

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

Appeal No. 385-01

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**DOUGLAS LOTTIE**, Appellant

Agency: DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT  
DIVISION, and THE CITY AND COUNTY OF DENVER, a municipal corporation

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**INTRODUCTION**

This matter comes before the Career Service Board on appeal by Douglas Lottie (hereinafter "Appellant") filed December 1, 2001. Appellant challenges the Department of Public Works, Wastewater Management Division's (hereafter "Agency") decision to suspend his employment for fifteen days without pay after Appellant allegedly threatened another employee during a dispute.

A hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on February 11, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Jack M. Wesoky, with Wastewater Management Operations Director, Reza Kazemian, present for the entirety of the proceedings and serving as advisory representative for the Agency. Appellant was present and was represented by John Mosby, Esq.

Witnesses for the Agency included Mr. Kazemian, and the following Agency employees: Crew Supervisors Timothy A. Whyte and John Sandoval, Jr., Collections Systems Supervisor Robin W. Snyder, and Construction Engineer Steven Bello.

Appellant's witnesses included Appellant himself.

The parties stipulated to the admission of Agency's Exhibits 1 through 5 and 7 through 12. Exhibit 6 was later admitted without objection. No additional exhibits were offered or admitted.

For purposes of the Findings and Order, the Rules of the Career Service Authority shall be abbreviated as the "CSR" with a corresponding numerical citation.

## ISSUES

1. Whether the Agency has demonstrated by a preponderance of evidence that Appellant made the alleged threatening comment to another employee.
2. If so, whether through the action described above, Appellant engaged in:
  - a) Threatening, fighting with, intimidating, or abusing an employee in violation of CSR Rule 16-50 A. 8);
  - b) Conduct which violates an executive order adopted by the Career Service Board in violation of CSR Rule 16-50 A. 18); namely, Executive Order 112, prohibiting violence in the workplace;
  - c) Failure to maintain satisfactory relationships with co-workers in violation of CSR Rule 16-51 A. 4); and/or
  - d) Failure to observe departmental regulations in violation of 16-51 A. 5); namely, the Public Works Policies and Rules Handbook, Section 1. A.
3. Whether the Agency demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
4. If so, whether the Agency's fifteen-day suspension of Appellant is reasonably related to the seriousness of the offense given the totality of the evidence.

## FINDINGS OF FACT

1. Appellant is a twenty-year veteran employee for the City and County of Denver. He has been with the Agency since 1986. At the times relevant to this appeal, Appellant was a Utility Worker in the Agency's two manhole adjustment crews. These crews are supervised by Crew Supervisors Timothy A. Whyte and John Sandoval, Jr. At all times relevant to this appeal Appellant primarily worked under Mr. Whyte, but on occasion he worked for John Sandoval, Jr. when such rotation was necessary for crew coverage.
2. Mr. Whyte served as Appellant's immediate crew supervisor in the field only and did not engage in evaluations of Appellant's performance, or otherwise supervise Appellant from an administrative standpoint.
3. Mr. Whyte and Mr. Sandoval are supervised by Collections Systems Supervisor Robin W. Snyder. Mr. Snyder's supervisor is Construction Engineer Steven Bello. Mr. Bello's supervisor is Agency Director Reza Kazemian.
4. Agency testimony established that one of the duties performed by all manhole adjustment crewmembers is the frequent operation of a jackhammer in cutting manholes. Appellant presented no evidence rebutting this assertion.

5. Appellant is presently 52 years old. For approximately three years prior to the incidents giving rise to this appeal, Appellant had been experiencing pain and difficulty in movement on days following jackhammer duty. At some point prior to the events leading to this appeal, Appellant reported this pain and difficulty to Mr. Whyte many times. Mr. Sandoval also learned of Appellant's difficulty although it is not clear how or when.
6. Mr. Whyte and Mr. Sandoval both observed that Appellant was symptomatic and appeared to be in pain after operation of the jackhammer. Mr. Whyte informed his supervisor, Mr. Snyder, of the difficulties Appellant was experiencing. Mr. Whyte testified he subsequently redistributed work, relieving Appellant to do other work while the other crewmembers operated the jackhammer. While it is unclear how often Appellant worked on Mr. Sandoval's crew, Mr. Sandoval's testimony suggests he also adjusted his crew's workload similarly with regard to Appellant. It is not clear when these adjustments occurred.
7. Mr. Snyder testified that initially Appellant's fellow crewmembers agreed to the work redistribution. However, at some point they began complaining to him and the crew supervisors about Appellant "not pulling his weight." Mr. Snyder testified he told Appellant about the complaints, but it is not clear when he did this. Mr. Snyder also informed his supervisor, Mr. Bello, of the problem. Mr. Bello and Mr. Snyder discussed potential alternative positions for Appellant that would not require operation of a jackhammer. It is not clear when this discussion occurred.
8. Mr. Bello testified that he first heard of Appellant's difficulty operating the jackhammers when Appellant told him about it during a staff meeting sometime around October of 2001. Mr. Bello testified he also received reports about the eventual complaints regarding Appellant's removal from jackhammer duty from Mr. Whyte, Mr. Sandoval and Mr. Snyder.
9. Director Kazemian marshaled the staff meeting in October of 2001, and was also made aware of Appellant's jackhammer difficulties at that time. In November of 2001, Mr. Kazemian was looking for an employee to fill a temporary Traffic Operations assignment replacing street signs, and approached Mr. Bello to offer Appellant the position. Mr. Kazemian testified he asked Mr. Bello to talk to Appellant about this by November 13 because there was an orientation session for the position on November 14.
10. Mr. Bello testified he called Appellant to his office on the evening of November 13, 2001 to tell him about the temporary opening in Traffic Operations. Mr. Bello testified that he told Appellant about the opening because of his difficulty with the jackhammer, which was not required on this assignment. Mr. Bello testified that Appellant grew agitated and apparently upset. He testified he told Appellant to just check out the new potential assignment. He testified that Appellant responded that such a new assignment would be unfair, would require him to drive further costing him additional gas money, and that the new assignment was discriminatory and retaliatory in response to Appellant's law suit.<sup>1</sup> Mr. Bello testified it was this reaction which prompted him to tell Appellant about the complaints by his fellow crewmembers reported by the crew supervisors that Appellant was not "pulling his own

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<sup>1</sup> Apparently, there was a pending lawsuit involving Appellant and the Agency at that time. Mr. Bello told the safety investigators he did not know of the pending lawsuit until this conversation with Appellant. (See, Exhibit 9, p.1.)

weight" because of his removal from jackhammer duty. Appellant requested a forthwith meeting with those who were making these allegations. Mr. Bello then arranged for such a meeting to occur the following morning at 6:45 a.m.

11. Appellant testified that it was he who initiated the discussion with Mr. Bello on the evening of November 13, 2001, for the purpose of discussing relief from jackhammer duty. He testified that Mr. Bello did not bring up any alternate positions or otherwise discuss the potential transfer of Appellant to a new position until the meeting the following morning. Appellant testified that he did not know about any complaints about the jackhammering assignment until Mr. Bello told him about this during their discussion on November 13.
12. On November 14, 2001 at approximately 6:15 a.m. Appellant arrived in the office parking lot. As he pulled in he saw Mr. Whyte also pull in. Appellant testified to the following. As he was walking to the complex he saw Mr. Whyte getting out of his truck. Appellant did not walk up behind Mr. Whyte. Appellant said, "What's going on Tim?" Then the two men began to walk to the complex together. Appellant asked Mr. Whyte why he told Mr. Bello Appellant was not holding up his end of the jackhammering duty, and why Mr. Whyte said he was "doing all the work." Mr. Whyte responded, "I never told Bello that." Appellant testified that they then went into the complex to Mr. Snyder's office to sign in for the meeting.
13. Mr. Whyte testified to the encounter in the parking lot on the morning of November 14 as follows. Appellant approached Mr. Whyte from behind and he did not see Appellant coming. He was startled when Appellant said his name. Mr. Whyte testified he interpreted this exchange as "aggressive" because Appellant "snuck up" on Mr. Whyte and said his name loudly enough to startle him. Appellant told Mr. Whyte that Mr. Bello said Mr. Whyte had complained about the amount of work Appellant was doing. Mr. Whyte told Appellant that they were trying to adjust his assignment because of the jackhammer complications. Appellant then told him about the meeting to occur at 6:45 a.m. concerning this subject.
14. At 6:45 a.m. the meeting commenced in a meeting room on the second floor. Present were Appellant, Mr. Whyte, Mr. Sandoval, Mr. Snyder, and Mr. Bello. Appellant asked if he could record the meeting. All present agreed except Mr. Whyte, who objected to recording the meeting. Appellant did not record the meeting.
15. The Agency supervisors who were present at the meeting all testified similarly to the following. Appellant asked who was complaining and what the nature of the complaint was. Appellant said that he wanted to hear such complaints directly from the individuals themselves, and asked who they were. Mr. Sandoval told him he and his crew had complained about Appellant not operating the jackhammer anymore. Appellant further asserted that he was the only Black Utility Worker, that he was the only one being required to jackhammer, and that other non-Black crew members were not required to jackhammer. Mr. Snyder asked Appellant specifically who was not being required to jackhammer. Appellant did not offer any names and said something to the effect that this information would all come out in a legal proceeding. Mr. Sandoval stood and said something to the effect that if this matter were going to a legal forum then the meeting should not continue. Mr. Sandoval then left the meeting. The remaining participants then discussed two potential alternate positions for Appellant, and also discussed the possibility of Appellant cutting half a manhole at a time.

16. Mr. Bello testified that Appellant appeared somewhat agitated during the meeting at 6:45 a.m. on November 14, 2001. He described the meeting as "getting a little out of hand" around the time Mr. Sandoval left. He said some "finger-pointing" was happening but did not specify by whom.
17. Appellant testified to the meeting as follows. When Mr. Sandoval said his crew and he had been complaining, Appellant responded that he had not worked on Mr. Sandoval's crew since July, and asked who specifically was making these complaints. Appellant testified that he did not make any statement referencing a legal action during the meeting. Appellant testified that Mr. Sandoval left the meeting, but said Mr. Sandoval left after saying the meeting was "getting kind-of heated." Appellant testified that they then discussed transfer options, including the temporary Traffic Operations assignment. Appellant testified that this was the first time any transfer options had been brought to his consideration.
18. At one point during the hearing, Appellant conceded under cross-examination that the Agency had tried to find him alternative positions in light of his jackhammer difficulties, but that this happened "after the suspension," which occurred in December of 2001. A few minutes later Appellant testified that he knew they were looking to send him to another position "probably in October," the time of the staff meeting when he expressed concerns about being too old to operate the jackhammer safely anymore.
19. Appellant testified that at the end of the meeting on November 14, 2001, Mr. Whyte got up "in front of" the participants, pointed his finger at Appellant, and said, "you better never walk up on me again." Appellant later told the safety investigators that Mr. Whyte also said, "I'm not a violent person." Appellant testified he was puzzled by these comments. Appellant then accompanied Mr. Bello to his office where Mr. Bello gave him paperwork on the Traffic Operations assignment.
20. Mr. Whyte testified that at the end of the meeting he told Appellant he did not want to discuss work matters before hours. Mr. Whyte later told the safety investigators that he said, "Do not get aggressive and ask me questions and approach me in the parking lot before working hours." Mr. Whyte testified he said these things to Appellant because he perceived Appellant's approach earlier that morning as aggressive, and was fearful of confrontation because he is not a violent person. Mr. Bello and Mr. Snyder were evidently not paying much attention to this conversation but were discussing something else. Mr. Bello testified that he saw Mr. Whyte talking with Appellant after the meeting but did not notice any finger-pointing or anything otherwise indicating an aggressive tone on the part of either man. Mr. Snyder testified that he did not notice any finger-pointing or other unusual interaction between Appellant and Mr. Whyte at the end of the meeting.
21. Appellant testified as follows. After getting the paperwork from Mr. Bello, Appellant then went to the assembly room (a lunch-type room on the first floor). He began looking through the paperwork and making the necessary arrangements to get an Agency vehicle. He saw Mr. Whyte coming into the building. Appellant approached Mr. Whyte and said, "Can I talk to you outside?" Appellant testified he wanted to talk to Mr. Whyte because Appellant had not understood what Mr. Whyte meant about "walking up on" him. Appellant was concerned

because the two men had to work together and Appellant had to approach Mr. Whyte regularly in the course of work. Appellant and Mr. Whyte went outside and Appellant asked Mr. Whyte what he meant by this comment. Mr. Whyte then turned and walked inside the building without responding. Appellant also returned to the assembly room to await the company car he had requested. Approximately five minutes later, another employee came down and summoned Appellant to Mr. Bello's office.

22. Mr. Whyte testified as follows. As he came into the assembly room, Appellant said to him, "Tim, I want to talk to you outside." Mr. Whyte and Appellant then went outside, and when the men were approximately fifteen feet from the building, Mr. Whyte said, "This is far enough." Mr. Whyte did not hesitate to go outside but was nonetheless apprehensive about the request, which is why he said fifteen feet was "far enough." Appellant then said something to the effect that "I didn't get aggressive with you this morning." Mr. Whyte said that if this topic were to be discussed they should return to the supervisors' offices upstairs. Mr. Whyte testified that Appellant then said "Don't ever let me catch you alone -- I'll light your mother-fucking ass up, punk." Mr. Whyte then turned and walked back into the building to diffuse the situation and report the incident to the supervisors. He went to Mr. Snyder's office, where he told Mr. Snyder what Appellant had just allegedly said. Mr. Snyder had him write down the alleged comment (Exhibit 6). Mr. Snyder then brought Mr. Whyte to Mr. Bello and Mr. Kazemian to report the incident, and the supervisors sent another employee to go get Appellant from the parking lot.
23. Both Mr. Whyte and Appellant testified that they did not have any prior history of tension between them. Appellant testified that he did feel intimidated by Mr. Whyte on one prior occasion, when Mr. Whyte arrived at work wearing a jacket with a confederate flag across the back of it. Appellant testified he did not file a complaint or make his emotional reaction to this observation known.
24. Mr. Whyte testified that he had never observed Appellant use the terms "punk" or "mother-fucker" or otherwise threaten anyone, while on duty or otherwise, before the incident described above in paragraph 22.
25. Mr. Kazemian testified that he observed Mr. Whyte's demeanor at the time Mr. Whyte reported the alleged threat, and that he appeared to be "shook up" and "fearful." He therefore found Mr. Whyte's allegation to be credible.
26. Appellant testified that when he got to Mr. Bello's office, Mr. Bello was not there. He sat and waited for Mr. Bello to return. Mr. Bello shortly returned and this was when Appellant learned of the alleged threat. He told Mr. Bello he did not make this comment.
27. The supervisors then placed Appellant on investigatory leave (Exhibit 5).
28. Mr. Kazemian initiated a safety investigation which was completed by Steven Brendlinger and Theodis Hall (Exhibit 9). The investigators interviewed all the parties whose testimony is recounted above and they relayed similar information as set forth above.

29. The safety report indicates the safety investigators talked with Crew Supervisor Mike Thalley. Mr. Thalley told them that he was in the assembly room on the morning of the incident, and that he observed Appellant pacing about six feet away. When Mr. Whyte entered the room Appellant walked up and said to him "I want to see you outside." The two went outside, then came back in about thirty seconds later. Mr. Whyte went upstairs and Appellant returned to the assembly room, sat down and started reading paperwork. (*See*, Exhibit 9, p.2)
30. Appellant testified that when he was in the assembly room after the meeting on November 14, 2001 he saw a couple of other individuals in the room, but definitively testified that Mike Thalley was not in the room. Appellant testified that Mr. Thalley was lying when he told investigators he witnessed the exchange between Appellant and Mr. Whyte in the assembly room.
31. Upon completion of the investigation, the Agency sent Appellant a Notification of Contemplation of Disciplinary Action on November 21, 2001 (Exhibit 4).
32. On November 30, 2001, the Agency held the predisciplinary meeting. Present were Appellant and his attorney, Mr. Kazemian, Mr. Snyder, and Human Resources Representative Rama Mallet. During the meeting, Appellant's counsel suggested that the Agency review Appellant's record to see if there was any history of Appellant engaging in threatening behavior of this sort.
33. Following the meeting Mr. Kazemian reviewed Appellant's disciplinary history upon Appellant's counsel's request. He found the following. In March of 2000, Appellant was suspended for two days for refusing to wear a safety harness (Exhibit 10).<sup>2</sup> In May of 1997, Appellant was issued a verbal warning for unauthorized absences and failing to help load a truck.<sup>3</sup> In February of 1997, Appellant was issued a written reprimand for failure to maintain satisfactory relationships with other employees (Exhibit 11).<sup>4</sup> Mr. Kazemian testified that he viewed Appellant's disciplinary history as lending credibility to the allegations in this case.
34. The written reprimand in February of 1997 resulted from Appellant's "heated argument" with Mr. Snyder, who was then a crew supervisor. (*See*, Exhibit 11.) Appellant allegedly approached Mr. Snyder and asked, "Why did you tell (another employee) that I did not help you?" A witness reported that Appellant further stated "I will meet you any time outside the gate." The argument was described in the written reprimand as growing louder and louder until a superintendent intervened. There is no evidence tending to suggest that Appellant used any type of profanity during this verbal altercation.

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<sup>2</sup> Because the nature of this offense does not appear to be related to the nature of the allegations in this case, the hearing officer has not taken it into consideration here.

<sup>3</sup> Verbal warnings are not documented in the CSA files and there is nothing in the evidence explaining this incident. It has therefore not been taken into consideration here.

<sup>4</sup> In 1995, Appellant was suspended for thirty days for a positive drug test (Exhibit 12). The CSR Rules do not allow the consideration of disciplinary actions older than five years. Mr. Kazemian further found information about an incident, which occurred in 1989 at the OHSC, when Appellant allegedly left the premises under protest after requesting help from them. The hearing officer has not taken either of these events into consideration due to their remoteness in time.

35. Mr. Kazemian testified he listened to the tapes of the interviews done by the safety investigators. He testified he heard nothing in the tapes that caused him to find Appellant's account of the incident in question more credible than Mr. Whyte's account.
36. Mr. Kazemian concluded based on the entirety of the evidence before him that Appellant made the statement in question, and determined that disciplinary action was appropriate.
37. Mr. Kazemian testified that he and the investigators did not know what the terminology contained in the alleged threat meant or whether it had any particular meaning. Mr. Whyte had raised a question whether it might be referencing the intent to shoot Mr. Whyte. Mr. Kazemian contacted the Denver Police Department's Gang Unit and relayed the alleged threat. The Police Department responded that the language was not known to refer to shooting in any way. Mr. Kazemian testified that his determination to issue Appellant a suspension, rather than terminate him, was based on this feedback.
38. On December 4, 2001 Mr. Kazemian issued Appellant a Notice of Suspension for fifteen days (Exhibit 2).
39. On December 7, 2001 Appellant timely filed the appeal in this case.

## PRELIMINARY MATTERS

### **1. The Hearing Officer's Jurisdiction**

The hearing officer finds she has jurisdiction to hear this case as a suspension case, pursuant to CSR Rule 19-10 b), as follows in relevant part:

#### 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... suspension... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Jurisdiction over Appellant's suspension was not disputed by either party to this case.

### **2. Burden of proof**

It has been previously established that the Agency responsible for suspending a career service employee bears the burden of establishing, by a preponderance of the evidence, that it had just cause for the suspension action. *See, In the Matter of the Appeal of Vernon Brunzetti*, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12/8/00). The Agency must also

demonstrate that the severity of discipline is reasonably related to the offense in question. *See, In the Matter of Leamon Taplan*, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99). The burden of proof was not disputed by either party to this case.

### **3. Appellant's claims of discrimination and retaliation**

Appellant's appeal form included allegations of discrimination based on race and color, and retaliation. His attorney subsequently filed a Motion to Withdraw Claims of Discrimination and/or Retaliation. The hearing officer has granted this Motion and therefore has not considered these issues in the course of her deliberations in this case.

## **DISCUSSION**

### **1. Rules the Agency alleges Appellant violated.**

The Agency posits Appellant violated the following relevant portions of CSR Rule 16, DISCIPLINE:

#### **Section 16-50 Discipline and Termination**

##### **A. Causes for Dismissal:**

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant...

...8) Threatening, fighting with, intimidating or abusing employees...for any reason...

...18) Conduct which violates an executive order which has been adopted by the Career Service Board.

#### **Section 16-51 Causes for Progressive Discipline**

A. The following unacceptable behavior or performance may be cause for progressive discipline.... Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline...

...4) Failure to maintain satisfactory working relationships with co-workers...

5) Failure to observe departmental regulations.

The Agency further cites Executive Order 112, Violence in the Workplace (Exhibit 7), which states as follows in relevant part:

##### **II. General Policy**

Violence, or the threat of violence, by or against any employee of the City and County of Denver is unacceptable and contrary to city policy, and will subject the perpetrator to serious disciplinary action and possible criminal charges. The city will work with law enforcement to aid in the prosecution of anyone inside or outside of the organization who commits acts against employees.

To ensure and affirm a safe, violence-free workplace, the following will not be tolerated.

- A. Intimidating, threatening or hostile behaviors...or other acts of this type clearly inappropriate to the workplace.
- B. Jokes or comments regarding violent acts, which are reasonably perceived to be a threat of imminent harm.

Finally, the Agency cites the Public Works Policies and Rules Handbook (Exhibit 8), which states under Section 1:

A. **Workplace Violence**

Violence, or the threat of violence, **is not acceptable and will not be tolerated** in any of the City and County of Denver's work locations. It is the goal of the City and County of Denver to rid work sites of violent behavior or threats of such behavior. It is each employee's responsibility to prevent or defuse actual or implied violent behavior at work. To ensure and affirm a safe, violence-free workplace, the following will not be tolerated:

- 1). Intimidating, threatening or hostile behaviors...or other acts of this type clearly inappropriate to the workplace.
- 2). Jokes or comments regarding violent acts, which are reasonably perceived to be a threat of imminent harm.

*(Emphasis in original)*

## 2. The arguments.

The Agency asserts that its conclusion, that Appellant made the threatening comment in question, is supported by a preponderance of the evidence. The Agency argues that Appellant's denials are not as credible as Mr. Whyte's assertions about the comment in question for several reasons. The Agency asserts that there are "too many coincidences" in which Appellant's testimony stands alone in contradiction to the consistent testimony of the other witnesses, tending to cast doubt on his credibility. First, the Agency witnesses all gave similar accounts of the meeting on November 14, 2001, and Appellant's is the only version which differs, in ways to his favor. Second, the Agency argues that Appellant's assertion that Mr. Thalley lied about Appellant is unfounded, again militating against Appellant's credibility. Third, the Agency points out that on at least one prior occasion in 1997, Appellant was disciplined for challenging a supervisor during an argument over allegations concerning the quality of Appellant's work. Thus Appellant has

demonstrated the propensity to do what has been alleged in this case. Fourth, there is no evidence to suggest that Mr. Whyte was motivated to fabricate his allegations against Appellant for any reason, and Mr. Whyte's demeanor of fear upon reporting this incident is credible, corroborative evidence that the incident occurred.

Appellant responds with the following arguments. First, he maintains he did not make the statement in question. He argues that the only question in this case is which man's account is more credible: Mr. Whyte's allegation, or Appellant's denial. He asserts that the surrounding events are not relevant to the determination of this credibility. Appellant points to the fact that it was he who requested the meeting of November 14, in order to address the difficulties in question with the supervisors and resolve the problem in a professional manner. Appellant underscores that there is absolutely no evidence he is given to using the extreme type of profanity as is alleged in this case, or any type of profanity for that matter, and that therefore the nature of the alleged threat is inconsistent with his character and past behavior. He points out that even during the argument with the supervisor in 1997, there was no indication that he used profanity of this type. Appellant contends that the fact that the Agency consulted with the Gang Unit concerning the language in question was unnecessary and inappropriate in the case of a fifty-two year-old gentleman, and suggests its pre-existing bias and inability to objectively assess the allegations against Appellant because of his race. Finally, Appellant asserts that he is being forced to prove a negative, which he cannot do.

### **3. The hearing officer's analysis and conclusions.**

The hearing officer found both Appellant and Mr. Whyte to be very credible during their testimony on the stand. If this case were based solely on the demeanor of the witnesses alone, the hearing officer would have found them equally believable, and Agency would not have proved its case by a preponderance of the evidence. However, the content of Appellant's testimony is troubling in many respects which militate against the accuracy of his claims and the credibility of his denials.

First, Appellant asserts that it was he who initiated the meeting with Mr. Bello on the evening of November 13, 2001. Appellant says the reason he went to visit with Mr. Bello was to seek resolution on the issue of the jackhammer duty, and that he learned of the crewmembers' complaints at that time. He claims that Mr. Bello did not mention the possibility of any alternative positions during that conversation.

Mr. Kazemian and Mr. Bello both testified that they initiated this meeting on November 13 for the purpose of informing Appellant about the alternate position because orientation for that position was to take place the following day. Implicit in Appellant's version is that it is coincidental that this discussion happened the evening before orientation for the temporary assignment. Appellant also implicitly attempts to discredit Mr. Bello's stated intention of trying to help Appellant by offering him an alternative position. Appellant's assertion further implies that Mr. Bello's detailed testimony about Appellant becoming upset at the offer of the temporary position, and stating that the assignment would be unfair and discriminatory, are all fabrications on Mr. Bello's part. Yet it is undisputed that Appellant went through this orientation the following day, as he described receiving paperwork for the position after the meeting the following morning.

Finally, it is necessary to presume by Appellant's version of events that he had not yet been removed from jackhammer duty, since this was the reason he gave for visiting Mr. Bello on November 13. Yet this was the very reason for the crews' complaints, which led to the supervisors' discussions about alternative positions, which in turn led to Mr. Bello calling Appellant into his office to tell him about the alternative position. Appellant's version of how this discussion occurred would mean that the crewmembers and supervisors had conspired to fabricate an unfounded tale about Appellant not jackhammering. Yet at the meeting with the supervisors the next morning, Appellant rebutted the complaints with the response that there are other, non-Black crew members who are not required to do jackhammer duty. Never once did any witness, including Appellant himself, testify that Appellant continued to do jackhammer duty at the time of these incidents.

The hearing officer finds that Mr. Bello's and Mr. Kazemian's explanation for why they requested the meeting on the evening of November 13 is corroborated by the timing of the discussion and flow of all the surrounding events. Appellant's explanation for initiating the discussion with Mr. Bello is inconsistent with the weight of all this evidence. The hearing officer concludes that Mr. Kazemian and Mr. Bello initiated the November 13 discussion between Appellant and Mr. Bello, not Appellant himself.

In his testimony, Appellant repeatedly downplayed his part in the friction between the individuals involved in the events on November 14. However, Appellant was clearly concerned and agitated by what he perceived as accusations by other crewmembers that he was not pulling his weight, which he learned from Mr. Bello on the evening of November 13. While the complaints might not have been as "accusatory" as they might have initially sounded to Appellant, given that this was his interpretation of the report from Mr. Bello, it is clear that Appellant found such a suggestion offensive. This was the very reason he wanted a meeting the following morning to hear the allegations firsthand and clear his good name.

Appellant first asserts that he did not "sneak up on" Mr. Whyte on the morning of November 14. The hearing officer finds Appellant's assertion that this was not his *intent* very credible. But it is both equally credible and apparent that this was Mr. Whyte's *perception*.

It is clear that Appellant knew that Mr. Whyte was one of the alleged "complainants," since Appellant admittedly asked Mr. Whyte why he was telling Mr. Bello Appellant was not "pulling his own weight." It is more likely than not that Appellant's agitation with this "allegation" was evident to Mr. Whyte. He was startled, then confronted and challenged by what he felt was a false accusation. Mr. Whyte perceived this surprise confrontation as aggressive, and grew defensive. He told Appellant they were simply trying to modify Appellant's assignment because of his jackhammer difficulties. It was this very defensiveness which led Mr. Whyte to make the statement to Appellant after the meeting, which in turn set the subsequent interaction into motion later that morning.

Appellant asserts that his initiation of a supervisory meeting to diffuse the issue in a professional manner tends to underscore the falsity of the allegations against him. While Appellant had a right to challenge these allegations and ascertain their nature, the hearing officer is not persuaded that Appellant was not visibly agitated and confrontational during the meeting on November 14. The consistent, credible testimony of the other participants establishes that

Appellant made statements referencing discriminatory work assignments, tending to suggest he was more interested in confronting his accusers with counter-allegations, rather than diffusing the situation as he claims. The tone of this meeting can be inferred from Appellant's allegations of racist work assignments and demands to know the specific names of his accusers, then a moment later his refusal to give the names of other crew members allegedly not required to jackhammer. Consistent testimony establishes that Appellant's statements escalated the meeting to the point where Mr. Sandoval left. The hearing officer is not persuaded that his motivation was to diffuse rather than defend himself by offering these accusations in return.

Appellant also specifically asserts he never made any reference of the situation going to a legal forum. He admitted that Mr. Sandoval left the meeting, but testified that Mr. Sandoval left after saying the meeting was "getting kind-of heated." Yet the other meeting participants to the person testified that it was Appellant's comment about the case going to a legal forum which prompted Mr. Sandoval's exit. Once again, the only alternative explanation is that all the witnesses colluded to manufacture a falsehood about why Mr. Sandoval left, and the hearing officer finds such a suggestion unlikely and unpersuasive. Second, Mr. Sandoval's demeanor during this portion of his testimony, as he explained his reason for leaving the meeting, was very credible. The hearing officer therefore concludes that, contrary to Appellant's denials, he made the statement about the case going to a legal forum during the meeting on November 14, 2001.

At the end of the meeting, Mr. Whyte told Appellant not to "walk up on me." Appellant describes this encounter as Mr. Whyte standing "in front of" the other meeting participants, pointing his finger at Appellant, and making such a demand. Appellant's version of the events intends to place Mr. Whyte in the aggressive light. By Appellant's account, Mr. Snyder and Mr. Bello should have seen Mr. Whyte talk to Appellant in such a way. Yet both of the other participants credibly testified that while they were aware Mr. Whyte and Appellant spoke to one another after the meeting, neither observed any such aggressiveness or finger-pointing in the interaction as was described by Appellant. Once again, Appellant's version suggests that these witnesses are in conspiracy to protect and favor Mr. Whyte at Appellant's expense. With each implied allegation of another act of collusion, the hearing officer finds such allegation less and less persuasive.

Next Appellant asserts that Mr. Thalley was definitely not in the assembly room when Appellant asked Mr. Whyte outside, and must be "lying" about what he saw. Yet Mr. Thalley described in some detail what he observed, how far away the men were from him, what they said, how long they were outside, and where they both went when they re-entered the building. Mr. Thalley's account is consistent with that of Appellant's and Mr. Whyte's in every detail, except for the fact that Mr. Thalley said Appellant was pacing back and forth just before speaking with Mr. Whyte, and that he told Mr. Whyte he wanted to talk to him outside, rather than asking him.

Once again, Appellant attempts to remove any evidence of his agitation, and add to the growing pool of alleged conspirators, by calling this witness a liar. Yet there is no indication that Mr. Thalley had any knowledge of the case from which to construct such an accurate "lie," let alone any motivation to do so. The hearing officer finds that Mr. Thalley's observations of the encounter in the assembly room as set forth in the investigative report are consistent with, and corroborated by, the testimony of Appellant and Mr. Whyte. The hearing officer concludes that

Mr. Thalley's statement to the safety investigators is accurate and not fabricated, as Appellant asserts.

Finally, Appellant admits to asking Mr. Whyte "outside" to speak with him. When Appellant was asked why he wanted to go outside to talk to Mr. Whyte, he responded that he did not intend to startle or get aggressive with Mr. Whyte earlier that morning, that he really did not know what Mr. Whyte meant by not "walking up on" him, and that he had to know because Appellant works with Mr. Whyte and has to approach him regularly in the course of his duties. All this makes perfect sense as an explanation for why Appellant asked Mr. Whyte what he meant. However, it is not responsive to the real question of why such a conversation had to take place *outside*.

In isolation, the hearing officer might not have attached the same significance to this request as is usually presumed when one man asks another to "step outside." However, Appellant challenged another supervisor, Mr. Snyder, to "meet you any time outside the gate" in 1997. This clear challenge also followed an incident in which Mr. Snyder apparently made some comment which Appellant apparently perceived as a challenge to the quality of his work, as was also the case here. There is no question from the content of that report that Appellant was throwing down the gauntlet and challenging Mr. Snyder man-to-man in that case.

Therefore, while Appellant appeared very credible in demeanor during his testimony, the hearing officer concludes that Appellant has made a pattern of assertions and denials in an attempt to minimize his aggressive and confrontational behavior, while exaggerating the aggressive and confrontational reactions of the other parties. There are numerous inconsistencies, repeated suggestions in Appellant's testimony of large-scale collusion against him, and numerous attempts to sanitize the evidence of any elements reflecting unfavorably on his part in these events. All this casts doubt on the credibility of all his testimony, including his denial that he made the statement in question. The Agency's evidence emerges as clearly more consistent, credible, and mutually corroborative.

In light of the totality of evidence in this case, the hearing officer concludes it is more likely than not that Appellant made the statement in question. The Agency has therefore demonstrated just cause for disciplining Appellant.

#### **4. Severity of the discipline.**

The Agency posits that its fifteen-day suspension of Appellant was proper under the relevant portions of the following CSR Rule:

##### Section 16-20 Progressive Discipline

- 1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter of the City and County of Denver, or the Revised Municipal Code of the City and County of Denver include:

- a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency's file on the employee;
- b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
- c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority...

At first, the Agency was not clear on what the terms of the threat might imply, and there was some question whether those terms might allude to the intent to shoot. When they investigated they found no such evidence.<sup>5</sup> Mr. Kazemian considered prior instances of discipline for similar acts, and therefore concluded that suspension was the appropriate discipline in this case.

Appellant has requested that the suspension be shortened to a more "reasonable" term. Appellant has already been issued a written reprimand for similar behavior in the past five years. The next level of discipline is suspension. The nature of the threat in this case was more severe than that of the previous case. The hearing officer does not have jurisdiction to modify the severity of a disciplinary action, even if she feels that an alternative severity of punishment might be more appropriate, where the discipline imposed is within the limits of reasonability. While a shorter term of suspension might have sufficed, given Appellant's prior discipline, and the repeated City directives setting forth a "zero-tolerance" policy toward any type of violent or threatening behavior, the hearing officer cannot find a fifteen-day suspension outside the range of reasonable alternatives.

Given all these considerations, the hearing officer concludes that the severity of discipline is reasonably related to the offense in question.

### CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of evidence that Appellant made the alleged threatening comment to another employee.
2. The Agency as demonstrated that, through the action described above, Appellant engaged in :
  - a) Threatening, fighting with, intimidating, or abusing an employee in violation of CSR Rule 16-50 A. 8);

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<sup>5</sup> The hearing officer is not persuaded that checking with the DPD Gang Unit concerning the meaning of the terminology in question evidenced sufficient bias against Appellant on the part of the Agency to prejudice his case, particularly since they used the information they learned to lessen the severity of the discipline from termination to suspension.

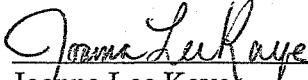
- b) Conduct which violates an executive order adopted by the Career Service Board in violation of CSR Rule 16-50 A. 18); namely, Executive Order 112, prohibiting violence in the workplace;
  - c) Failure to maintain satisfactory relationships with co-workers in violation of CSR Rule 16-51 A. 4); and
  - d) Failure to observe departmental regulations in violation of 16-51 A. 5); namely, the Public Works Policies and Rules Handbook, Section 1. A.
3. The Agency demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
  4. The Agency's fifteen-day suspension of Appellant is reasonably related to the seriousness of the offense given the totality of the evidence.

### **DECISION AND ORDER**

Based on the Findings and Conclusions set forth above, the Director's decision to suspend Appellant for fifteen days is AFFIRMED.

This case is hereby DISMISSED.

Dated this 20<sup>th</sup> day of February, 2002.

  
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Joanna Lee Kaye  
Hearing Officer for the  
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 20 day of February, 2002 addressed to:

John Mosby  
Attorney at Law  
730 - 17<sup>th</sup> St. #750  
Denver, CO 80202

Douglas Lottie  
1424 Columbine #4  
Denver, CO 80206

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 20 day of February, 2002, addressed to:

Jack M. Wesoky  
Assistant City Attorney  
Employment Law Section

Rama Mallett  
Wastewater Management

*Virginia Granado*