

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

Appeal No. 24-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

CHRISTOPHER MARTINEZ, Appellant

Agency: DENVER HEALTH AND HOSPITAL AUTHORITY, DEPARTMENT OF
REHABILITATION SERVICES

INTRODUCTION

This matter comes before the Career Service Board on appeal by Christopher Martinez (hereinafter "Appellant") filed February 20, 2001. Appellant, a Physical Therapist Aide in the Department of Rehabilitation Services (hereafter "Rehab"), challenges the Denver Health and Hospital Authority's (hereinafter "DHHA" or "Agency") decision to suspend him for five working days without pay. The Agency alleges that Appellant has cumulatively engaged in various types of inappropriate, loud, angry, and otherwise excessive behavior intermittently for a long period of time, leading to prior progressive discipline. The Department further alleges that the event prompting the disciplinary action in this case was Appellant's threatening behavior toward another employee, and that the severity of the discipline was based on that event coupled with other behaviors leading to prior disciplinary acts. Appellant contends that his general behavior is not disruptive and is not dissimilar to that of other employees in Rehab, and further contends that the accusation of a threat is false.¹

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Kaye ("hearing officer") on October 4, 2001 at the Career Service Authority Offices. Appellant was present and represented himself. The Agency was represented by Assistant City Attorney Mindi Wright, with Rehabilitation Services Director, Jeffrey Fine, M.D. present for the majority of the proceedings and serving as advisory representative for the Agency.

Witnesses for the Agency included Dr. Fine, Physical Therapist Assistant Patricia Osthoff, Senior Occupational Therapist Cathy Goetz, Inpatient Physical Therapy Supervisor Linda Jones, and Rehabilitation Services Manager Corine Lensink.

¹ Appellant also indicated sex discrimination in his appeal form. However, none of the evidence Appellant presented addressed this allegation or met the basic qualifications of consideration under the statutes and case law governing cases of discrimination based on an individual's sex. Therefore, this allegation is dismissed as abandoned by Appellant.

Appellant examined all the Agency's witnesses as adverse witnesses in his case-in-chief and also testified on his own behalf.

Agency Exhibits 1 through 9 and 11 through 13 were offered and admitted without objection. The Agency withdrew Exhibit 10. Appellant's Exhibit A was offered and admitted over the Agency's objection that it constitutes hearsay.

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 demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
2. If so, whether the Agency's five-day suspension of Appellant is reasonably related to the seriousness of the offenses forming the basis of the suspension, given the totality of the evidence.

FINDINGS OF FACT

1. Appellant has been a Physical Therapist Aide in Rehab for approximately nine years. He has at various times served as a Rehab Aide in both inpatient and outpatient treatment at DHHA during that time. His primary duties are to assist physical and occupational therapists and therapist assistants in administering various therapy programs to patients, as those programs are established by the therapists. At the time of the hearing, Appellant was employed in outpatient treatment. At all times relevant to this appeal, he was working inpatient treatment.
2. Inpatient therapy is administered to patients who remain in the hospital during the course of treatment, as compared to patients treated in outpatient treatment, who come to the hospital from home for therapy. Inpatient treatment thus typically comprises individuals suffering from more debilitating types of injuries, including brain and spinal cord injuries, requiring hospital care during rehabilitation. As a result, individuals treated in inpatient therapy encounter more severe physical, mental and emotional stress. All the Agency witnesses testified that Rehab attempts to create a calm, soothing, nurturing environment for its rehabilitation therapy patients to minimize the stress patients experience, maximize their success in rehabilitation, and achieve the goal of their eventual return to the home environment. They testified that maintaining such an atmosphere is central to the program mission.
3. Inpatient treats its patients in three primary locations. For those unable to ambulate, they are treated in the Intensive Care Unit, or in their hospital rooms. For those who can be moved, they are taken to the gym, which is a large room containing various types of workout equipment and therapy tools. While Rehab's goal is to create a nurturing soothing environment, due to the amount of activity and number of people frequently being treated in the gym, the noise level can nonetheless remain quite high.

4. In the mornings, therapists and therapist assistants put the names of their patients to be brought to the gym on a board in the gym. One of the duties of Rehab Aides, such as Appellant, is to bring the patients listed to the gym for therapy.
5. Patricia Osthoff is a Physical Therapist Assistant in inpatient therapy. She worked alongside Appellant for a total of approximately one year. Ms. Osthoff testified that while working in the gym, Appellant frequently selects a radio station which plays rap and heavy metal rock music, and that he sometimes turns the volume up high enough that she finds it disruptive in her attempts to communicate with her patients. She testified that Appellant uses profane language in his regular course of conversation despite what mood he is in. Ms. Osthoff testified that while sometimes Appellant's demeanor was unremarkable and generally normal, approximately half the time Appellant presented as apparently angry, loud, intimidating and unapproachable to her and others in general. She based this interpretation of Appellant's demeanor on elements of his body language, such as loud voice, use of swear words, slamming of drawers and other physical objects, and facial expression. Ms. Osthoff generally described her reaction to Appellant during such times as being intimidated and somewhat frightened, and that she felt the need to "stay out of his way." She testified that she usually would not know why he was angry. Ms. Osthoff described an instance exemplary of her feelings toward Appellant when he is unapproachable. He was walking toward her down the hall staring straight forward and she had to step aside to get out of his way and prevent colliding with him. The hearing officer observed Ms. Osthoff to be a woman of small, slight stature with a notably mild, soft-spoken disposition.
6. Ms. Osthoff testified that while Appellant sometimes exhibits these excessive behaviors in the gym and patients are present, she has never seen Appellant direct any kind of inappropriate behavior toward a patient. Ms. Osthoff testified her observation is that Appellant is very good with his patients. She further testified that while Appellant uses profanity in all moods, she has never observed Appellant "swear at" either a patient or an employee, and has never observed him threaten anyone else.
7. Ms. Osthoff testified that Appellant was generally more resistive to bringing patients to the gym than other Rehab Aides are. She bases this assessment on Appellant's delays in responding to requests for patients, or saying he couldn't get them at that time. She testified that while she has reported to Ms. Jones that Appellant has been reluctant or failed to bring her patients in the past, she is not always aware of the reason for his failure to bring them and he has never directly refused to do so.
8. Cathy Goetz is a Senior Occupational Therapist for DHHA. She works in the gym and other locations with patients. She worked with Appellant for approximately nine years during which he served her as a Rehab Aide. Ms. Goetz testified that she has had the opportunity to observe Appellant in the execution of his duties, and that on occasion Appellant would engage in loud behaviors such as slam things, slap the elevator button audibly, incessantly tap pens, and on occasion curse. She testified that she got the impression on these occasions that Appellant's demeanor was intended to create distance between himself and others. She further testified that Appellant has on occasion chosen loud, heavy music on the gym radio with the volume high enough to be disruptive. Ms. Goetz testified that on occasion, when she has requested Appellant bring a patient to the gym for therapy, his response was delayed and his

body language indicated to her that he would help her when he was ready to do so. She testified that other staff members talk and laugh loudly and occasionally engage in other loud behaviors, but that Appellant "definitely slams things more than anyone I can think of in the Department." Ms. Goetz testified that these behaviors are occasional, and that Appellant's usual, naturally somewhat loud behaviors are "just a personality trait." She testified that in her observation, Appellant was effective, thoughtful, and in general excellent with patients. She testified that she has never seen him swear at patients, although he will occasionally engage in vernacular with them. Ms. Goetz testified that she has never witnessed Appellant directly threaten anyone.

9. Inpatient Physical Therapy Program Supervisor, Linda Jones, is responsible for the day-to-day supervision of the inpatient physical therapy staff, including Appellant. She reports to Rehab Services Department Manager Corine Lensink. Ms. Jones testified that she supervised Appellant during the times he worked in inpatient therapy. She testified she has had occasion to request Appellant's assistance, and that on occasion he is resistive in that he would simply not respond to her verbally or make eye contact with her upon her request for assistance. Ms. Jones testified that the rest of the time Appellant responds to her normally. Ms. Jones testified she has observed similar types of occasionally resistive behavior on Appellant's part toward other staff. Ms. Jones testified that she has not observed Appellant having any type of outbursts toward others. Rather, she described his behavior as occasionally rude, during which times his naturally loud demeanor becomes excessive and he uses swearing to express himself more than usual. Ms. Jones testified that occasionally Appellant will select loud, driving music to play on the radio at a volume high enough that she has been compelled to turn it down and sometimes turns it completely off during treatment in the gym. Ms. Jones testified that other employees have complained to her "frequently" concerning Appellant's occasional loud slamming behavior, his radio use habits, and his occasional resistiveness to assisting other staff. She further testified that she counseled Appellant on these types of behavior on multiple occasions in the past. Ms. Jones testified that the radio issue came up "a few times a week."
10. Corine Lensink is the Manager of Denver Health Medical Center's Rehabilitation Services Department. Among her many program operation duties, she supervises clerical staff, counsels employees, and conducts interviews, reference checks and performance evaluations. She has worked with Appellant in this capacity since the beginning of her tenure in 1995 and has observed the following respecting Appellant's behavior. She testified that Appellant at times can be loud, demeaning and intimidating, swear using a loud voice, and ignore others. While she has never seen Appellant direct these behaviors toward patients, she has observed him at times engaging in such behaviors in their presence. She testified that Appellant's voice carries even if he "swears at the air." Ms. Lensink testified that Appellant's conduct can escalate if he is asked to do something by slamming things or swearing, although he eventually will return and finish the project. Ms. Lensink testified that Appellant would get angry virtually any time he was asked to secure doctor's notices explaining absences or other administrative requirements. Ms. Lensink testified that Appellant engages in some form of this behavior approximately half the time. She testified that therapists, physicians, and clerical staff, in her department and others, have complained to her about similar behavior on Appellant's part. She testified that she has counseled and disciplined Appellant on the behaviors and that he has tried to improve on them, but that after a period of improvement,

Appellant's demeanor would again gradually deteriorate. She testified that while nearly all employees occasionally engage in an occasional incident of loud behavior, such as swearing out loud or losing their tempers, none of her employees engage in such behaviors to the extent and with the regularity Appellant does.

11. Rehab Director Jeffrey Fine, M.D. testified that Appellant takes it upon himself to initiate dialogues and contribute meaningfully to activities concerning employee morale and general operations. Dr. Fine testified that he has had the opportunity to observe Appellant interacting with his co-workers, and that on occasion he has observed Appellant engage in the same behaviors described above. Dr. Fine testified that he believes Appellant is not aware of the magnitude of the effect his demeanor has on those around him, but suspects Appellant may use some of these behaviors as a way to maintain control over a given situation.
12. On July 11, 2000, Rehab Services Manager Corine Lensink issued Appellant a Verbal Warning (Exhibit 12). This Verbal Warning includes, in relevant part, an admonition to Appellant for engaging in "...loud, disrespectful interactions. You regularly lose your temper and use foul language. When you are asked to please be quieter, you are not respectful or accommodating to these requests. You frequently do not make eye contact during conversations, particularly when there is a conflict... When the therapists request your assistance you are frequently resistant." The Verbal Warning indicates these actions were violations of certain Principles and Practices of the Department and directed Appellant to make immediate and continued improvement in these areas. This document states "There is an immediate need for improvement which must be continued and lasting. Further violations may be cause for disciplinary action...."²
13. Linda Jones delivered the Verbal Warning prepared by Ms. Lensink to Appellant on July 11, 2000 at approximately 3:00 p.m. in her office (*see*, Exhibit 12). She testified she delivered this document to Appellant late in the day because she was concerned about the reaction he might have. Upon receipt of the Verbal Warning, Appellant acted very upset, raised his voice and used foul language. Ms. Jones testified that Appellant then stormed out of her office and left work prior to the end of his shift (which was to end at 4:30) without authorization. Ms. Jones testified that she felt intimidated and threatened by Appellant's outburst.
14. On July 27, 2000 Ms. Lensink issued Appellant a Written Reprimand (Exhibit 11). The Written Reprimand recounted Appellant's reactions to receiving the Verbal Warning on July 11, and included the alleged violation of CSR Rule 60-50. 8) referencing "Threatening, fighting with, intimidating...officers of the City and County of Denver... including... intimidation or retaliation against an individual who has been identified as... a representative... relating to any disciplinary procedure..." The Written Reprimand indicated consideration of Appellant's Verbal Warning of July 11 and again stated that "There is an

² The Verbal Warning included corrections concerning Appellant's attendance habits and dress code violations. Since these elements were not included in Appellant's suspension which is the subject of this appeal, the hearing officer has not considered them.

immediate need for improvement which must be continued and lasting. Further violations may be cause for additional disciplinary action which may include suspension..."³

15. Ms. Lensink testified that after the Written Reprimand issued July 27, 2000, Appellant's demeanor improved for a period of time but then gradually began again to deteriorate.
16. Sometime in September of 2000, Appellant was sitting at a table in the gym training a new Aide, Lucy McGinnis. Appellant testified that Ms. Osthoff approached the two and alluded to needing help getting a patient she needed to see. Appellant testified that he did not understand her comment as a request for him to retrieve the patient, and continued training Ms. McGinnis. Ms. Osthoff later reported to Ms. Jones that Appellant had failed to get the patient. Ms. Osthoff testified she barely recalled this incident except that around that same time she recalled some incident leading to a discussion, resulting in her agreement with Appellant that if she had any future complaints about his performance she would approach him first and give him the chance to cure the problem.
17. Appellant testified that Ms. Osthoff frequently beats around the bush and does not get to the point. He has experienced several occasions when he has become frustrated in conversations with her because he does not understand what she wants and is hesitant to make herself clear. Appellant testified he did not refuse to get the patient for Ms. Osthoff in September of 2000 and her report as much to Ms. Jones demonstrates her propensity to fabricate allegations against him. Appellant offered Exhibit A in support of this contention. He testified that Ms. Jones did approach him at the end of the day and confront him about his alleged refusal to get the patient for Ms. Osthoff. This conversation led to an agreement among them that Ms. Osthoff would approach Appellant first if she had any complaints about his performance before reporting those problems to management.
18. Ms. Osthoff testified that on December 20, 2001 she and Appellant were sitting together at a lunch table with another employee named Dianne. Ms. Lensink walked by the table and said something to the group at the table reminding them she needed an overhead projector at a certain time and place the following day. Dianne said that she would be off duty the following day. Ms. Osthoff testified she recalled Ms. Lensink requesting the projector at a staff meeting earlier that week. She does not recall further details of the December 20 lunch table conversation about the projector, but recalls she and Appellant talked about it briefly and there was no argument or contention over the issue.
19. On the morning of December 21, 2000 Ms. Osthoff entered the elevator and encountered Appellant. She mentioned the projector discussion of the previous day and asked Appellant if he recalled the issue. Appellant told her he did not know what she was talking about. Ms. Osthoff testified he appeared to be somewhat agitated at that time. She tried to remind him of their discussion the day before regarding the projector. He repeated that he did not know what she was talking about.

³ Again, the Written Reprimand included corrections concerning Appellant's unauthorized absences from work surrounding the July 11 incident. The hearing officer has not considered those portions for the reasons stated above.

20. Later in the morning of December 21, 2000, Ms. Lensink contacted Appellant and told him where and when to bring the projector. Appellant had the projector, and again encountered Ms. Osthoff on the elevator. She saw him with the projector and asked him if he finally recalled the conversation she had referenced earlier. Appellant appeared agitated to Ms. Osthoff. He stated that he had been told to go get it. Ms. Osthoff testified that as they exited the elevator and walked toward the gym doors, Appellant looked her in the eye, pointed a finger in her direction, and clearly said in a normal tone of voice, "Get out of my face or you're going down." Ms. Osthoff testified that she did not feel her location in proximity to Appellant's person during any part of this conversation placed her in "his face." She testified that she was very intimidated by this encounter and did feel Appellant intended to threaten her. Ms. Osthoff testified that she was "stunned" that a co-worker would say such a thing to a co-worker. She testified she was perplexed why Appellant would express this sentiment to her under such ordinary, unremarkable circumstances.⁴

21. Appellant testified at the time of the hearing that he did recall the elevator encounters with Ms. Osthoff on the morning of December 21. He testified it was one of those incidents when Ms. Osthoff can be vague in her requests and beat around the bush to the point that it becomes frustrating and tedious. He testified that she was not direct in what she was asking him and he responded by telling her he did not know what she was talking about. He testified he repeated this to her twice before they got off the elevator. Then Ms. Lensink called him and asked him to retrieve the projector. On his way back he again encountered Ms. Osthoff on the elevator. Again she asked him if he recalled the conversation, and again he told her he did not know what she was talking about. Appellant testified that he did not make the "get out of my face or you're going down" comment, and at no time did he threaten her in any way. Appellant testified he was "blown away" by the accusation when it came out. He testified that he is not a person to make threats.

22. Ms. Osthoff testified that she deliberately avoided interacting with Appellant the remainder of that day and the following day, primarily out of fear. However, she testified that she remained hopeful she would have the opportunity to straighten out with him why this happened in the near future. Ms. Osthoff testified that it was this hope, combined with a degree of fear of Appellant, which led her to elect not to report this incident to her supervisors. She testified that between December 22 and December 29, she did have a few brief interactions with Appellant and that things appeared to be normal, but she remained concerned that they had not yet discussed the elevator incident. She testified she did not bring the incident up with Appellant during these days because the appropriate opportunity never presented itself.

23. Ms. Goetz testified that on December 22, she and Appellant were alone in the gym. At this time the holidays had resulted in short staffing as they typically do, and the staff was

⁴ Ms. Jones testified that she overheard the tail-end of a conversation between Ms. Osthoff and Appellant sometime around the morning of December 21, during which she could tell by the tone of their voices they were having a disagreement about something, although she did not hear what they were saying. When Ms. Osthoff later told Ms. Jones about the incident on the elevator on December 21, 2000, Ms. Jones assumed this was what she had overheard. However, Ms. Jones testified that she could not be certain whether what she had heard was that conversation or some other conversation between Appellant and Ms. Osthoff. (See, Exhibit 7 ph. 2)

consequently somewhat stressed and overworked. Ms. Goetz was sitting at a table doing paperwork. She heard Appellant behind her, loudly slamming and moving chairs and other objects around as he was straightening the gym. Appellant then walked up to the table where Ms. Goetz sat, tossed a solid wood puzzle on the table hard enough to make a loud noise, and said to her, "What do you want me to do with this OT shit?" Ms. Goetz testified that she then lost her temper with Appellant and engaged in retaliatory behavior. She got up from the table, grabbed a wheelchair, drug it across the room, shoved it in front of the Stairmaster, and said, "Where do you want this PT shit?"⁵ Ms. Goetz testified that she was embarrassed by her own behavior and later that evening she confessed the incident to Ms. Jones, and expressed remorse over her reaction during the incident. Ms. Goetz testified that she did not receive a Verbal Warning or any other type of discipline for her behavior as a result of this incident. A few weeks later she and Appellant discussed this incident. They both agreed they were out of line, and basically apologized to one another. (*See*, Exhibit 8.)

24. Ms. Jones testified that during the end of the year 2000, she had received some complaints from employees about Appellant's approachability and willingness to cooperate. After learning about the incident which occurred on December 22 between Ms. Goetz and Appellant in the gym, she decided to meet with Appellant and again counsel him about some of these incidents. She met with him on December 26, 2000, and they discussed several recent reports concerning Appellant's interactions as they are described in Exhibit 7, including his encounter with Ms. Goetz within the past week, as well as complaints from others she had received. She prepared Exhibit 7 on January 2, 2001.
25. Ms. Jones testified that Appellant was very angry during this conversation with her on December 26, 2000, and that Appellant raised his voice and swore many times during the conversation. Appellant responded that staff should approach him first with any complaints and give him a chance to cure before making such reports. Appellant requested the names of the complainants giving rise to the conversation, and Ms. Jones told him she would ask them if she could disclose their identities to him. Appellant eventually expressed the need for a time out and left the office, effectively ending the conversation. About half an hour later, Appellant contacted Ms. Jones and they resumed the conversation. Ms. Jones told Appellant that the reason staff do not approach him with such complaints is because they reported to her that Appellant is unapproachable, the discussions take a long time and they do not seem to help. While Appellant again cursed during this conversation, the two parted on an affirmative note when he took Christmas cards to deliver. Ms. Jones thanked Appellant and he responded positively. (*See*, Exhibit 7.)
26. Ms. Jones then met again with Appellant on December 29, 2000 to share some of the details of the complaints she had raised during her conversation with Appellant on December 26 as he had requested. During this meeting, she further told him it was unacceptable to swear, raise his voice and stomp out of meetings with his superiors or anyone else. She admonished that if these behaviors continued the Agency might pursue further progressive discipline. The two further discussed future communication methods. Finally, Ms. Jones told Appellant his use of the radio was inappropriate. Appellant argued that her request constituted censorship. They

⁵ Appellant testified Ms. Goetz actually did this with two wheelchairs.

did not come to consensus on this issue, and Appellant was still upset about the negative reports, but the conversation apparently was calm and appropriate overall. (*See*, Exhibit 7.)

27. At the time of her discussions with Appellant on December 26 and 29, Ms. Jones was not aware of the elevator incident between Appellant and Ms. Osthoff which reportedly occurred on December 21, 2000.
28. Sometime between December 29, 2000 and January 2, 2001, Ms. Jones met with Ms. Osthoff and made some work assignments. In one of them Ms. Jones mentioned that Ms. Osthoff would be working with Appellant on that assignment. Ms. Osthoff testified that she spontaneously muttered "Oh great," and something about him being mad at her for a while. Ms. Jones inquired further about what Ms. Osthoff was referring to. At that time, Ms. Osthoff disclosed the elevator incident of December 21. Ms. Jones admonished Ms. Osthoff that she should have disclosed this incident to management right away given the threatening nature of the incident, and asked Ms. Osthoff to write an account of the incident. Ms. Osthoff did so on January 2, 2001. (*See*, Exhibit 9.)
29. Ms. Jones reported Ms. Osthoff's account of the December 21 elevator incident to Ms. Lensink, because the incident apparently included a direct verbal threat by Appellant. Ms. Jones and Ms. Lensink then met with Dr. Fine, to consult about what action they should take. All three of these individuals testified that they considered potential progressive discipline against Appellant in light of the apparent seriousness of this incident, and the fact that this incident was not an isolated disciplinary issue given Appellant's prior Verbal Warning and Written Reprimand.
30. After meeting with Appellant and discussing these issues with him, management elected to initiate a disciplinary action due to the severity of Appellant's alleged threat to Ms. Osthoff on December 21. Ms. Lensink prepared the Notice of Contemplation of Disciplinary Action letter ("Contemplation letter") dated January 2, 2001 (Exhibit 4). Issues in this Contemplation letter included Appellant's alleged threat to Ms. Osthoff on December 21, the incident with Ms. Goetz in the gym on December 22, and concerns surrounding Appellant's general demeanor and communication habits, including his reaction to their conversation on December 26.
31. Dr. Fine delivered the Contemplation letter to Appellant on January 17, 2001. Dr. Fine testified that during this meeting Appellant was angry, tense, short in his responses, pacing, making poor eye contact, and was raising his voice and cursing. Dr. Fine testified that he tried to display compassion toward Appellant, be open to discussion, and offered to talk about the situation. Dr. Fine testified that Appellant was not interested in discussing it.
32. A Contemplation meeting was held on February 5, 2001. Present were Dr. Fine, Ms. Lensink, Ms. Jones and Appellant.⁶ During the meeting, Appellant "indicated he had no conversation

⁶ The Contemplation Meeting was originally scheduled for January 29, 2001. Chuck King, an employee representative for the DHHA, had agreed to be present but could not make it and the meeting was rescheduled for February 5, 2001. Within a few minutes before the February 5 meeting, Mr. King notified the group that his representation of Appellant would present a conflict of interest and that he therefore could not represent Appellant at

with Patricia Osthoff in the elevator..." and that he "was unable to recall any type of conversation with Patricia Osthoff..." concerning an overhead projector on December 21. He flatly denied ever threatening Ms. Osthoff. (See, Exhibit 5) Appellant did recall the interaction with Ms. Goetz on December 22. Finally, Appellant admitted to cursing and raising his voice during the January 17, 2001 meeting with Dr. Fine. Appellant agreed to modify his communicative habits in and conceded the general content of the Contemplation letter, but maintained the alleged threat to Ms. Osthoff was a fabrication. (See, Exhibit 5). At the meeting, Appellant offered a letter from Lucy McGinnis describing the incident in September, during which Ms. Osthoff reported to Ms. Jones that Appellant had failed to get a patient for her. (See, Exhibit A). In this letter, Ms. McGinnis offers an account of the incident which supports Appellant's account. Appellant asserted that this was evidence of Ms. Osthoff's tendency to fabricate negatively against Appellant. Ms. McGinnis did not appear at the meeting.

33. Appellant and Dr. Fine both testified that during the meeting on February 5, Dr. Fine stated that were it not for the alleged threat to Ms. Osthoff on the elevator on December 21, there would not have been a Contemplation of Disciplinary Action initiated.
34. On the afternoon of February 5 following the Contemplation meeting, Dr. Fine, Ms. Lensink and Ms. Jones consulted on the appropriate action. Dr. Fine testified that they did consider Appellant's letter from Ms. McGinnis concerning the incident in September when Ms. Osthoff reported Appellant failed to get a patient for her (Exhibit A). The Agency witnesses testified they did not find the letter persuasive enough to establish Ms. Osthoff intended to fabricate anything against Appellant and overcome her allegations about the separate incident of December 21. All three Agents testified that in their deliberations concerning the appropriate discipline, they took into consideration Appellant's past disciplinary actions and the history of his behavior complications. They testified they considered various forms of discipline, and elected a one-week suspension as hopefully sufficient to finally get Appellant's attention.
35. On February 8, 2001, at 4:00 p.m., Dr. Fine delivered the Notice of Suspension to Appellant (Exhibit 2). Appellant grew extremely agitated and yelled "this is fucking bullshit" among other expletives several times. Appellant refused to open the envelope and apparently was unable to control his outburst, despite Dr. Fine's attempt to de-escalate Appellant by remaining calm and mature. It was apparent to Dr. Fine that staff could observe and hear Appellant's tirade through the office window. Appellant then left Dr. Fine's office without responding to his offer to discuss the matter, threw the envelope in a sleeve mounted on the wall, and returned to the gym. Dr. Fine testified that while he was not surprised Appellant was angry, he was surprised at the magnitude of Appellant's reaction and described it as unique among his interactions with employees. Approximately twenty minutes later, Appellant reconvened with Dr. Fine to discuss the suspension, having reviewed the document at that time. Again, he swore and raised his voice during the conversation. Again, it was apparent to Dr. Fine that staff could observe and hear this encounter through the office window. Dr. Fine documented this incident (see, Exhibit 3).

the meeting. Appellant did not object to the meeting moving forward without representation at the time and did not request that the meeting be rescheduled.

36. Appellant filed his appeal of the suspension on February 20, 2001 (Exhibit 1).

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as an appeal of a disciplinary suspension, 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 was not disputed by either party to this case.

2. Burden of proof

In civil administrative proceedings such as this one, the level of proof required in order for the party bearing the burden to prove its case is by a *preponderance of the evidence*. In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

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.

DISCUSSION

1. The CSR Rules Allegedly Violated

The Agency argues Appellant's actions as complained of in his suspension constituted violations of the following CSR Rules and Executive Order, set forth in relevant part:

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 or officers of the City and County for any reason, including...intimidation or retaliation against an individual who has been identified as...a representative of any party to...investigation relating to any disciplinary procedure...

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

* * *

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. 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, other City and County employees or the public...

* * *

EXECUTIVE ORDER NO. 112

...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...

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

- A. Intimidating, threatening or hostile behaviors...

* * *

2. Appellant's alleged threat to Ms. Osthoff.

The Agency asserts that it has proven Appellant's alleged threat to Ms. Osthoff, which is the primary motivating incident behind the suspension, by a preponderance of the evidence. Dr. Fine testified that the Agency found Ms. Osthoff's account of the elevator incident credible, given

her general reliability and demeanor as an employee. She is generally regarded as a credible, trustworthy individual. The Agency presented further testimony that while Appellant's reliability is generally not a question, his overall demeanor and behavior as observed and experienced by all the witnesses is not inconsistent with such an outburst as Ms. Osthoff described. They concluded therefore that it was more likely than not that this incident happened, and that suspension was justified in the context of Appellant's multiple, ongoing instances of hostile, inappropriate behavior and prior progressive discipline therefor.⁷

Appellant responds with a categorical denial that he ever said anything amounting to a threat to Ms. Osthoff on December 21 or any other day. Appellant testified that he does not threaten people. He asserts this accusation is unreliable hearsay, that there were no witnesses to the incident, and that Ms. Osthoff should not be considered credible because he has demonstrated at least one other occasion when she fabricated an allegation against him. Further, Appellant argues that on that occasion, Ms. Osthoff agreed to approach him first if she had any problems. Yet she failed to do this after the elevator incident. Finally, under cross-examination of the witnesses, Appellant established that none of the witnesses has ever observed Appellant directly threaten anyone. Finally, Appellant underscores that the Agency has admitted there would have been no suspension action in the absence of the reported threat to Ms. Osthoff.

a. Evidence to be considered in determination of the ultimate issue.

Agency witnesses have conceded that were it not for Appellant's reported threat to Ms. Osthoff on December 21, 2000, this disciplinary action would not have taken place. However, Agency testimony established that while this incident alone comprised the primary impetus for the action, the Agency considered Appellant's general demeanor and prior actions as suggesting conformity with the alleged threat. Such consideration raises questions concerning whether those "prior bad acts" can be considered when determining whether Appellant acted in conformity with them on the day of the alleged verbal threat.

While this proceeding is not governed by the Administrative Procedure Act ("APA") and the Colorado Rules of Evidence ("CRE"), such authority can be referenced for some degree of persuasive guidance here. "Generally, those conducting administrative hearings need not comply strictly with the rules of evidence. The standard to be applied is whether the evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs." Colorado Mot. Veh. v. Northglenn, 972 P.2d 707, 713 (Colo. App. 1998); *ref.* 24-4-105, C.R.S. (2001).

However, while the hearing officer is not strictly bound by the CRE, as a matter of consistent past practice Career Service Authority hearing officers have referred to the principles set forth in Colorado law for reasonable guidance. Common sense and fairness lie at the root of most rules of evidence, including CRE 404 (b), which states:

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be

⁷ Appellant conceded the December 22 incident with Ms. Goetz and his conversation with Ms. Jones on December 26, which were also included in the suspension action, for the most part took place as reported.

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

With the possible exception of "absence of mistake or accident," none of these exceptions appear to apply to the facts of Appellant's case. This rule arises from the notion of fundamental fairness that a person should not be tried for every wrong he has committed in the past, but instead only for the incident in question. The intent of CRE 404 (b) is to avoid a jury being contaminated in its opinion of the defendant by prior bad acts which are separate from the incident for which he is being tried. For this reason, persuasive case law establishes that under this rule, even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." People v. Spoto, 795 P.2d 1314 (Colo. 1990), quoting C.R.E. 403. The Court in Spoto explained the rationale behind CRE 404 (b) as follows:

Bearing in mind that evidence of similar acts has inhering in it damning innuendo likely to beget prejudice in the minds of jurors, and that such evidence tends to inject collateral issues into a criminal case which are not unlikely to confuse and lead astray the jury, it becomes exigent that courts observe the fine balance in regard to such evidence that must exist between the necessity of proof on the part of the prosecutor and the danger of unfair prejudice to the defendant.

Spoto, above, citing Stull v. People, 140 Colo. 278, 284, 344 P.2d 455, 458 (1959)

Appellant's prior behaviors were admitted in this case as relevant to his disciplinary history, which in turn is relevant to the severity of discipline for this incident, should the incident be proven. As the finder of fact and the trier of law, the hearing officer has already been exposed to this evidence. However, it is incumbent upon her to separate such evidence and consider only that which is admissible for purposes of determining the ultimate fact in dispute.

Furthermore, the evidence illustrates the potential for unfairness in assuming that Appellant somehow acted in conformity with prior aggressive behavior by making the threat in question. First, all of the witnesses who testified against him, including Ms. Osthoff with the exception of this incident, also testified that they had never been directly threatened by Appellant or witnessed him threatening anyone else. In addition, unlike the allegations that Appellant raises his voice as an indicator of his aggressive behavior, Ms. Osthoff testified that Appellant used a normal tone of voice when he made the threatening comment in question. There is no evidence tending to establish Appellant had previously entertained the habit of directly threatening people, or that he expressed anger in a normal tone of voice.

Finally, the Agency bore the burden of making a *prima facie* case in the first instance. In the absence of some affirmative demonstration or legal argument by the Agency that the hearing officer should consider Appellant's past behaviors as relevant to the determination of the incident at issue, in light of the reasoning behind CRE 404 (b) and its interpretive case law, the hearing officer is reluctant to presume the propriety of considering such evidence. Given the notion of fundamental fairness whence CRE Rule 404 (b) arises, the hearing officer concludes that it would be neither prudent nor reasonable to consider those prior behaviors in her determination of the ultimate issue of whether it is more likely than not the December 21, 2000 incident occurred.

Therefore, while the hearing officer admitted evidence of Appellant's prior behavior habits for other purposes, she will not consider it in her deliberation as making the elevator incident more or less likely. The hearing officer must therefore base her determination on the credibility of the testimony and evidence as it surrounds only that incident.

b. The elevator incident.

The hearing officer is charged with assessing and weighing the credibility of the witnesses. Since there were no direct witnesses to the elevator incident other than Appellant and Ms. Osthoff, the hearing officer must rest her conclusions concerning that encounter on the demeanor and apparent reliability of the testimony of those two individuals.

The hearing officer carefully observed the demeanor of both Appellant and Ms. Osthoff, and recognizes the basis for a complex communication dynamic between them. On the one hand, Ms. Osthoff's demeanor is significantly gentle and soft-spoken compared to Appellant's. On the other hand, Appellant's assertive demeanor was observed and noted by the hearing officer. In a room full of people, his presence naturally drew more attention than those around him. This effect was heightened when he spoke or gestured. To make it clear, this is true even when Appellant appears not to be overtly irritated or angered in any way, which was the case during most of the hearing. In essence, Appellant has a naturally forceful personality.

Based on her observations, the hearing officer finds it apparent that the two are quite different in the manner of their presentation, and Appellant's testimony as to his periodic frustration with Ms. Osthoff's seeming inability to be clear and forthright in her communications with him is very credible. Appellant's testimony, that he became somewhat irritated with Ms. Osthoff on the elevator, is equally credible. She more likely than not approached him with the attitude of shyness when asking him about the discussion of the previous day, and because of her nonconfrontational nature, alluded to her question rather than stating it outright. It is more likely than not that Appellant's increasingly irritated demeanor on the elevator was in turn intimidating to Ms. Osthoff given her mild manner and soft-spoken nature.

The hearing officer found the sincerity of both Appellant and Ms. Osthoff persuasive during their testimony about the elevator incident. In the absence of any additional evidence, the hearing officer might have called it a draw based solely on her observation of this testimony.

However, there is a difference in the evidence which tips the scale in favor of Ms. Osthoff's account. From the very first moment she reported this incident within a few days after it occurred, she has consistently reported that she clearly heard Appellant say "Get out of my face or you're going down." This account is further bolstered by Ms. Osthoff's equally credible report of her shock in reaction to Appellant's alleged clear comment.

Appellant's testimony of being "blown away" upon learning of Ms. Osthoff's accusation was equally convincing. However, Appellant did not recall this conversation at all at the time of the Contemplation meeting. Yet by the time of the hearing, his memory had somehow improved rather than deteriorating. He evolved from not recalling the encounter at all to recalling it so distinctly that he could tell the hearing officer exactly what he did say and what he did not say.

Whether he is conscious of it or not, Appellant's clear motivation in this reconstruction of such a memory is the clearing of his name.

Appellant's primary response to Ms. Osthoff's accusation is that it is unreliable, as demonstrated by her alleged previous fabrication against him in September. The hearing officer is not persuaded that Ms. Osthoff deliberately fabricated against Appellant. Given her general shy demeanor, coupled with her testimony of being fearful of his angry reactions and frustrated with his periodic lack of responsiveness, it is not difficult to imagine Ms. Osthoff approaching Appellant with a degree of trepidation and alluding that she needed help rather than stating such a request outright. Then when he did not respond, she became frustrated and reported the incident to Ms. Jones. Similarly, it is not difficult to imagine Appellant, not fully cognizant of the trepidation Ms. Osthoff regularly felt toward him, to be unaware of the reason she habitually approaches him as gun-shy, and experience yet another vague communication which he finds so frustrating.

For these reasons, the hearing officer rejects that Ms. Osthoff deliberately fabricated an allegation against Appellant after the September encounter, and that she has therefore been shown as unreliable in this regard. Rather it was more likely than not the result of a miscommunication caused by the circumstances of both their personalities. While this is not necessarily solely Appellant's fault, neither does it demonstrate a deliberate a pattern on Ms. Osthoff's part to fabricate against Appellant.

The hearing officer found Ms. Osthoff's testimony concerning the clarity with which she heard Appellant's threat on December 21 to be very credible, reliable testimony. When considering the credibility and consistency of this account over time, and the spontaneous manner in which it was initially reported, as opposed to the metamorphosis of Appellant's account of the same incident over time in his favor, the hearing officer concludes that Ms. Osthoff's account is more credible than Appellant's denial.

Therefore, the Agency has established by a preponderance of evidence that Appellant's threat to Ms. Osthoff on the elevator on December 21, 2000 more likely than not occurred in violation of CSR Rule 16-50 A. 8) and 18), and Executive Order 112.

3. Severity of the Discipline.

a. Consideration of prior progressive discipline.

CSR Rule 16-10, Purpose, states that "The purpose of discipline is to correct inappropriate behavior...the type and severity of discipline shall be reasonably related to the seriousness of the offense...." Section 61-20, Progressive Discipline, state as follows in relevant part:

- 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...include:
 - a) Verbal reprimand...

- b) Written reprimand...
 - c) Suspension without pay...
- 2) Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation, as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

The parties all concurred that the issue leading to the Agency's suspension action was the alleged threat to Ms. Osthoff. However, once initiated, the Agency also addressed additional troublesome incidents that had occurred around the same time, and further considered Appellant's past pattern of unacceptable behaviors, some of which have been addressed in prior disciplinary actions. The Agency considered all these factors in its decision to suspend Appellant.

Appellant argues that suspension is too harsh a discipline for an alleged threat supported only by hearsay. While the Agency maintained that the suspension action in question was initially inspired by the alleged threat to Ms. Osthoff, once this report was made, other continuing problems were included in the contemplation of discipline.

While the hearing officer could not consider Appellant's prior behavior traits in a determination of the verbal threat incident, once that occurrence has been established, she may consider prior relevant behaviors where those behaviors were the grounds for progressive disciplinary actions. Under the CSR Rules set forth above, this is necessary in considering the appropriateness of the discipline as part of a progressive chain. In this case, the prior disciplinary actions in question addressed Appellant's angry, intimidating behaviors. While none of the other incidents in question rises to the level of a threat, there are multiple other instances of repeated, unacceptable behavior to which Appellant has admitted. The witnesses have described that behavior as being intimidating at times. The hearing officer finds the subjects of those prior disciplinary measures sufficiently related to the one in this case to consider them progressive discipline relevant to the allegations in this case.

The hearing officer observed Appellant's demeanor and presentation very carefully. The totality of evidence, including the hearing officer's observations of Appellant, lead her to concur with Dr. Fine that Appellant is largely unaware of the effect his high energy and forceful personality have on others, particularly when he is agitated or angry. He is further either unaware or deliberately ignorant of when his self-expression can be so obtrusive to those around him as to be reasonably worthy of self-moderation.

However, Appellant's lack of awareness can only take him so far, especially when he has been put on notice by the Agency not once, but several times prior to the initiation of the disciplinary action in question. While Appellant may not "intend" to intimidate, he has been given several warnings putting him on notice that multiple individuals perceive his behavior as such, and it is his responsibility to reform accordingly when his supervisors have directed him to do so. The Agency has taken several measures to get Appellant to acknowledge the excessiveness of his own behavior, but Appellant continues to refuse to do this. Through

Appellant's own continuing neglect of the problem, he continues to force the Agency to take further, increasingly severe actions in response.

The Agency has already tried both a Verbal Warning and a Written Warning, and they have not served to correct the problem. The next logical step is therefore a suspension under the above CSR Rules governing disciplinary actions.

b. Appellant's conspiracy theory.

Appellant argues that the Agency is conspiring to terminate Appellant because they dislike him and want to get rid of him. Appellant has presented no credible evidence to support this allegation. On the contrary, in their testimony the Agency witnesses unanimously and repeatedly made allowances for Appellant's behavior problems in sort of a "that's just Chris" way. Only when numerous complaints of excessive behaviors come to management's attention has the Agency taken corrective actions. The witnesses otherwise appear to like Appellant and think highly of his work. That management's patience has been tested and is becoming increasingly thin after ongoing reports from multiple individuals, and repeated warnings concerning the same types of behavior, does not amount to a conspiracy. That these same witnesses apparently otherwise held Appellant's work with patients in high regard further militates against the idea that they are trying to eliminate him.

Appellant's outburst in Dr. Fine's office on February 8, 2001 alone was sufficient evidence of insubordination in itself to warrant termination. Since it was not considered in determination of the disciplinary action present before the hearing officer, she is bound to refrain from considering this outburst in her deliberations about the discipline in this case. However, while the Agency's decision to exclude Appellant's outburst with Dr. Fine prohibits the hearing officer from considering it with respect to Appellant's discipline, this does not bar her from considering it as evidence which militates against Appellant's charge of a conspiracy against him. If the Agency had wanted to "get rid of" Appellant, it probably could have succeeded in doing so right then. But as Dr. Fine testified, he permitted a degree of deference to the progressive disciplinary process, basically ignoring the outburst by Appellant in his office altogether. He gave Appellant yet another chance, deciding to rest on the discipline already chosen.

It is apparent that Appellant felt somewhat sabotaged by having relied on his agreement with Ms. Osthoff that she would confront him first if she had any problems with him, then having this report come up. It is not out of the question that in Appellant's apparent distracted state of mind that day, he was not cognizant of the impact such a statement would have on a person of Ms. Osthoff's personality when he made it, and that he thought so little of such a comment that he did not even recall making it. This would explain why the report took him by such surprise, as he very credibly testified. The hearing officer finds Ms. Osthoff's asserted desire to work it out with Appellant, as well as her hesitation in approaching him during the subsequent days, equally credible. The hearing officer concludes that Ms. Osthoff's disclosure about the elevator incident to Ms. Jones on December 29 was not a deliberate digression from her prior agreement with Appellant or an act of sabotage, but a spontaneous utterance of her trepidation toward Appellant, which led to further inquiry on Ms. Jones' part. In any event, the breach of such an agreement did not deprive Appellant of his due process, which is the purpose of these proceedings.

Based on the totality of this evidence, the hearing officer rejects Appellant's conspiracy theory.

c. Appellant's free-speech arguments.

Appellant asserts that the limitations being imposed by the Agency are basically a violation of his civil rights of free expression as an American citizen. The hearing officer does not have jurisdiction over constitutional issues. But a basic understanding of the rights Appellant asserts is nonetheless instrumental in making a determination whether the Agency's asserted limitations on Appellant's means of expression are reasonable.

Freedom of speech is not an absolute, unqualified right, even in the United States. No one has the right to yell "fire" in a crowded theatre, causing a stampede killing hundreds of people, where there is no such fire. *See, United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). The United States Supreme Court has interpreted the First Amendment right to free speech as being limited depending on the time, place, manner and context of the speech. The reason for this is that while the constitution provides protections to an individual's freedom of expression, those protections cannot be allowed to the extent that they impose on the same basic freedoms of others or otherwise create unnecessarily dangerous situations.

Similarly, an employer has the right to impose certain reasonable limitations on the expressions of its employees if those limitations are reasonably necessary to the goals and objectives of the company. The employee always retains the right not to be employed by that company and seek employment in another environment where the limitations might be less severe, but at any rate maintains the right to express his ideas and thoughts while outside the workplace. *See, Connick v. Myers*, 461 U.S. 138 (1983).

The environment in which Appellant works is controlled for many reasons. The goal of the facility is the rehabilitation of severely injured people who are under tremendous amounts of various types of stress. For this reason, the Agency attempts to maintain as low-stress, calm, and nurturing an environment as possible given the volume with which they deal. Clearly, this objective is reasonably related to the goal of rehabilitation. A secondary, and equally reasonable objective, is the imposition on employees that they operate in such a way as to contribute to the calmness and productivity of the environment, not to its stress and dissension. This reasonably includes employee relations since employees interact with one another while in the presence of patients in rehabilitation. The hearing officer finds these arguments reasonably related to the goal of the Agency, and therefore concludes that they are not unreasonable restraints on Appellant's behavior.

Appellant has no absolute right of free expression in the context of supervisory meetings and corrective interactions. The right of free speech is not protected with respect to the chain of command in an employment setting where management must make decisions, enforce company policy and maintain order. *See, Connick*, above.

The hearing officer suspects that the DHHA has not terminated Appellant because his supervisors recognize the same thing the hearing officer observed -- that the very elements of Appellant's personality which prompt him to act in volatile and contextually inappropriate ways

are the same elements that apparently harbor tremendous potential for Appellant as a desirable asset. It is unfortunate that Appellant has thus far failed to recognize he is apparently considered a valuable employee despite, and with the exception of, these behaviors. The witnesses, to the person, each had positive things to say about his performance despite the complications at hand and despite they all testified on behalf of the Agency.

d. Appellant's argument of disparate treatment.

Appellant argues that he has been treated disparately by being disciplined so severely for actions that other employees have taken, yet they have not been disciplined. Appellant offered some examples of this. On one occasion an employee, Brian Olson stormed out early one day when he was upset about an incident at work. However, there was no additional evidence suggesting that Mr. Olson engaged in a pattern of volatile behavior similar to Appellant's. Similarly, Appellant underscored in his cross-examination of the Agency witnesses that Ms. Goetz was not disciplined for her angry outburst in the gym on December 22, 2000. Once again, however, this incident appeared to be isolated and somewhat out of character for Ms. Goetz. Given the totality of evidence and Appellant's own admitted behaviors, his role in this same incident can hardly be considered out of character. The evidence clearly demonstrates that Appellant engages in repeated instances of unacceptable behavior, even during the moment of being disciplined for it. Ms. Lensink testified under cross-examination that she was aware of no employees who engaged in the same kinds of problematic behaviors to the extent Appellant does.

Appellant further testified that certain other employees swear and use vernacular just like he does when they are in his presence, yet they do not get disciplined for it. Yet his only evidence was the hearsay claims of these other employees that they were not disciplined. In addition, Appellant admitted not lodging complaints against them for their digressions. Appellant cannot expect other employees to be held to the same standards as he, if those who observe the alleged digressions by these other employees do not report on the inappropriate behaviors. In addition, while these employees may have an implicit understanding with Appellant that they can express themselves to one another in such a manner in their personal conversations, Appellant very clearly does not have such an understanding with the employees who find this offensive and complain. Finally, the hearing officer has no evidence before her that any other employee has engaged in foul-mouthed diatribes during meetings with supervisors. This behavior is simply unacceptable on its face, particularly when those meetings are to discuss disciplinary actions for the very same types of inappropriate behavior.

Case law has established that an individual claiming disparate treatment from other employees must demonstrate among other things, that those other employees "must have engaged in conduct similar to the plaintiff's, *without such differentiating or mitigating circumstances* that would distinguish their conduct or the appropriate discipline for it." See, Mazzella v. RCA Global Communications, 642 F. Supp. 1531, 1547 (S.D.N.Y. 1986), aff'd, 814 F.2d 653 (2d Cir. 1987) (emphasis added). Appellant has not demonstrated by a preponderance of the evidence that there is any other employee who engages in "conduct similar to the [Appellant's] without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it." *Id.*, at 1547. The hearing officer concludes that there is insufficient evidence to find that Appellant's suspension for the incidents in question constitutes disparate treatment.

In light of the totality of evidence in this case, the hearing officer finds Appellant's five-day suspension reasonable, given the severity of the incidents in question and relevant prior progressive discipline.

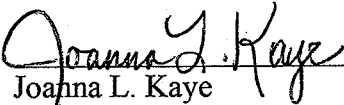
CONCLUSIONS OF LAW

1. The Agency demonstrated by a preponderance of evidence that Appellant engaged in threatening behavior toward Ms. Osthoff on December 21, 2000 in violation of CSR Rule 16-50 A. 8) and 18), and Executive Order 112, and that he engaged in actions constituting a failure to maintain satisfactory working relationships with co-workers during the incidents of December 21 and December 22, 2000 in violation of CSR Rule 16-51 A. 4).
2. The Agency has demonstrated just cause for disciplining Appellant.
3. Appellant has failed to demonstrate by a preponderance of the evidence that he has been treated disparately for the same types of behaviors by other employees such as Ms. Goetz and Brian Olson.
4. The Agency has demonstrated that the severity of the discipline is reasonably related to the nature of the offense in question, in light of the severity of the offense and prior progressive discipline for similar behaviors.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to suspend Appellant for five days is AFFIRMED. This case is DISMISSED WITH PREJUDICE.

Dated this 31st day of October, 2001.


Joanna L. 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 **ORDER OF DISMISSAL** by depositing same in the U.S. mail, postage prepaid, this 5 day of November, 2001, addressed to:

Christopher Martinez
1809 S. Sherman St.
Denver, CO 80210

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER OF DISMISSAL** by depositing same in the interoffice mail, this 5 day of November, 2001, addressed to:

Mindi L. Wright
Assistant City Attorney
Employment Law Section

Dr. Patricia Gabow
Denver Health and Hospital Authority

Office of General Counsel
Denver Health and Hospital Authority
660 Bannock St. 5th Floor MC 1919

Virginia Granado