

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

BERNIE MAEZ, Appellant,

vs.

DEPARTMENT OF AVIATION,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on July 22, 2011 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by his brother, Paralegal Ben Maez. The Agency was represented by Assistant City Attorney Franklin Nachman, with Deputy Manager of Aviation Ken Greene serving as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order.

I. STATEMENT OF THE APPEAL

This is the appeal of Appellant Bernie Maez, Director of Fleet Maintenance for the Department of Aviation (Agency), challenging his April 14, 2011 termination. Agency Exhibits 1 -14 were admitted by stipulation. Appellant withdrew his Exhibits A – S, U and V. Exhibits T and W were admitted without objection.

II. ISSUES

The issues in this appeal are as follows:

- 1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and
- 2) Did the Agency establish that termination was within the range of penalties that could be imposed by a reasonable administrator for the violations established by the evidence?

III. FINDINGS OF FACT

As Director of Fleet Maintenance at Denver's Department of Aviation, Appellant Bernie Maez was manager of the division responsible for the airport's transportation fleet, a unit with 68 employees and an annual budget of \$14.3 million. In that position,

Appellant was responsible for snow removal operations, finance, information management, human resources, and the division's compliance with policies. [Exh. 5.] Appellant was classified as a Manager 2, one of six managers directly under Deputy Manager of Aviation Ken Greene, who serves under Manager of Aviation Kim Day.

As a result of an anonymous complaint of race discrimination and sexual harassment against Appellant filed in Sept. 2010, the Career Service Authority (CSA) conducted an investigation, interviewing ten witnesses within Fleet Maintenance. [Exhs. 4, 8.] Appellant was placed on investigative leave in Feb. 2011 while the investigation was being completed. The report issued in March made nine findings: 1) in June 2010, Appellant sent an email to the entire division that was sexually inappropriate and offensive to his Executive Assistant Tiffany Dietz, then emailed an unprofessional response to an anonymous criticism of the first email; 2) that same month, Appellant made an offensive sexual joke at Ms. Dietz' office baby shower; 3) at a Sept. 2010 hiring interview, Appellant commented that a member of the panel, Senior Human Resources (HR) Generalist Rachel Bland, "has a nice ass"; 4) during the selection process for a fleet supervisor, Appellant complained to his supervisors at a weekly management meeting that HR was interfering with the hiring decision, and stated, "Fuck them. I'll hire who I want to hire"; 5) after an anonymous complaint from the employees at DIA's Fleet Shop, all work groups raised concerns of racism between whites and Hispanics, fear of retaliation, and low morale during an October 2010 meeting held by Human Resources; 6) that month, Appellant told others he was going to get Ms. Dietz a box of condoms; 7) Appellant frequently stated "we need more La Raza", which employees interpreted to mean he favored advancement of Hispanics over other races, causing a rift between Hispanics and others within the division; 8) Appellant demonstrated favoritism towards Hispanic applicants for managerial positions, which led HR personnel to oversee one selection process to ensure fairness to all applicants; and 9) Appellant was a "hot head" who yelled at employees on the floor, belittled and blamed certain supervisors at meetings, and demonstrated a dismissive and confrontational management style. [Exh. 3.]

The Agency held a pre-disciplinary meeting in early April. Appellant presented a written statement, in which he admitted sending the email regarding Ms. Dietz's pregnancy and making a remark that he wanted to get her "a box of condoms" upon her return from maternity leave, but stated he intended them as jokes. "Knowing my position I should have refrained, as I normally do, from getting caught up in the 'shop talk' that goes on." He also admitted he commented, "[w]hat an ass" in reference to Ms. Bland, but explained that it referred to her attitude and not her physique. He denied favoring Hispanics during selection processes, or using the term "La Raza". "For the most part, I do not 'yell and scream'". He denied berating supervisors, adding that his comments were "made in fun and taken as such at the time." He apologized for his unprofessional acts, which he stated were attempts to meet his team's expectation that a director should be "one of the guys". [Exh. 14.]

Deputy Manager Ken Greene found that Appellant committed the acts alleged, and that those actions were inconsistent with his duties to lead his division. He also found that Appellant had undermined the human resources function and contributed to an unprofessional culture within Fleet Management. He determined that Appellant's comments created an intimidating, harassing atmosphere on the basis of the improper factors of race and sex. Based on Appellant's response that others should have told him they were offended, Greene concluded that Appellant still does not recognize

acceptable conduct or the effect his actions had on operations, leading to a risk that the behavior would continue. At the pre-disciplinary meeting, Appellant also argued that some employees were out to get him because they were not promoted. Based on this statement, Greene decided that anything less than termination could lead to retaliation against those who made the allegations. He considered Appellant's length of service and discipline-free tenure at the city, but concluded that dismissal was required given the environment of intimidation and harassment created by Appellant's misconduct. [Greene, 2:25.] On April 14, 2011, Appellant was terminated. [Exh. 2.]

At hearing, Appellant admitted making a number of the remarks alleged in the disciplinary letter, but characterized them as jokes or shop talk not meant to be offensive. [Appellant, 7/22/11, 4:37 pm.] He does not dispute that he sent an email to the entire division on June 1, 2011 which stated, "[d]ue to Tiffany's unexpected pregnancy she will be in need of donated time to cover her absence", and posting it in the breakroom. [Exh. 6.] Tiffany Dietz is Appellant's Executive Assistant. Dietz testified that distribution of the email to the entire staff and posting it in the break room embarrassed her and made her feel promiscuous. [Dietz, 9:09.] It was well known in the shop that Dietz and her husband were planning the start of their family, and so other employees considered the use of the word "unexpected" as an attempted joke that was not funny. [Rudebusch, 10:50.] The next day, the posted email was altered to read, "[d]ue to Bernie's expected illiteracy he will be in need of donated time to cover his absence". Appellant later added, "[t]hank you whom ever wrote this but you spelled 'illiteracy' wrong it is illiteracy. If you plan on correcting someone know your right in your own. Thank you." [Exh. 7.] Appellant then re-sent the email containing both handwritten notes to the entire staff. [Exh. 4-3.]

Appellant also admitted that when Dietz returned to work after her maternity leave, he told her, "[p]lease excuse me, but I was going to get you some roses and a box of condoms so that you don't take any more time off." [Appellant, 4:47, 5:24; Exh. 14-1.] Heavy Equipment Mechanic (HEM) Supervisor Gordon Rudebusch testified that Appellant had made the same comment to him the day before Dietz' return to work. Dietz approached him the day she came back and remarked, "[c]an you believe he said that?" Rudebusch acknowledged that Appellant had told him the same thing. Dietz' face was flushed and her voice cracked, showing that she was "pretty hurting" and did not consider it funny. [Rudebusch, 10:57, 11:21; 4-37.] Two others heard Appellant make the same remark. [Exhs. 4-9, 4-27.] One of them told the investigators, "[s]omeone in his position should know better than to make a comment like that." [Exh. 4-28.] Dietz understood that Appellant was trying to say he felt overburdened in her absence, "but that is just not something you should hear from a manager, I guess it was just really more embarrassing and humiliating than anything else." She added that she believed Appellant's statements were harassment. [Exh. 4-4.]

Third, Appellant stated that he said, "[w]hat an ass", not "[s]he has a nice ass", in reference to Rachel Bland. Appellant testified that the statement was a criticism of her attitude, not a compliment on her physique. [Appellant, 5:06 pm; Exh. 14-1.] Three other employees who were in the room recalled the incident differently. Rudebusch testified that he and others were interviewing applicants at the time, and Appellant was not scheduled to participate. Appellant came into the interview room and remarked that he was only there to check out Bland. [Rudebusch, 10:57; 4-37.] According to HEM supervisors David Bougsty and Bradley Plate, Appellant leaned over

the table and said, "[s]he has a nice ass", after Bland left the room to make a phone call. [Bougsty, 1:40, Exhs 4-15, 4-19, 4-33.]

On June 16, Appellant organized a baby shower in the lunchroom for Dietz, which was attended by about half of the staff. Two employees heard him say, "[t]he last time I was in a room with this many women, I was shoving money in their pants", or something along those lines. He was referring to strippers". [Dietz, 9:33; Exh. 4-3; Bougsty, 1:36; Exh. 4-32.] Tom Neubert remarked to Bougsty, "I can't believe he said that." [Exh. 4-32.] In his written statement submitted at the pre-disciplinary meeting, Appellant said he had no memory of making that comment. [Exh. 14-1.] At hearing, Appellant testified that he "never said that", and explained that his earlier statement was the result of his effort to recall whether he said something that could have been construed as that remark. [Appellant, 4:46.]

Appellant has said, "[w]e need more La Raza in the shop," and "[v]iva La Raza", leading some to believe he wanted to promote Hispanics over others. [Exhs. 4-10, 4-19, 4-24, 4-32, 4-42; Kramer, 11:40; Plate, 11:52.] This occurred so often that the definition of La Raza was posted at the breakroom entrance at one point, and Plate looked the phrase up on the internet. [Kramer, 11:40; Plate, 11:51.] Appellant commented at a shift meeting that "Veteran's Day is a white man's holiday". [Kramer, 11:28, 11:51; Plate, 11:51; Exh. 4-43.] Mechanic Matt Kramer noticed that since Appellant took over, a group of Hispanic employees discussed La Raza in the workplace. That group was referred to as "the untouchables" by other employees because they "go in line with what he [Appellant] says and believes." [Exhs. 4-42, 4-43.] Appellant talked about La Raza with employee Hector Mendoza, but Mendoza was offended and told him it was inappropriate. [Exh. 4-34, 4-44.] Appellant made comments about his own ethnic background to Rudebusch, and remarked during a review of one of Rudebusch's subordinates that "[i]t's Mexicans like him that give us a bad name." Rudebusch considered those comments inappropriate in the workplace. [Rudebusch, 10:59.] Appellant told Dietz that an employee named Jose "is a disgrace to our race." [Exh. 4-5.] He jokingly asked another subordinate, "How does it feel to be working under a Mexican?" [Exh. 4-28.] Since Appellant's removal, Bougsty observed that the division between employees based on national origin is lessening. "I think people are trying to pacify those statements. I think everyone's so tired of hearing it, they don't want to hear it anymore and they ignore it." [Exh. 4-32.]

Appellant has studied his Hispanic heritage and is writing a book on the subject. He considers La Raza a term that expresses pride and affection for his people, and "fighting for the rights of Hispanic values, latino values". Appellant denies using the phrase in the workplace. [Appellant, 4:51.] In his pre-disciplinary statement, Appellant denied only using the term to mean "promoting the advancement of Hispanics". [Exh. 14-2.] I find that the detailed testimony and statements of seven employees is more persuasive than Appellant's general denial.

At the start of the hiring process for a heavy equipment line supervisor, Appellant selected those to be interviewed from a list of qualified applicants provided by CSA. Appellant's friend, Saul Amaro, was one of the applicants. While Appellant was out of town, Amaro told Plate that he did not pass the CSA qualifying test for the position. When Appellant returned, Amaro told Plate that he had passed the test. [Exh. 4-20.] Rudebusch, who was involved in the selection process, called Bland in Human Resources to express his concern that favoritism may be affecting the process. Bland

reported the matter to her supervisor, and then informed Rudebusch that it would not be possible for favoritism to influence the hiring result. At some point thereafter, Appellant told Plate that Amaro had the worst application of the group. [Exh. 4-20.] Kramer told the investigators that "Bernie was complaining that his #1 guy couldn't get his application through. Saul said Bernie helped him with his application." [Exh. 4-43.] Amaro was later called for a second interview. [Kramer, 11:59.] When Amaro began to make comments on the floor as if he already had the position before the interviews had been held, employees became concerned that Appellant had pre-selected Amaro for the promotion. [Appellant, 5:30; Exhs. 4-20, 4-43.] "Everyone assumed it was a fix from the get go, that Saul was going to get it." [Exh. 4-43; Kramer, 12:10.] Based on these concerns, Human Resources stopped the interview process. The issue generated so much controversy that Rudebusch observed "a change in the group culture, guys on the floor." [Exh. 4-38.]

Appellant told those at a subsequent supervisors' meeting that he was being watched, and expressed his anger over the perception that the promotion process was not fair. [Exh. 4-38.] He told the group that HR was not going to bully him, and that he would be picking the supervisor, not them. [Kramer, 11:37; Appellant, 5:30; Exh. 4-43.] Some recalled that Appellant swore, "[y]ou guys are not going to pick the fucking supervisor"; he was going to do it. [Plate, 12:09.]

When the process resumed, Amaro and Bougsty were selected for second interviews. Appellant then reported to Greene he had heard that Bougsty said he could not work for Hispanic supervisors. [Exh. 14-2.] Rudebusch told the investigator,

Lots of hearsay that Bernie was going to put his guy in there. The only time I heard him say anything is he point blank told Dave [Bougsty] that he was making racial comments. Bernie was trying to put his own words out there (lorasa) as comments that Dave made. I think it bothers Bernie that the person he was handpicking didn't work out in his (Saul Amaro). All hearsay.

[Exh. 4-38.]

To ensure fairness, Greene gave Bougsty an opportunity to confront the accusation at a separate interview. Thereafter, the selection panel found that Bougsty's answers resolved the issue in his favor. The panel thereafter concluded that Bougsty was the best candidate and selected him for promotion. [Greene, 1:57; Appellant, 4:58.]

During the investigation and at hearing, a number of employees stated they did not report the above incidents because Appellant sometimes became defensive and angry when confronted. [Exhs. 4-5, 4-18; Bougsty, 1:20.] Others were reluctant to come forward because they were afraid Appellant might harass them or retaliate against them. [Phillips, 10:16; Exh. 4-44; Kramer, 12:01.] Bougsty remarked, "[w]hen statements are made from someone at this level you just don't know what to say". [Exh. 4-32.] Several observed that Appellant often seemed to target Plate, Bougsty and others by making sharply critical comments about their performance and work ethic during shop meetings. [Phillips, 10:12; Exhs. 4-10, 4-20, 4-24, 4-25, 4-31, 4-33, 4-36, 4-37, 4-44.] Sexual, racial and sarcastic comments were common, and Appellant made no effort to

discourage them. [Phillips, 10:05; Exhs. 4-5, 4-31]. Bougsty observed that Appellant's humor appeared to be an attempt to be seen as one of the guys. [Bougsty, 1:40.] "It's such a routine thing, after a while I just block it out." [Exh. 4-36.] "He did make other comments, but I closed my ears." [4-37.] "I can't say I don't respect him, but I can say I have doubts on his leadership ability which is why I filter out things he says. Definitely coming from his position, comments are inappropriate." [Exh. 4-38.]

Many employees stated that morale had declined since Appellant began as manager, and got better once he was placed on investigative leave in Feb. 2011. [Dietz, 9:17; Exhs. 4-5, 4-25, 4-44.] Bougsty told the investigators,

I heard about the condom comment toward Tiffany [Dietz]. I'm not surprised at all that he said that. He's gotten far worse since he's been in the Manager 2 position. My personal thoughts on the situation, all this other stuff is bad, but I honestly believe the bigger issue is that we're not conducting business like we should, not getting the direction, blown up engines that aren't getting fixed. Victor and Bernie are not creating the work orders . . . that's their job.

[Exh. 4-33.]

An office employee observed that Appellant has a tendency to "fly off the handle" and insult his employees, "basically tell[s] the guys they are pieces of shit and he'd have to get real mechanics in to fix things, just demeaning to [them.]" [Exh. 4-10.] A mechanic stated the shop environment shifted since Appellant's promotion. It's "[a]ll about themselves, especially his guys." [Exh. 4-43.] Another mechanic told the investigators, "[t]he shop has fallen apart since he's taken over the management. Down to changing oil . . . we've had several engines blow up. . . Bernie told us [we] were nothing but a bunch of glorified oil changers. . . Nothing is ever his fault. He's very dismissive." [Exh. 4-44.]

Appellant was warned by Deputy Director Greene and Human Resources personnel that he needed to improve his communication with his employees. When he returned to the shop, "[h]e starts out the meeting I've been told [to improve] the way I interact and talk with people . . . fuck em . . . I'm not going to change." [Exhs. 4-38 – 39, 4-6.] At a division retreat, Phillips suggested that Appellant "not [fly] off the handle when people say stuff. Bernie said it's taken the wrong way when he raises his voice." [Exh. 4-6.] He was described by many of his subordinates as a hot head who yells before he thinks. [Plate, 12:08; Exhs. 4-5, 4-11, 4-20, 4-25, 4-33, 4-41, 4-44.] "Lead by example doesn't work in his case. I wouldn't want to follow his example." [Exh. 4-37.]

IV. ANALYSIS

Appellant was terminated based on the Agency's finding that the above conduct violated six disciplinary rules, and that dismissal was appropriate under the circumstances. The law is well-established that an agency must carry the burden to prove the violations it asserts by a preponderance of the evidence, and to show that its discipline is within the range that can be imposed under the circumstances. In re Gustern, CSA 128-02, 20 (12/23/02); see also Department of Institutions, Div. for Developmental Disabilities v. Kinchen, 886 P.2d 700, 706 (Colo. 1994), citing CRS § 24-4-105(7).

1. Carelessness in the performance of duties, § 16-60 B

Careless performance is established by proof that an employee performed an important work duty poorly, resulting in potential or actual significant harm. In re Galindo, CSA 39-08, 9 (9/5/08); In re Mounjim, CSA 87-07, 5 (7/10/08).

As Director of Fleet Maintenance, Appellant manages the division that maintains the city's transportation fleet of vehicles at DIA, a responsibility that is key to the safe and efficient operation of Denver International Airport. The position requires leadership, high level communication and problem-solving, and management of the division's human resources. The Director is expected to uphold performance standards, champion organizational change and best practices, defend final decisions, model city values and ethics, and motivate excellent performance in keeping with the Agency's mission and policies. [Exh. T.] Service, teamwork, accountability, ethics and respect for others are major components of this and every other position under the Career Service performance evaluation system, the process that ties job performance to merit pay increases. [Exh. 5.]

An employee's Performance Enhancement Program Report (PEPR) "may be used as a basis for disciplinary action under Rule 16 . . . up to and including dismissal, if an employee's performance fails to comport with the standards set forth in the PEP plan." CSR § 13-38. As Appellant's supervisor Deputy Director Greene explained, a division director must demonstrate skills well beyond technical competence. He must be able to lead a group of people to accomplish the mission of the unit by understanding and changing the culture for the better. To achieve this end, a director must set the tone by behaving in a manner that exhibits the required city values and ethics. [Greene, 2:10.]

At hearing, Appellant acknowledged that his job was to "model good behavior", and that he failed to do so by his unprofessional comments to Dietz. [Appellant, 5:41.] He also conceded that his conduct showed disrespect to his managers, and now requires that he apologize to his team. "I learned a good lesson. I tried to be friends. They don't want that, they want you to be a manager." [Appellant, 5:11.]

Beyond these admissions, the Agency also proved that Appellant made an inappropriate sexual comment about Bland, and remarked to a large number of employees at Dietz' baby shower that the last time he was in a room with this many women, he was shoving money in their pants, a crude reference to activities at a strip club. The latter comment embarrassed Dietz and others who heard it, and caused substantial damage to the staff's respect for their unit Director. In addition, Appellant made repeated comments which touted those of his own national origin, leading several to assume he would favor Hispanic employees in his employment decisions. These comments created doubt that his decisions would be based on merit and ability as required by the City Charter, rather than national origin or friendship with Appellant. As a result, staff morale declined, operations were adversely affected, and the selection process for a supervisory position was temporarily halted to allow management and Human Resources to ensure all applicants were treated fairly during the hiring interviews.

As the official who bears the important work duty of setting the tone for respectful communications within his organization, a Manager 2 cultivates and

encourages relationships of trust and mutual respect within and among the staff. [Exh. 5.] The manager is also charged with modeling city values and ethics, creating an environment that promotes "unparalleled customer service", and setting performance standards for his staff. [Exh. T-3.] Appellant performed these duties poorly by making sexual comments and statements that expressed bias in favor of employees of his own national origin. The Agency also proved that Appellant displayed a critical and angry demeanor that silenced feedback, and publicly defied human resources' efforts to assure fairness in the employee selection process. As a result, Appellant damaged employee morale and trust in his leadership, and negatively affected overall organizational performance. The evidence therefore established that the proven misconduct constituted careless performance of duties, in violation of this rule.

2. Failing to meet established standards of performance, § 16-60 K

An employee violates this rule when he fails to meet established and communicated performance standards. In re Diaz, CSA 45-05, 7 (9/7/05); Pabst v. Industrial Claim Appeals Office, 833 P.2d 64, 64-65 (Colo. App. 1992).

As determined above, Appellant's job as Director of Fleet Maintenance was to provide leadership to the division and all its functionalities. Appellant's performance evaluation required him to model city values and ethics, including its policy prohibiting discrimination and harassment, CSR § 15-101. [Exhs. 5, T.] After a thorough investigation, the Agency concluded that Appellant had made offensive sexual and racial comments, showed public defiance toward human resources during a hiring process, demonstrated favoritism toward Hispanic employees, created low morale and fear of retaliation in his staff, and used an angry and confrontational management style. [Exh. 3.] As determined above, I have concluded that the evidence presented at hearing supports these determinations. In turn, this conduct clearly failed to meet Appellant's performance standards to provide leadership and model city values, including prohibition of discrimination and harassment. CSR § 15-100 et. seq.

Appellant received ample training on the behavior prohibited by the above policy over a ten-year period, including courses in violence in the workplace, supervision, recruiting, mentoring, discipline, respect in the workplace, diversity, leading in a multi-cultural environment, and sexual harassment. [Exhs. S-11, 4-11, 4-16.] In addition, Deputy Director Greene and Human Resources personnel specifically counseled Appellant on his angry communication style. Appellant reacted by telling his staff, "[f]uck 'em, I'm not going to change." [Exh. 4-38, 4-39.] Appellant admitted that he failed to model good behavior, disrespected his managers, and owed his staff an apology for his inappropriate use of sexual jokes in the workplace. The Agency proved at hearing that Appellant's conduct as alleged in the disciplinary letter failed to model city values, resulting in lower staff morale, divisions between Hispanic and other employees, distrust in Appellant's leadership, and an atmosphere of intimidation and harassment, in violation of Appellant's established performance standards as Manager 2 in the Department of Aviation.

3. Failure to observe departmental regulation, § 16-60 L

A violation of this rule is established by proof that there was a written departmental or agency regulation, policy or rule, the employee knew of that rule, and

he failed to follow it. In re Mounjim, CSB 87-07, 6 (1/8/09). The Agency asserts only that Appellant's comments violated CSR § 15-101. Since § 15-101 is a Career Service Rule rather than a departmental or agency regulation, policy or rule, § 16-60 L does not provide a basis for discipline of a violation of § 15-101.

4. Failure to maintain satisfactory work relationships, § 16-60 O

This rule requires proof that an employee's conduct would cause a reasonable person to know it would harm a co-worker or significantly impact their working relationship, as well as evidence that the conduct in fact caused such harm or impact. The co-worker's reaction is relevant to those determinations. "The rule imposes no more and no less than the requirement that employees conduct themselves with the civility, respect and sensitivity of a reasonably prudent person who is working with a diverse mix of people in a government agency." In re Burghardt, CSA 81-07 A, 2-3 (8/28/08).

Appellant admitted sending the June email and making the condom remark to others. The Agency also proved that he made the reported comment about strippers at the baby shower, and stated that Bland had "a nice ass" during a break in a selection interview. These comments embarrassed those who heard them based on their content, the business settings, and Appellant's high rank as director of the organization. Dietz, the object of two of the remarks, was visibly upset and believed she was being held up to the entire staff as promiscuous. Phillips was so offended by the remark that he left the baby shower. [Phillips, 10:17.] Appellant should have known his attempted jokes would harm Dietz, embarrass his staff, and significantly lower his employees' respect for him as the director of fleet operations. The employees who heard his comments reacted by surprise, embarrassment, and ambivalence about whether to report the behavior to higher level management or human resources. These reactions were reasonable and foreseeable by a person in Appellant's position.

In further support of this asserted violation, the Agency presented evidence of Appellant's frequent emphasis on national origin, including announcing, "Viva La Raza", on the workroom floor. Appellant failed to discourage his Assistant Director Victor Lovato from making comments such as, "we are going back to the primo days . . . it means cousins . . . just going to be us cousins." [Exh. 4-44.] Appellant admitted that he used the term "gringo" in the workplace. [Exh. 14-2.] An employer's preference for one racial group over others may support a finding of discrimination by the disfavored racial groups. See United Steelworkers of America v. Weber, 443 US 193, 197 (1979); Parker v. Baltimore & O. R. Co., 652 F.2d 1012 (C.A.D.C. 1981).

As could have been anticipated, Appellant's racial remarks sowed division between Hispanic employees and other groups, and fueled suspicion that Appellant's employment decisions would be skewed in favor of Hispanics. Appellant's use of the phrase "La Raza" was reasonably interpreted by his staff to mean he favored the promotion of Hispanics over other racial groups. Appellant sometimes inexplicably identified employees by their national origin, and commented during one meeting that "Veteran's Day is a white man's holiday". As a result of Appellant's unusually frequent comments about race, some Hispanic employees were known as "the untouchables" because they were considered to be protected against adverse actions based on their race. [Exh. 4-42, 4-43.] Based on these remarks and Appellant's well-known assistance to a Hispanic candidate for promotion, employees believed Appellant favored Amaro because of his race. Dietz, Phillips, and Kramer all testified they do not want Appellant

to return to his position because they either fear retaliation or believe it would reverse the improvement in morale that occurred after Appellant was removed from his position. This is strong evidence of the damage done to Appellant's relationships with his subordinates based on his misconduct.

The evidence shows that Appellant's racial and sexual comments were widely known within his division. Fears that he would become angry or retaliate against them prevented several from reporting the situation to management or Human Resources. Appellant had been counseled by both Greene and HR personnel that he needed to improve his communication style toward his employees. Appellant reacted by telling his staff, "[f]uck them, I'm not going to change." Appellant's response to HR's intervention into the promotion process was a similarly angry and profane statement of defiance during a supervisor's meeting: "[y]ou guys are not going to pick the fucking supervisor." Predictably, morale declined and friction between racial groups developed as a result. Employees tuned out Appellant when he became angry or inappropriate, and began to doubt his leadership ability. Appellant's defensiveness when criticized caused some to "keep their head down" in order to minimize their stress, "not get on his enemy's list", and try to avoid "nitpicking" and harassment. [Phillips, 10:10; Kramer, 11:30; Dietz, 9:13.] Others reported that Appellant's unprofessional communication style and failure to give directions was beginning to harm the unit's performance of maintenance on airport vehicles. Finally, in Sept. 2010, a group of employees who chose to remain anonymous contacted CSA to investigate allegations of racial and sexual comments and favoritism. "Employees are starting to look into talking with a labor attorney." [Exh. 8.] The fact that morale improved after Appellant was placed on leave is persuasive of the fact that Appellant caused the negative effect on the staff's collective motivation. Appellant himself acknowledged that he owed his managers and teams an apology for his unprofessional comments, a concession that his behavior had, to some extent, harmed the workplace.

A reasonable person in Appellant's position would have known that racial statements such as "Viva La Raza" would significantly impact his relationship with employees not included in that group, given his status as Director of Fleet Maintenance and his role in promotions, raises and all other aspects of division operations. Appellant's recurring sexual comments toward Dietz reasonably resulted in harm to her, and her reluctance to have Appellant return to work. "I look forward to enjoying coming to work again." [Dietz, 9:16.] Appellant's conduct foreseeably and adversely affected his employees' morale, and Appellant's own ability to maintain satisfactory work relationships within his division. Appellant presented no contrary evidence. I find that the Agency proved Appellant failed to maintain satisfactory working relationships in violation of this rule.

5. Discrimination or harassment, § 16-60 R

Harassment subject to discipline under this rule must be distinguished from sexual or other harassment actionable under federal or state law. Under Title VII of the federal Civil Rights Act of 1964, discriminatory harassment must be "sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993); 42 USC § 2000e. The hearing office has

jurisdiction over employee claims of sexual harassment under Title VII pursuant to the authority granted by CSR § 19-10 A.2.a.

In contrast, this appeal challenges the Agency's termination action under a disciplinary rule that sets forth a less onerous definition of harassment. Section 16-60 R subjects an employee to discipline for derogatory statements based on race, national origin, gender, and any other status protected by federal, state or local laws. "[T]his prohibited conduct does not have to rise to the level of a violation of any relevant state or federal law before an employee may be disciplined and the imposition of such discipline does not constitute an admission that the City violated any law." § 16-60 R (Revised Jan. 22, 2010). It is therefore clear that the rule does not require evidence that the derogatory statements were so severe or pervasive that they altered work conditions or rendered the work environment abusive. In re Gallo, 63-09A, 5, (CSB 3/17/11). This is consistent with the purpose of Rule 16 "to correct the situation and achieve the desired behavior" under § 16-20. The difference in proof also recognizes the role played by evidence of prompt and effective discipline of a sexual harassment perpetrator in any subsequent Title VII action. Such discipline may be used by an employer as an affirmative defense against a court's imposition of vicarious liability for a supervisor's creation of a hostile work environment. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

In similar employment settings, federal courts have recognized that the differing purposes of disciplinary rules and Title VII justify a different level of proof for each.

The right or opportunity for a victim of sexual harassment to seek redress under Title VII has no bearing on the right of an employer to establish and enforce reasonable rules governing the workplace . . . An employer is not required to tolerate the disruption and inefficiencies caused by a hostile workplace environment until the wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action. The agency need only show that 'the employee's misconduct is likely to have an adverse effect upon the agency's function.'

...

Further, the employer need not place its own liability at risk, as could follow if an employer fails to take timely action after receiving notice of the prohibited acts.

Carosella v. USPS, 816 F.2d 638 (Fed.Cir. 1987) (internal citations omitted).

As found above, Appellant's comments may fairly be characterized as injecting an unwarranted and unwelcome sexual dimension into otherwise work-related events, including an office baby shower and an interview for a management position. While the remarks were neither pervasive in scope nor severe in quality, they need not be in order to establish a violation of a disciplinary rule. In re Gallo, *supra*. All employees who testified acknowledged that the comments were unprofessional in the work context, and inappropriate for a manager whose role was to set the tone for communications in his division. Dietz felt she was being called promiscuous in Appellant's email to the rest of the staff. She turned red and her voice shook in reaction to Appellant's condom remark, which he repeated to other employees at different times. Some employees

reacted by stunned silence or by studiously ignoring the comments because of Appellant's high ranking within the organization. The situation came to light only after an anonymous report to CSA. Appellant admitted that his statements were unprofessional and an attempt at humor so he could be seen as "one of the guys." He acknowledged that Dietz' embarrassed reaction was understandable, and that someone in his shop found the email and its prominent posting in the break room offensive, as shown by the anonymous note added the next day. The evidence is thus undisputed that Appellant's sexual comments were reasonably considered derogatory on the basis of gender by the employees who heard them, in violation of this rule.

6. Conduct which violates the Career Service Rules or other authority, § 16-60 Y

This rule as a catchall provision for wrongdoing not specified elsewhere in the notice of discipline, and incorporates into the career service rules wrongdoing prohibited by other authorities. In re Sawyer and Sproul, CSA 33-08, 14 (1/27/09). In order to establish a violation, an agency must prove "some actual or reasonably perceived harm". In re Abdi, CSA 63-07, 29 (2/19/08).

Here, the Agency asserts that Appellant's conduct violated its policy prohibiting discrimination and harassment as defined in the Code of Conduct, § 15-102. That rule proscribes, among other behavior, "verbal conduct such as epithets, derogatory comments, slurs, unwanted sexual advances, invitation, or comments", but is not limited to conduct that would violate Title VII. A contrary interpretation "would discourage the prompt reporting of harassing conduct, hinder the ability of City agencies to effectively redress such conduct, and increase the City's liability exposure in Title VII lawsuits." In re Gallo, 63-09A, 5, (CSB 3/17/11).

As determined in the previous sections, Appellant's sexual and racial comments were objectively derogatory in some instances and unwelcome intrusions of race into the workplace in others. See In re Burghardt, 81-07A, 3 (8/28/08). As to both types of remarks, employees were harmed by the resulting decline in morale and the widely-held perception that employment decisions would be based on race, a change in the culture of the division that negatively affected its operation. Thus, the Agency proved Appellant's conduct contravened the CSA harassment policy, fostered an atmosphere of sexual and racial harassment, and resulted in actual harm to others and fleet operations as a whole, in violation of § 16-60 Y.

7. Appropriateness of Disciplinary Action

In evaluating the appropriate degree of discipline, an agency must consider the severity of the misconduct, an employee's past employment and disciplinary history, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. An agency's determination of penalty must not be disturbed unless it is clearly excessive, or based substantially on considerations not supported by the evidence. In re Owens, CSA 69-08, 8 (2/6/09).

Deputy Director Greene made the decision to terminate Appellant. He considered carefully the fact that Appellant had been employed by the City for 18 years, and had received positive or excellent performance reviews during that time.

He also noted that Appellant had a completely clear disciplinary record. On the other hand, Greene heavily weighed Appellant's role as a high level director at DIA to lead the employees in his organization, exhibit proper cultural values, change the culture for the better, and set the tone for respectful communications. Appellant's remarks and behavior were not exposed outside the division until a Sept. 2010 anonymous complaint from "[w]e the employees at the Dia Fleet Shop" that claimed racial and sexual harassment. [Exh. 8.] Thus, Greene considered that Appellant's prior positive performance evaluations were not dispositive of his actual performance and behavior.

Appellant justified his racial and sexual comments, which he characterized as "shop talk", by asserting that they were common within the group, and no one claimed to be offended by them. Greene did not find that this mitigated the seriousness of the incidents, since it was Appellant's job as director to correct inappropriate racial or sexual talk and improve the cultural level of his organization. Instead, the tone set by Appellant's leadership was "anything goes," according to Greene. Appellant's frequent use of the phrase La Raza led his employees to believe their director favored his own ethnic group, to the detriment of other employees. Greene concluded that the atmosphere of harassment and intimidation detracted from the functions to be performed by the organization. Appellant failed to recognize the seriousness of his behavior and its effect on operations and morale, Greene found. In fact, after one effort by Greene to counsel Appellant on his demeanor, Appellant announced to his employees, "[f]uck them, I'm not going to change." As a result, Greene believed the likelihood the behavior would continue was high.

While Greene saw no evidence that favoritism affected the ultimate selection for a 2010 supervisory position, he did determine that Appellant undermined the HR function by his strongly stated opposition to having HR involved in the hiring process. Greene concluded that Appellant was disrespectful of him as the manager who issued the order requiring HR intervention in the hiring process, and that Appellant did not support the city's goal to maintain a nondiscriminatory hiring process.

Greene found that employees were deterred from coming forward because of Appellant's confrontational management style. The fact that the allegations were ultimately made under the protection of an anonymous report demonstrated that this fear was widespread. The resulting investigative report uncovered numerous instances of sexual and racial comments that demonstrated bias and offended those who heard them over a substantial period of time. Greene reasoned that Appellant's belief that his accusers were "out to get" him indicated he still did not understand the impropriety of his admitted conduct. As a result, Appellant would be unlikely to correct his behavior and lead the unit in a manner consistent with city values and ethics. This mindset also increased the chances that Appellant would continue to resent the employees who cooperated in the investigation.

Based on all these factors, Greene concluded that serious discipline was warranted by Appellant's conduct and its effect on the organization, and that any discipline less than termination would not correct the deficiencies or achieve the desired improvement in Appellant's behavior.

The only remaining issue is whether termination was within the range of reasonable penalties that could be imposed based on the proven violations. I find

that the Deputy Director properly considered Appellant's past employment and disciplinary history, but reasonably concluded that termination was most appropriate based on the seriousness and scope of the misconduct, the effect it had on the organization and its employees, and Appellant's demonstrated inability to understand or correct his behavior, in light of Appellant's high rank within the organization and heavy leadership responsibilities for proper operation of the Fleet Maintenance Division.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that the Agency's Apr. 14, 2011 termination action is AFFIRMED.

Dated this 26th day of August, 2011.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within **fifteen** calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org

I certify that on August 26, 2011, I forwarded a correct copy of the foregoing Decision and Order as indicated below:

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