplinary actions: a verbal reprimand for failing to report for her assigned shift on April 19, 2000, and a written reprimand for failing to obey the instructions of a supervisor on July 9, 2002. After evaluating the information received at the pre-disciplinary meeting, Manager of Safety Tracy Howard found that, from the beginning of her service as an ASA III for the Denver Police Department's Identification Bureau, Appellant was fully aware that fingerprinting was a part of her job, and had raised questions about its inclusion since August 2002. The disciplinary letter noted that Appellant's performance had exceeded expectations in most areas of her latest Performance Enhancement Program Report (PEPR), and expressed the hope that the discipline imposed would serve to correct the negative behavior that Appellant had exhibited. [#77-03, Exh. 2.]

At the hearing, Appellant admitted that she left a parolee waiting downstairs for forty-five minutes on April 2nd. Appellant testified that she told co-worker Tom Truesdale to "kiss my ass", and that she became agitated in front of Sgt. Walker and Monica Connor and shouted that some people are too lazy to do their job. She stated that she then left work without permission, and that she took a couple of days off thereafter "to cool down." Appellant testified that she was frustrated by her observation that some other employees in higher job classifications did not work as hard as she did. She became vocal about those frustrations in August 2002, after she compared the job description of fingerprint technicians to her own, and saw that the former included the taking of rolled fingerprints as one of its essential duties. [#77-03, Exh. D, p. 2.] As a result of her complaint, Sgt. Walker instructed the staff to help each other out. Appellant testified that the situation only improved for a short time, and that the fingerprint technicians became very angry with her for criticizing them for not "doing their job" in her Feb. 2003 e-mail. As a result, Appellant observed that the work environment became stressful.

Appellant first argues that she did not refuse to do any work on April 2nd, and thus did not violate CSR § 16-50 A. (7). Sgt. Walker testified that Appellant told her on that date that she was not going to process unfinished paperwork on a parolee that was on her desk, and that Appellant later left the job without permission. Appellant admits that she "blew up" and left work after her constant requests to have the fingerprint technicians do their job were not addressed. [# 77-03, Exh. 1, p. 12.] It is concluded that Appellant did refuse to complete the unfinished paperwork for the parolee in question.

Appellant also contends that her conduct was justified because she had complained to her supervisors about the fingerprint technicians' resistance to performing fingerprint duties, and they had not resolved her complaint. However, the existence of employee complaints about a work assignment is not a defense to a charge of failing to perform that assignment. See In re: Dollison, CSA # 64-03 (8/18/03). Moreover, the work Appellant refused on April 2nd bore no relation to her ongoing complaint about fingerprinting. On that date, Appellant was upset that National Crime Investigation Center (NCIC) employee Thomas Truesdale had not completed his

work in clearing a parolee through the National Crime Information Center (NCIC). The evidence thus establishes by a preponderance of the evidence that Appellant refused to do assigned work which she was capable of performing, in violation of CSR § 16-50 A. (7).

The Agency also charged Appellant with failing to maintain satisfactory work relationships in violation of CSR § 16-51 A. (4). Appellant testified that on April 2nd she told Mr. Truesdale to “kiss my ass” because of his tone of voice. She admitted that later that day she told Sgt. Walker that Mr. Truesdale was “an asshole.” The latter comment was made within the hearing of four witnesses, two of which heard her loudly add that some people are too lazy to do their jobs. [#77-03, Exhs. 9, 12, 14, and 15.] Appellant admitted at hearing that her complaints about the fingerprint technicians created a stressful working environment with them. Her Feb. 20, 2003 e-mail related several conversations she’d had with co-workers wherein she advised other ASA IIIs that they were not required to roll fingerprints. [#77-03, Exh. 8.] Throughout the evidence, it was clear that Appellant’s statements and behavior toward her co-workers adversely affected her ability to maintain positive working relationships within her work group during the time in question. The totality of the evidence proved that Appellant violated CSR § 16-51 A. (4). See In re: Mosquera, CSA #118-02 (12/11/02) [employee’s reference to co-workers as “bitches” in their presence violates CSR § 16-51 A. (4).]

Since I have determined that Appellant violated the above specific disciplinary rules, the asserted violation of CSR § 16-51 A. (11), which allows discipline for “conduct not specifically identified herein”, will not be considered.

The only evidence Appellant presented in support of her claim of sexual orientation discrimination was that she believed she had been treated differently, and did not know why. Appellant has failed to meet her burden to prove the first element of a prima facie case of discrimination, that she was a member of the protected group. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Appellant has therefore failed to establish that the discipline was motivated by sexual orientation discrimination in violation of CSR § 19-10 (c).

II. APPEAL NO. 134-03

This appeal is directed to Appellant’s overall below expectations rating on her PEPR dated June 24, 2003, which was based upon ratings of below expectations in the areas of attendance, personal relations, personal contact, and safety and security.

Career Service Rules require that an agency evaluate the performance of each non-probationary employee once a year. CSR § 13-22. Performance is rated against an employee’s achievement of the expected accomplishments set forth in that year’s Performance Evaluation Program (PEP), which details the duties to be performed by each employee holding a classified position within each Agency. Agency supervisors may revise the annual PEP to include new duties being performed by an employee. Career Service Authority (CSA) approval is not needed to implement changes to a PEP.

In contrast, the job specification establishing the classification and pay to be assigned a job title must be adopted by the Career Service Board. [CSR Rule 7; testimony of Linda Lambiotte; #77-03, Exhs. D and 21.]

In 1999, Appellant was hired into the position of Senior Support Services Clerk. On September 1, 2000, that position and nineteen others were reclassified by the Career Service Board into the job specification of Administrative Support Assistant III. [#77-03, Exh. 21, p. 4.]

The evaluation of an employee's performance is intended to assist each employee in becoming a more effective worker. This evaluation is designed to inform the employee of the manner in which he or she is meeting standards of performance established by the supervisor. In no event shall an employee's employment performance rating be a substitute for disciplinary action under Rule 16 DISCIPLINE. It may be used, however, to establish attempted non-disciplinary corrective action in support of subsequent disciplinary action under Rule 16 DISCIPLINE for unsatisfactory work performance. The Performance Enhancement Program Report is intended to cover overall performance during a specific period of time.

CSR § 13-10.

An Agency shall advise an employee of an anticipated below expectations rating no less than two working days before issuance of the rating, and must allow the employee to be represented at the meeting to review the PEPR. CSR § 13-60. An employee may grieve a below expectations rating, and may appeal the denial of that grievance. CSR § 13-50. "The only basis for reversal of the Performance Enhancement Program Report shall be an express finding that the rating was arbitrary, capricious, and without rational basis or foundation." CSR § 19-10 (e). The employee challenging the performance rating bears the burden of proving the facts supporting such a finding. In re: Douglas, CSA #154-02, p. 3 (1-27-03). An act is arbitrary and capricious if "a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion." Wildwood Child & Adult Care Program, Inc. v. Colo. Dept. of Public Health Care and Environment, 985 P. 2d 654, 658 (Colo. App. 1999.)

The Career Service Rules define each level of performance which may be used in a PEPR. Performance may be rated as below expectations if an employee "failed to meet a significant portion of the employee's expected accomplishments." Performance may be given a rating of outstanding, exceeds expectations or meets expectations if the performance consistently falls within that rating. CSR § 13-23.

Appellant received below expectations ratings in three job responsibilities deemed Priority 1 (attendance and punctuality, personal contact, and safety and security), and one Priority 2 category (personal relations). [# 134-03, Exh. D.] In accordance with CSR § 13-60, the Agency notified Appellant on May 29, 2003 that her overall PEPR

rating was below expectations, and that she was entitled to a representative at the meeting set to review that rating. [# 134-03, Exh. A.] Appellant did not attend the review meeting. [# 134-03, Exh. B, p. 4.]

The PEPR rated Appellant's performance between June 1, 2002 and May 31, 2003 in four major categories: work habits, communication, office routine, and safety and security. The Agency determined that Appellant exceeded expectations in the categories of communication and office routine, but performed below expectations in the categories of work habits and safety and security based upon four incidents:

1) On Feb. 20, 2002, Appellant sent an e-mail to her managers stating that she would no longer fingerprint, and accusing the Fingerprint technicians of "playing dumb" to avoid the duty. [# 77-03, Exh. 8.]

2) On March 11, 2003, Appellant cleaned out her desk and stated that she would not be back until Sgt. Walker "took care of things". She took leave for two days thereafter.

3) On April 2, 2003, Appellant refused to process paperwork for a parolee, swore and yelled in front of other employees and her supervisors, left before her work shift was over, and did not return to duty for three work days.

4) On May 20, 2003, Appellant did not return to work after a disciplinary suspension. [# 134-03, Exh. B, p. 8].

Appellant argues that she should not have been rated below expectations because she met more than fifty percent of her expected accomplishments, as indicated by the greater number of positive contemporaneous remarks made by her supervisor in her Supervisor's Situation Record (SSR). [# 134-03, Exh. B, p. 5 - 8]. That argument is not well founded. An employee is properly rated as below expectations for the rating period under CSR § 13-23 if she fails to meet a significant portion of her expected accomplishments, regardless of her achievement of others. The word "significant" in the definition of performance levels has been interpreted to refer to expected accomplishments that have "considerable influence or effect." In re: Douglas, supra, p. 4. Thus, it is the effect of the failure to perform that determines whether the inadequacy of the performance merits a below expectations rating. The mere proportion of positive to negative remarks in a supervisor's day-to-day notes does not determine whether a performance must be rated at a certain level.

An agency's determination of what constitutes a significant portion of an employee's accomplishments will not be overturned unless it fails to meet the standard of review set forth in CSR § 19-10 (e). The evidence demonstrated that Appellant's failure to adequately perform in those areas exercised a considerable negative effect on her overall performance. The Agency therefore did not abuse its discretion in determining that attendance, personal relations, personal contact, and safety and security constituted a significant portion of Appellant's duties.

Appellant was rated below expectations in the area of attendance based upon two incidents where she left work without permission after becoming angry, and failed to return for a total of four and a half days. Appellant testified that she did not return to work because she needed time to cool down. The Agency proved that Appellant's pattern of leaving without permission when angry had the effect of undermining her supervisor's authority to control its staffing of the bureau. The Agency thus did not act arbitrarily in determining that her absences failed to meet the standards set for attendance. [#134-03, Exh. B, p. 1; #167-03, Exh. A. p. 1.]

Appellant was given a below expectations rating in personal relations based upon her vocal criticism of her co-workers, and her refusal to comply with supervisors' instructions in three separate incidents from February to April 2003. Appellant was not rated lower based upon her use of the grievance procedure, but based upon her negative conduct toward her co-workers. Appellant admitted during her testimony that the fingerprint technicians were angry at her because of her statements that they were not doing their jobs. The evidence is undisputed that it was the confrontational nature of her criticisms that caused the decline in her relations with her fellow workers. That decline was noted in the below standards rating in the area of personal relations.

Appellant also failed to maintain a positive working relationship with her supervisors by her statements that she intended to refuse future fingerprinting duties, and her unprofessional behavior on April 2nd in front of co-workers, supervisors and her manager. On that date, Appellant screamed and swore in front of four co-workers, loudly accused others of being too lazy to do their jobs, and alternately yelled and whispered at her supervisors, with arms waving. [#77-03, Exhs. 9, 10, 14, and 15.] Based upon the evidence, the Agency did not act in an arbitrary manner in rating her performance in the area of personal relations as below expectations. [#134-03, Exh. B, pp. 1, 2; #167-03, Exh. A, p. 2.]

Appellant contends that she should not have been rated below expectations in the category of personal contact based upon her April 2nd conduct, since such outbursts are a daily occurrence and others are not suspended for it. The only evidence produced in support of this contention was a single heated exchange between two other employees on April 2, 2003, which was resolved when a supervisor stepped between the employees. On this evidence, it does not appear that this conduct was comparable in duration or severity to that admitted by Appellant. Thus, Appellant did not meet her burden to show that the Agency was arbitrary in its rating of Appellant as below expectations in the area of personal contact. [#134-03, Exh. B, p. 2; #167-03, Exh. A. p. 2.]

The final area in which Appellant was rated below expectations was safety and security, which measures an employee's compliance with CSA and agency rules, regulations, and directives. [#134-03, Exh. B, p. 4.] One of the cited violations occurred outside the rating period, and therefore cannot be used to support the below expectations rating. [#134-03, Exh. B, p. 5, entry 7/9/02.] "The Performance Enhancement Program Report is intended to cover overall performance *during a*

specific period of time.” CSR § 13-10, emphasis supplied. However, the remaining five incidents amply support the rating.

The first such incident was a statement that Appellant would not perform fingerprinting duties until a job audit was completed. [[#134-03, Exh. B, p. 6, entry 2/20/03.] Appellant could not rely on a Career Service staff member’s instruction to discontinue the work if it constituted more than 50% of her duties, since it is undisputed that fingerprinting consumed no more than two hours of her day. [#77-03, Exh. 5.] The Career Service Rules do not grant an employee the right to suspend performance of a challenged assignment until the completion of an audit. CSR § 7-22. The refusal to do the work violated Appellant’s duty to comply with the orders of her supervisors and to perform assigned work. CSR § 16-50 A. (7). The next entry dated 3/11/03 indicates a similar intention to refuse assigned work, followed by two days’ absence from work. On April 2, 2003, Appellant refused to process paperwork for a parolee, called a co-worker an asshole, and left the job without permission, in violation of her duties to perform assigned work, maintain satisfactory working relationships, and to comply with agency rules regarding attendance. CSR §§ 16-50 A. (7), (13); 16-51 A. (4). Appellant has failed to establish that the Agency acted arbitrarily in determining that Appellant’s performance was below expectations in the area of safety and security.

Appellant argues that her evaluation was issued in retaliation for Appellant’s filing of a grievance and for speaking out about the conduct and practices of fingerprint technicians. Appellant relies upon her supervisor’s entry into the contemporaneous SSR record on Appellant’s performance as evidence of retaliatory intent. In December 2002, Sgt. Walker noted that Appellant informed her that “she planned on filing a grievance because she felt that this was the best way to get an audit. I advised her that this was not true.” [# 134-03, Exh. 3, p. 5, entry dated 12/02.] Appellant concluded that her supervisor intended to discourage her from engaging in a protected activity, the filing of a grievance.

“To establish a prima facie case of reprisal, a plaintiff must show (1) protected employee action; (2) adverse action by an employer either after or contemporaneous with the employee’s protected action; and (3) a causal connection between the employee’s action and the employer’s adverse action.” Morgan v. Hilti, 108 F.3d 1319, 1324 (10th Cir. 1997).

The grievance filed on April 8, 2003 did not assert that the assignment of fingerprinting duties was discriminatory. [#77-03, Exh. 4.] For that reason, Appellant has failed to prove that the grievance constituted unlawful harassment or discrimination protected by Title VII and CSR § 15-106. It remains to be determined whether the grievance constituted “assisting the City in the investigation of any complaint” as that phrase is used in CSR § 15-106.

Appellant complained that she was required to do work that other employees should have been required to perform. That complaint raised no evidence of a waste of public funds, abuse of authority, mismanagement of an agency, or any other information

that was not in the public interest. Appellant failed to present any evidence that the quality of fingerprinting was affected by its assignment to ASA IIIs. Thus, Appellant was not a whistleblower as that term has been defined under the analogous state whistleblower statute, C.R.S. § 24-50-5-102. The public's interest was not affected by how the grievance was resolved: either ASA IIIs or fingerprint technicians would be required to do the work. Appellant therefore failed to meet her burden to establish the first element of a claim of retaliation: that she was engaged in a protected activity.

Appellant raised one complaint that appears to affect the public interest: that some staff in the bureau were using city equipment to earn money by fingerprinting groups at private locations. Appellant's supervisors took action on that complaint the very day it was raised. [#77-03, Exh. Q; #167-03, Exh. U.] There was no evidence that Appellant suffered any adverse action arising from her presentation of that issue.

I find that Sgt. Walker's use of the term "hostile work environment" in the December SSR entry did not refer to Appellant's grievance, but rather to Appellant's February e-mail to management that "I am no longer going to fingerprint anyone else until the job audit is completed." The e-mail stated that the fingerprint technicians were "still playing dumb" in order to avoid doing their job. Appellant indicated in the e-mail that she had informed another clerical employee that she was "no longer supposed to be printing", and that she had many prior conversations with other employees about her views on this issue. The evidence indicates that Appellant expressed her opinion in the workplace that she did all the work, and that the fingerprint technicians avoided work and played computer games on duty. Her criticisms were known to the other staff members, and as a result, her relationship with her co-workers suffered a great deal. The totality of the evidence is persuasive that the Agency based its evaluation on Appellant's performance, including her personal relations, and not in retaliation for Appellant's grievance or her workplace complaints.

Appellant's remaining contentions addressed to her performance rating are not meritorious. Appellant was not rated lower based on her failure to perform fingerprinting duties, but based on her inappropriate conduct. [# 134-03, Exh. B, pp. 1 – 2, 5 - 8]. Appellant received an exceeds expectations rating for her performance of her office duties. [# 134-03, Exh. B, p. 3]. The fact that her conduct stemmed from her belief that she was being treated unfairly does not establish that the rating was arbitrary. The rating was not unfairly based upon the new language in the July PEPR, since Appellant had performed that duty since her hire in 1999, and was on notice since April 17, 2003 that the Agency considered her objections unfounded. [Testimony of Appellant; # 77-03, Exh. 5.] Finally, Appellant has cited no authority for her argument that she may refuse to perform a duty because that duty appears on the job description of another classification, and does not appear on her job description. [# 77-03, Exhs. 21, D.] The Career Service Rules do not support that argument. Appellant did not dispute the testimony of DPP Human Resource Director Linda Lambiotte that changes in job duties are expected, and are addressed after the fact by changes to an employee's PEP. Further, Appellant's job description requires her to prepare documents and operate

office equipment, which duties adequately describe the task of fingerprinting. [# 77-03, Exhs. 21, p. 2, and F.]

Appellant has failed to establish that her below expectations PEPR was arbitrary, capricious, and without rational basis or foundation under CSR § 19-10(e).

III. Appeal No. 167-03

A. Termination

On October 16, 2003, Appellant was terminated from her employment for refusing to perform fingerprinting duties and leaving work without permission on Sept. 29, 2003. On October 24, 2003, Appellant filed a timely appeal of her termination based upon asserted violations of Career Service Rules 16 -19, and discrimination on the bases of age and sexual orientation. The appeal requests reinstatement, back pay, and the purging of all adverse information from Appellant's personnel file.

The Agency based its termination decision upon the following incident. On Sept. 29, 2003, at 8:45 a.m., Appellant refused an order by Sgt. Clark to fingerprint a sex offender. Appellant initially resisted meeting with Lt. Barker about her refusal of this order. When the meeting was later held in his office, Lt. Barker twice ordered Appellant to fingerprint the individual. Appellant refused both orders, left the meeting, and left work shortly thereafter, several hours before the end of her shift.

Appellant admitted that she refused the orders to fingerprint given by Sgt. Clark and Lt. Barker, and that she left work on Sept. 29th without permission because she was upset. Appellant testified that she was washing dishes in the fingerprint room after a staff breakfast when Sgt. Clark located her and asked her to fingerprint a sex offender. Appellant replied by asking why a fingerprint technician couldn't do it. Sgt. Clark said she thought Sgt. Walker had added that duty to her job description. Appellant replied, "[t]hat's why we're going to court," a reference to her pending appeals. Sgt. Clark went to Lt. Barker's office and asked him if Appellant was required to perform fingerprinting. Lt. Barker assured her that she was. Sgt. Clark returned to Appellant, and stated that Lt. Barker had told her to tell Appellant that she was to do the fingerprinting. Appellant said she would not do it, because there were four technicians on duty who could do it.

Lt. Barker then approached Appellant at the desk and asked to speak to her. She said that she was busy helping someone else. Lt. Barker responded that he needed to speak with her now. Appellant demurred, stating that she would be with him when she was finished helping a police officer at the counter. At the meeting in Lt. Barker's office in the presence of Sgt. Basefsky, Sgt. Clark and Appellant's chosen witness Benita Thompson, Lt. Barker ordered Appellant to process the fingerprint request. Appellant informed him that she wasn't going to do it. Lt. Barker repeated the order, and Appellant again refused to comply. Lt. Barker warned her that she would be written up for her refusal. Appellant then left the office, and shortly thereafter left work for the day, without obtaining the permission of her supervisor. The next day, Appellant worked for

a few hours and then left for the day without permission. [Testimony of Appellant; Sgt. Clark, Lt. Barker, and Benita Thompson; #167-03, Exh. S, pp. 2 - 4.] This testimony was consistent with Appellant's written statement filed in support of her appeal. [#167-03, Exh. 1, pp. 2 - 3.]

The Agency decision considered Appellant's four instances of previous discipline over the past three years, including a one-day suspension for similar conduct imposed four months before the current incident. [# 167-03, Exh. 2, p. 3.] The Agency's final decision also took into consideration the verbal statements of Appellant and her attorney at the pre-disciplinary meeting, as well as Appellant's past work history.

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.
- (7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.
- (13) Unauthorized absence from work, including but not limited to: when the employee has requested permission to be absent and such request has been denied; leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.
- (20) Conduct not specifically identified herein.

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

- (2) Failure to meet established standards of performance including either qualitative or quantitative standards.
- (4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.
- (10) Failure to comply with the instructions of an authorized supervisor, and
- (11) Conduct not specifically identified herein.

The evidence indicates that the central dispute in this appeal is Appellant's belief that she should not be required to perform the duty of fingerprinting, and her supervisor's enforcement of that requirement. Appellant testified that she was informed at the time of her hire in 1999 that the position required fingerprinting, and that she was given training to roll fingerprints. In August 2002, Appellant expressed to Sgt. Walker

that she believed the ASA IIIs were doing more than their share of the fingerprinting duties. In response, Sgt. Walker ordered all staff to help out with fingerprinting duties.

In December 2002, Appellant informed Sgt. Walker that she did not believe that fingerprinting should be a part of the duties of ASA IIIs, since it was listed in the job description of a fingerprint technician, and was not listed in the ASA IIIs' job description. Sgt. Walker responded by promptly exploring a job audit and investigating the merits of Appellant's objection by compiling work statistics, interviewing technicians and obtaining information from the Human Resources Department from December 2002 to April 14, 2003. [#77-03, Exh. 5; # 134-03, Exh. 3, pp. 5 - 6, entries 12/02, 1/04/03, 1/03.] Marge Ceja in Human Resources confirmed that unless Appellant was fingerprinting for more than half of her work day, it was a part of her duties. Sgt. Walker concluded that fingerprinting is properly a part of the job of an ASA III working in the Denver Police Department's Identification Bureau, albeit a minor one. [# 77-03, Exh. 5]. As a result of that investigation, and in an effort to make clear that fingerprinting was a part of the ASA IIIs' job, Sgt. Walker added that duty to the Performance Evaluation Program (PEP) for ASA IIIs assigned to the Identification Bureau in July 2003. [#167-03, Exh. A, p. 3.]

The job description of an ASA III provides a general description of the duties to be performed by all office support workers assigned to any agency in the city. Included is the essential duty to "[prepare and process] a variety of documents according to guidelines," and to "[operate] a variety of office equipment." [# 77-03, Exh. 21.] Positions in the "administrative class" such as an ASA III perform "work along specialized or technical lines requiring special training, experience, or knowledge, or . . . execution, under only general supervision, of special assignments and tasks". CSR Rule 1. Agencies employing ASAs throughout the city use PEPs to provide a more detailed description of their job duties within the specific unit than is included in the city-wide job specification. [#77-03, Exh. 21; #167-03, Exh. A.]

The Denver Police Department Identification maintains an extensive file of fingerprints that are classified for identification for many purposes. Fingerprinting is the use of a fingerprint kit and cards to obtain the inked prints of persons who appear at the Identification Bureau. ASA IIIs assigned to the Identification Bureau have been performing that duty since 1994. [# 167-03, Exh. T, p. 16.] Appellant received training in fingerprinting when she began her employment there in 1999, and continued fingerprinting until Sept. 29, 2003, the date of the conduct which led to her termination. At that time, ASA IIIs in the Identification Bureau spent less than two hours per day performing fingerprinting duties. [Testimony of Appellant, Benita Thompson and Gerianne Buschy; #167-03, Exh. T, p. 13.]

Sgt. Marsha Walker testified that the five fingerprint technicians, three police technicians and three ASA IIIs share the duty to prepare inked fingerprint cards. ASA IIIs receive about an hour's training in how to roll an inked finger onto a card in order to obtain a readable print. Fingerprint technicians receive six months to a year's training in the classification and identification of fingerprints. The top priority of fingerprint

technicians is processing the paperwork of prisoners booked into the jail, which consumes eighty percent of their work day.

The quality of the inked impressions is sometimes adversely affected by the physical position of the subject, as in the case of a person sitting in a wheelchair, or by the distinctness of a person's fingerprints. In the latter case, the readability of the impression can be enhanced by the application of lotion to the fingers. There was no evidence that the quality of fingerprints was affected by whether they were made by ASA IIIs or fingerprint technicians. Only two Identification Bureau staff members have been excused from fingerprinting, both for health reasons.

About six months before the incident in question, Appellant filed a grievance challenging her obligation to fingerprint, and seeking as a remedy an order that "fingerprint technicians shall begin to do their assigned duties." [#77-03, Exh. 4.] Appellant testified that she knew that fingerprinting had been determined to be a part of her job when she received the grievance response, which was dated April 17, 2003. In July 2003, Appellant received an amended PEP which specifically listed fingerprinting as a part of her duties. [#167-03, Exh. A. p. 3.]

In an appeal of a disciplinary action, the Agency bears the burden to establish by a preponderance of the evidence that it had just cause for the action taken. In re: Gustern, CSA #128-02 (12/23/02). The evidence is undisputed that Appellant refused to comply with two direct orders to perform work. Appellant argues that the refusals were justified for a number of reasons: 1) her challenge to the inclusion of fingerprinting duties was pending in the CSA Hearing Office [In re: Leal-McIntyre, CSA 135-03]; 2) her PEP was amended improperly because it had not been approved by the CSA, 3) she was being unfairly sought out to perform work that should have been assigned to fingerprint technicians; and 4) she was ordered to fingerprint in retaliation for her complaints about fingerprinting.

The Career Service Rules do not provide that duties challenged in an appeal are stayed pending a decision of the Hearing Office. Agency actions are reversed only in the event of a final decision by a hearing officer pursuant to CSR § 19-27. The Department's Human Resources Director Linda Lambiotte testified without rebuttal that a PEP is changed to include new non-essential duties after a job's duties actually change, and not the reverse. Ms. Lambiotte confirmed that a PEP does not need the approval of the Career Service Authority before it is valid. In contrast, changes to a classification and pay plan are not effective until approved by the Career Service Board. CSR § 7-98.

The evidence revealed that Appellant became increasingly frustrated by her perception that she was performing more than her share of the work of the department. ASA III Benita Thompson shared this perception. However, it is axiomatic that supervisors determine how the work of a unit is assigned. The Career Service disciplinary rule prohibiting refusal to obey a supervisor's order indicates only one condition: the employee must be capable of performing that work. CSR § 16-50 (7).

Appellant's disagreement with the assignment may not be used to justify a refusal of an order to perform the work.

Since fingerprinting constituted less than 50% of the duties of the position, her position was not eligible for reclassification. "In classifying a position, Career Service Authority will evaluate permanent changes to essential duties that comprise a majority of work time and are most important to the position." CSR § 7-13. Appellant did not request an individual position audit under CSR § 7-22, which request cannot be denied for budgetary reasons. [#77-03, Exh. 6; testimony of Chief Howard.] Two months before Appellant refused the orders to fingerprint, that duty had been properly included in her PEP. Appellant's separate appeal of that action was dismissed for lack of jurisdiction under "the unambiguous language of CSR § 13-50." [In re: Leal-McIntyre, CSA 135-03 (11/19/03).] Moreover, the appeal of Appellant's May grievance which first challenged the fingerprinting duty had been dismissed as abandoned on August 27, 2003, a month before Appellant refused to do the work requested. [In re: Leal-McIntyre, CSA #76-03 (8/27/03).]

At hearing and in her closing argument, Appellant claimed that her refusal to comply with the order was based in part upon her belief that fingerprint technicians could do the job more efficiently, and that a reassignment of that duty to the technicians may decrease the likelihood of incorrect prints. However, Appellant offered no evidence that the assignment of fingerprint duties to ASA IIIs actually caused either errors or inefficiencies.

At hearing, Appellant argued that the termination was in retaliation for her filing of a grievance or for her speech on the issue of fingerprinting among the staff at the Identification Bureau. The jurisdiction of an administrative hearing officer is strictly limited to that set forth in its enabling statute. The person invoking that jurisdiction has the burden to demonstrate that it exists to hear the claim. Clark v. USPS, 989 F.2d 1164, 1167 (Fed. Cir. 1993).

The Career Service Rules prohibits retaliation for "reporting unlawful harassment or discrimination or assisting the City in the investigation of any complaint". CSR § 15-106. The disposition of a complaint of harassment or discrimination is appealable under CSR § 19-10 (f). Appellant raised the issue of retaliation in the nature of whistleblowing in her appeal. [#167-03, Exh. 1, p. 3.] Even if whistleblowing was one of the types of protected activity included in CSR § 15-106, Appellant failed to submit a complaint to her supervisor alleging retaliation, and thus failed to obtain "the disposition by a supervisor or other appropriate official of a complaint of harassment or discrimination," as required by CSR § 19-10 (f) in order to invoke the jurisdiction of the Hearing Officer to present a complaint of retaliation.

Appellant also raised a concern that some employees were improperly using the city's fingerprint equipment to fingerprint groups for pay at off-site locations. Appellant first raised that concern on April 23, 2003 at her pre-disciplinary meeting on the one-day suspension. [Testimony of Chief Howard.] Division Chief Cooper and Appellant immediately met to discuss this issue. That same day, Lt. Barker issued an e-mail to

the staff forbidding the practice of checking out fingerprint kits without supervisory approval. [# 167-03, Exh. U.] The matter was thus resolved several months before Appellant's termination in a manner that was consistent with Appellant's expressed opinion. No evidence was presented in support of Appellant's claim that she was retaliated against for the bringing of this complaint.

The Agency has established by a preponderance of the evidence that Appellant's conduct on Sept. 29, 2003 in refusing to fingerprint constituted willful neglect of duty in violation of CSR § 16-50 (1). In addition, the Agency has proven that Appellant refused to comply with her supervisor's orders, in violation of CSR § 16-50 (7), and failed to comply with her supervisor's instructions, as prohibited by CSR § 16-51 (10). The Agency also demonstrated that Appellant violated CSR § 16-50 (13) by her admittedly unauthorized absence on Sept. 29th. The evidence also proved that Appellant violated CSR § 16-51 (2), failure to meet established standards of performance, by her exhibition of a negative attitude toward co-workers and supervisors on Sept. 29th, in violation of the standard of personal relations. [#167-03, Exh. A, p. 2.] Finally, the evidence showed that Appellant failed to maintain satisfactory work relationships with her co-workers by her insubordinate behavior on Sept. 29th toward her supervisors Sgt. Clark and Lt. Barker, the Commander of the Identification Bureau.

Since I have found specific violations of the disciplinary rules herein, it is not necessary to consider whether the conduct also constituted a violation of CSR §§ 16-50 (20), or 16-51 (11), both of which prohibit other unspecified misconduct.

B. Discrimination Claim

Appellant testified that she raised a claim of sexual orientation discrimination because she believed she had been treated differently, and did not know why. No other evidence was submitted on that claim, or her claim of age discrimination. Appellant has failed to meet her burden to prove the first element of a prima facie case of discrimination on either basis: that she was a member of a group protected by the rule prohibiting discrimination. McDonnell Douglas v. Green, 411 U.S. 792 (1973); CSR § 19-10 (c). Appellant has therefore failed to establish that the discipline was motivated by sexual orientation or age discrimination in violation of CSR § 19-10 (c).

C. Penalty

Appellant next contends that the Agency failed to comply with Career Service Rules governing the imposition of progressive discipline. CSR §§ 16-10 and 16-20.

The relevant Career Service Rules state:

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense *and take into consideration the employee's past record*. The appointing

authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.

The disciplinary action taken must be consistent with this rule . . .

CSR § 16-10 (emphasis added).

“Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.” CSR § 16-20 (2).

Appellant claims that termination is an inappropriate penalty because three of the four past disciplinary actions upon which the Agency relied were unwarranted. Appellant argues that the July 2002 reprimand for failure to complete eight hours of training in 2001 should not be considered because the violation occurred over six months prior to the discipline. The Career Service Rules do not bar consideration of discipline based solely on the lapse of time between violation and discipline. The Agency appropriately considered the 2002 reprimand because it bore a reasonable relationship to the misconduct at issue. [#77-03, Exh. 20.] This decision upholds the written reprimand and one-day suspension imposed on May 8, 2003. Appellant concedes that the verbal reprimand issued in April 2000 was justified. Therefore, the Agency acted in conformity with CSR § 16-10 by taking into consideration the employee’s past record in order to determine the type and severity of discipline necessary to correct inappropriate behavior.

The Agency is required under Rule 16 to determine the level of discipline in accordance with the gravity of the misconduct, taking into consideration an employee’s past disciplinary history. Here, the Agency reasonably determined that Appellant’s unequivocal refusal to obey the repeated orders of her supervisors, the recurrence of her unauthorized departure from the job site immediately thereafter, and her recent suspension for similar misconduct, indicated that Appellant did not intend to correct her behavior.

Appellant was on notice since the beginning of her employment that her duties included fingerprinting. Her testimony indicated that she remained convinced at the time of the hearing that the assignment was improper. The Agency had continued to require the work, and had imposed a reprimand and a one-day suspension for similar behavior only five months previously. Since it is clear that the misconduct would recur unless the Agency removed the duty from the responsibilities of an ASA III, it must be concluded that the Agency was not unreasonable in its conclusion that termination was necessary and appropriate to correct the situation.

Termination was also reasonably related to the seriousness of the offense in conformity with CSR § 16-10. It is essential for the efficient operation of a city work unit

that support employees comply with the orders of their supervisors. For that reason, a willful refusal to obey a direct order is a serious offense which may warrant discharge. CSR § 16-50 (7). While there was persuasive evidence that Appellant had been a good worker in many other respects, the totality of the evidence supported the Agency's conclusion that her positive qualities did not outweigh the negative impact on the bureau of her refusal to perform important work and her unsatisfactory relationship with her co-workers. Under the circumstances present here, the Agency acted reasonably in determining that dismissal was warranted.

Appellant argues that the discipline must fail because the appointing authority was not aware of many important issues regarding the termination. The due process clause does not require such awareness. A pre-termination hearing is "an initial check against mistaken decisions - - essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The essential requirements of due process are notice and an opportunity to respond." Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Appellant received notice of the charges by means of the pre-disciplinary letter. The pre-disciplinary meeting was her opportunity to respond to the charges and inform the decision-maker of any facts which she believed would apprise him of what had occurred, and of any factors in mitigation. CSR § 16-30 B. Appellant attended the pre-disciplinary meeting with her attorney, and presented both an oral and written statement in response to the charges. Appellant was thus provided with due process in the pre-disciplinary process, and has exercised her right to a de novo review during this appeal in accordance with City Charter § C5.25(4) and CSR § 2-104. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.)

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer AFFIRMS the following Agency actions:

- 1) the written reprimand and one-day suspension imposed on May 8, 2003, which was the subject of Appeal No. 77-03,
- 2) the below expectations PEPR dated June 24, 2003, appealed in Appeal No. 134-03, and
- 3) the dismissal of Appellant dated October 24, 2003, which was appealed by Appeal No. 167-03.

Dated this 27th day of
January, 2005.

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 _____ day of January, 2005, addressed to:

Teri Dalbec, Esq.
7745 West 44th Avenue
Wheatridge, CO 80033

Odilia Leal-McIntyre
6263 W. Floral Pl.
Denver, CO 80227

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail, this ____ day of January, 2005, addressed to:

Robert D. Nespor
Assistant City Attorney
Litigation Section

Alvin J. LaCabe, Jr.
Manager of Safety

Linda Lambiotte
Denver Police Department
