

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

Appeal No. 207-00

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

STEVE MESTAS, Appellant

Agency: DEPARTMENT OF PARKS AND RECREATION,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board on appeal by Steve Mestas (hereinafter "Appellant") filed September 19, 2000. Appellant challenges the Department of Parks and Recreation (hereinafter "Department" or "Agency") decision to terminate his on-call employment as a Recreation Instructor at the Department's 20th Street Gym. Appellant alleges his termination was an act of racial discrimination. The Agency maintains that its reasons for terminating Appellant's employment bore no relationship to his race, but rather it was motivated by problems with Appellant's performance.

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Kaye ("hearing officer") on June 20 and July 9, 2001 at the Career Service Authority Offices. Appellant was present and represented himself. The Agency was represented by Assistant City Attorney Robert D. Nespor, with 20th Street Gym's Recreation Supervisor, Kay Spring, present for the entirety of the proceedings and serving as advisory representative for the Agency.

Appellant testified on his own behalf and called Ms. Spring as an additional witness.

Witnesses for the Agency included Ms. Spring, 20th Street Gym's Activities Leader Shann Villhauer, and Recreation Coordinator Robert Lopez.

The Agency stipulated to Appellant's Exhibits L, M and O. Appellant's Exhibits A, C, E, F and H were admitted over the Agency's various objections.

Appellant's Exhibit N was offered, but was not admitted because it was not previously listed by Appellant as an exhibit in his prehearing pleadings. Exhibits D and I were offered but not admitted because they were not relevant to Appellant's claim of discrimination. Exhibit G was offered but not admitted for lack of foundation. Exhibits B, J and K were withdrawn.

Agency's Exhibits 2, 4, 7 and 9 were offered and admitted without objection. Exhibit 5 was admitted over Appellant's objection and given its due weight.

Exhibit 8 was disallowed because it was prepared several weeks after the incidents it described. Instead, Mr. Lopez, the document's author, was permitted to testify directly based on his recollections as refreshed by the document.

Exhibits 1, 3, and 6 were not offered or admitted.

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

ISSUES

1. Whether Appellant has demonstrated a *prima facie* case of racial discrimination.
2. If so, whether the Agency has articulated a legitimate business reason for its allegedly discriminatory actions.
3. If so, whether Appellant has shown that the Agency's stated business reason is a pretext for discrimination.

FINDINGS OF FACT

1. Appellant, an Hispanic male, was an on-call employee at the Department's 20th Street Gym for approximately five years. Appellant began in approximately 1995 as a Recreation Aide, serving under the unofficial title of "assistant boxing coach" until approximately 1997, when he was reassigned to the position of Recreation Instructor, which position he occupied for the final three years of his employment there. His working title was "head boxing coach" or "boxing instructor" during that time. As an on-call employee for the duration of his employment at the 20th Street Gym, Appellant did not have Career Service status at any time.
2. During his stint as a boxing instructor until approximately July of 2000, Appellant's immediate supervisor was Sam Carabajal and the Recreation Supervisor was Jeff Anderson.
3. While under Anderson's and Carabajal's supervision as head boxing coach, Appellant was responsible for running the amateur boxing programs, answering all telephone and in-person inquiries concerning the boxing program, and the skills and safety training of members of the 20th Street Gym who were interested in boxing. He was also responsible for the 20th Street Booster Club. Appellant testified that since the 20th Street Gym was a US Amateur ("USA") Boxing-certified gym, its trainers had to be USA-certified and it was Appellant's responsibility to assure that they were.
4. During Appellant's tenure under Anderson and Carabajal's supervision, the 20th Street Gym was involved in professional boxing events and its employees were involved with professional

boxers. Appellant was specifically responsible for holding professional and amateur boxing events to raise funds for the Booster Club.

5. Appellant was responsible for preparations and operations for the Denver Athletic Club's ("DAC") first professional boxing event on April 14, 2000 (*see*, Exhibit E).
6. Appellant contends that two other Recreation Instructors, Shann Villhauer and George Stevens, both white males, engaged in professionally oriented affiliations during their employ at 20th Street Gym which were similar to those of Appellant. In addition, both were professional boxers prior to their employ at the facility. Mr. Stevens was a former World Champion.
7. Other employees of the 20th Street Gym were also involved with professional boxers during the same time period. Scott Audrey, a white male who evidently was also an on-call boxing instructor there, was known to be the trainer of professional world-championship boxer Stevie Johnson. Furthermore, Mr. Johnson apparently trained as a professional at the 20th Street Gym under Mr. Audrey's guidance. (*See*, Exhibit M)
8. The exhibits establish that high officials of the City and County of Denver not only knew of the connections and involvements between 20th Street Gym employees and professional boxers during this time period, but that they sanctioned such relationships. *See*, Resolution 69 passed in 1996 (Exhibit M, signed by the President of the City Council and Mayor Wellington Webb). Furthermore, the Agency stipulated that City Councilman Ed Thomas was the Master of Ceremonies at the professional event at DAC on April 14, 2000 orchestrated by Appellant. Exhibits 9 and E suggest that the 20th Street Gym was a contractual party to this and other professional events. Appellant testified that Jim Anderson instructed him to arrange the professional boxing event at the DAC in April of 2000 and other similar events as part of his regular duties, and the above-referenced exhibits tend to support this testimony.
9. During Appellant's employ under Mr. Carabajal and Mr. Anderson, he received an ongoing large volume of telephone calls and faxes related to professional and amateur events while on duty at the 20th Street Gym. Department agents conceded during testimony that such calls were received by the facility's reception desk, and that they were not screened prior to being forwarded to the individual with whom the caller requested to speak. Agents further testified that the reception desk has the facility's fax number, and the receptionists typically do not screen requests for the facility's fax number by callers. Appellant admits that he received these calls and faxes while on duty at the facility, but contends he obviously had no control over such incoming inquiries since the calls were not screened and the facility's telephonic information was generally available. In addition, Appellant contends that as head boxing coach, it was one of his assigned duties to respond to all inquiries and facility employees expected him to do so. Mr. Villhauer's testimony supports this contention.
10. Mr. Anderson sent a memo to Appellant on December 28, 1999 informing Appellant that his professional boxing business activities which were not contractually linked to the 20th Street Gym must be done on his own time. The memo stated that Appellant's use of Department resources during his scheduled hours to engage in such outside professional promotional

activities interfered with his duties, was "illegal," and that disciplinary action might result if such activities during Appellant's work hours did not cease. (Exhibit 9)

11. Robert Lopez was formerly a Program Coordinator at 20th Street Gym, and served in various positions within the Department as a Program Coordinator for the past 24 years. Appellant was a Recreational Instructor when Mr. Lopez began his tenure as Program Coordinator at 20th Street sometime in 1998. He testified he had ample opportunity to observe Appellant's work habits during that time. Mr. Lopez observed that Appellant was not monitored by Mr. Carabajal. He observed that Appellant frequently failed to perform some of his cleaning duties such as cleaning spit buckets, that Appellant was disorganized and messy, that Appellant frequently left dirty towels and litter around the facility, and that his work area was so poorly kept that the facility eventually moved it into the basement out of view. Mr. Lopez observed that Appellant would frequently leave work early, come in late, and at times not show up for work at all and fail to call in. Mr. Lopez observed that Appellant's phone usage was excessive, as long as three hours during some days. Mr. Lopez further observed that Appellant focused more on adult participants than on youth, whereas the youth were supposed to be the primary focus of the facility. He observed Appellant make remarks about Mr. Carabajal on numerous occasions which Mr. Lopez felt were disrespectful, on one or more occasions to the point of what Mr. Lopez felt was insubordination. Finally, Mr. Lopez observed that Appellant generally had ongoing difficulty observing the facility's rules. As an example of this, Mr. Lopez described an incident in which an individual was training without any headgear when Mr. Lopez walked into the facility. Upon Mr. Lopez' arrival, Appellant then had the individual put on his headgear. Mr. Lopez testified that Appellant chronically used bad language, and in general was a poor role model for the youth in programs at the gym. Mr. Lopez testified that he rated Appellant's overall performance during his employ at 20th Street as "very poor."
12. Mr. Lopez compared Appellant's overall performance to that of Mr. Stevens. Mr. Lopez testified that he found Mr. Stevens to be trustworthy, that he helped close and open the gym, and that he had been given a set of facility keys for this purpose. Mr. Lopez testified that Mr. Stevens interacted well with supervision, kept up with his chores, cleaned the gym, and repaired boxing equipment. Mr. Lopez expressed no complaints about Mr. Stevens' performance while a 20th Street employee.
13. Mr. Lopez compared Appellant's performance to that of Mr. Villhauer. He testified that Mr. Villhauer invited his input and involvement in youth boxing program development, whereas Appellant tended to resist outside involvement, including that of Mr. Lopez. He testified that the youth program has changed for the better under Mr. Villhauer's subsequent leadership. Mr. Lopez expressed no complaints about Mr. Villhauer's employment performance at 20th Street Gym.
14. In May through July of 2000, the Department underwent a reorganization of management. Kay Spring was placed in charge of the 20th Street Gym as the new Recreation Supervisor. Bill Peterson became the Department's new Manager of Recreation.
15. Ms. Spring testified she was responsible for the supervision of two facilities, 20th Street and another facility, during her transition into her new position. She was at 20th Street part time

beginning in May until approximately the third week of July. As of approximately the fourth week of July, she began on-site supervision of the 20th Street Gym on a full-time basis.

16. Ms. Spring testified that when she first came on board at 20th Street, she became aware that the amateur boxing programs appeared to be suffering from lack of attention, and were not well managed or attended, particularly the youth programs. She testified Mr. Peterson told her there were some problems with the boxing program, but that a former employee, Jim Paris, was returning to employment at the facility and had assured Mr. Peterson he would be "cleaning it up." Mr. Paris subsequently retired on June 20, 2000 and no changes or improvements in the boxing program had been made. Ms. Spring therefore undertook to reorganize the operations of the facility and its programs.
17. Shortly after the beginning of her tenure at 20th Street Gym, Ms. Spring became aware that there were extensive affiliations between 20th Street Gym employees and professional boxers. She further observed that professional boxers were coming into the gym and engaging in training activities at the same time program functions were in progress. Ms. Spring implemented a policy which prohibited affiliations at the 20th Street Gym between professional boxers and 20th Street employees while they were on the clock. In her testimony, Ms. Spring referenced a City Ordinance which indicates that private trainers are not allowed to train in city facilities. Ms. Spring's philosophy on this issue was that professional boxers who possessed a membership card were welcome to come to the gym as program participants, but that 20th Street employees were not to be involved in the furthering of their professional careers while on duty, or engage in activities which otherwise interfered with 20th Street duties. However, a 20th Street employee can engage in training a professional off city grounds on his own time.
18. Ms. Spring admitted during testimony that she knew about the professional DAC boxing event occurring when she first started at 20th Street Gym, but that she removed herself from it because it had been set in motion under the direction of prior management.
19. From late July through mid August, 2000, Ms. Spring held several individual meetings with the various coaches including Appellant, Mr. Villhauer, and Mr. Stevens, seeking input on their visions of the direction of the amateur youth and adult boxing programs.
20. Appellant continued to receive various facsimile solicitations for professional involvements not related to 20 Street Gym business, and numerous phone calls at work while he was on duty. (See, Exhibits 5 and 7, testimony of Ms. Spring and Mr. Lopez) However, Appellant testified that he did not solicit these communications, and that he still had no control over other parties sending facsimile transmissions to the office fax machine or making calls to the facility, which was widely known as the location of his employment, particularly after events were broadcast on the Internet system (see, Exhibit E).
21. On August 17, 2000, Ms. Spring held a meeting with the facility employees including Mr. Stevens, Mr. Villhauer, Appellant, and Mr. Lopez. During that meeting, Ms. Spring addressed the direction of the facility and its programs. She also addressed several concerns including the employees using the facility during work hours for work-outs, using facility resources while on and off the clock to receive faxes, do paperwork, make phone calls and

engage in other activities which might give rise to a conflict of interest, and training professional boxers during work hours (*see*, Exhibit 4, hand notes; testimony of Ms. Spring). The meeting participants also discussed the new schedule of hours as set forth in Exhibit 4. This document indicates in the first sentence that the new duties set forth therein were effective "immediately," and the new hours set forth therein would become effective as of September 11, 2000.

22. Ms. Spring testified that on August 18, 2000, the morning following the meeting, when she arrived at the facility it looked as though, in her words, "people had trashed it just to make a point." Ms. Spring testified that the new duties set forth in Exhibit 4 indicate that it was Appellant's responsibility to clean the facility on the night of August 17 after the meeting was over and the facility closed that night.
23. Ms. Spring testified that her observations of Appellant's performance took place between approximately July 23, 2000 through September 18, 2000 and that she felt she had sufficient time to observe his attendance and work habits during that time. Ms. Spring testified that she observed Appellant to be neglectful of his cleaning duties, that his attitude toward management was generally arrogant, disrespectful and evasive, that he called former supervisors on numerous occasions to consult with them concerning work-related issues rather than approaching her, that he had a difficult time following rules and regulations, and that he frequently showed up for work late or not at all. She testified that the average amount of time a Recreation Instructor spends on the phone in the course of his regular duties is about fifteen minutes a day, but that Appellant allowed numerous time-consuming phone calls and other interruptions during work hours. She testified she observed Appellant sitting on a bench at times when he was supposed to be instructing program participants. Ms. Spring further testified that Appellant was "incredibly messy," that she received complaints about this, and that he apparently engaged in outside activities which might present a conflict of interest. She testified that Appellant's language was very bad, including with the program youth.
24. Ms. Spring testified that Appellant was scheduled to work on August 22, 2000, but that he did not come in on that day, nor did he call the facility.
25. Ms. Spring testified that she had several conversations with Appellant during the first months of her supervision, but that she never admonished him in writing about any of these performance problems. She testified that Appellant was very difficult to communicate with because he would not "just accept a (supervisory) decision," but instead took much time debating and discussing relatively insignificant issues. He rambled, and he resisted direction. Finally, after Appellant repeatedly requested more hours, she gave them to him and gave him extra work assignments to justify the extra time. However, Appellant failed to do the extra work.
26. Ms. Spring testified that her observations of Appellant's work habits did not compare favorably to those of Ms. Stevens and Mr. Villhauer. She testified that while Mr. Stevens was sometimes late, he always kept her informed of his absences, he was flexible, versatile, cooperative, always respectful of management, seldom used bad language, assisted in keeping the facility secure, and was trusted with opening and closing the facility. Ms. Spring testified

that Mr. Villhauer was an "excellent" employee in virtually every respect, and expressed no complaints of his performance.

27. Ms. Spring testified that after one of her numerous contentious conversations with Appellant, he approached her and asked her what kind of car she drove, and asked her to point it out for him. Ms. Spring testified that this inquiry made her feel very uncomfortable and felt the comment might be a veiled threat by Appellant. When she asked him why he wanted to know, Appellant told her he just wanted to know where everyone was parked in the parking lot.
28. Ms. Spring testified that after her conversation with Appellant concerning her car, she addressed Safety Manager Ron Sanders with her concerns that the comment was a threat. She testified he told her to call the police.
29. Ms. Spring testified that from approximately August 27 to September 11, 2000, she closed the facility for a complete cleaning. Appellant recalls the closing as being from September 11 to September 18, the day he was terminated. The employees assisted with the cleaning of the facility during the closing. Ms. Spring asked Appellant to remove photographs from the gym walls. Several of these pictures were of Hispanic boxers previously associated with the 20th Street Gym. Appellant testified he asked Ms. Spring why he was supposed to remove the pictures, and she told him they were "not inviting." Appellant recalls putting the pictures in the facility office, and does not know their fate after that. The walls were then cleaned.
30. Appellant was absent for two days during the first part of the cleaning process when he was expected to be at work. Ms. Spring testified that she did not know at first why Appellant was absent, but another employee informed her that Appellant was in Hawaii at a fight. Ms. Spring testified she later telephoned Appellant himself, who verified he had been in Hawaii at a fight during that time.
31. Mr. Villhauer testified that he met professional fighter Robert Rice at the 20th Street Gym when Rice was still an amateur fighter. Mr. Villhauer testified that he did second fights¹ for Mr. Rice and assisted him during his amateur years, but contended that Appellant was Rice's manager. Mr. Villhauer stated several times that since Appellant was his boss during this time, he did what Appellant told him to, and that his involvements in fights with various professionals were arranged by Appellant, who was also responsible for arranging the fights themselves. Mr. Villhauer further testified that once Mr. Rice went professional in August of 2000, he no longer worked with Mr. Rice while on city grounds at the 20th Street Gym. Mr. Villhauer testified he did second Mr. Rice's first professional fight on or around August 27, 2000 at the Riviera in Blackhawk. Mr. Villhauer admitted that by the time he participated in Mr. Rice's first professional event on August 27, he already knew that "it was a problem to do pro training," but that it was on Sunday during his off hours and that he was not paid for his services. He further testified that he was filling in for Appellant who was at another professional fight in Hawaii the same weekend, where Appellant was serving as manager for two professional fighters. Finally, Mr. Villhauer testified that, with the exception of Mr. Rice

¹ The term "second" is a boxing term of art referring to the assistant trainer who occupies the corner of the ring and coaches the boxer during a fight.

putting gas in his car during the event at the Riviera, he has never received money for the professional training of Mr. Rice, or any other professional fighter, since the beginning of his employ at 20th Street in 1998.

32. Mr. Villhauer testified he never had any idea that being involved in professional training while an employee at 20th Street Gym was a problem until Ms. Spring became his supervisor and instituted new policies related to that issue.
33. Ms. Spring testified that she was aware of Mr. Villhauer's previous professional affiliations. However, those relationships took place under the old administration, and to her knowledge Mr. Villhauer ceased any problematic activities once she became the supervisor and issued new policies prohibiting certain professional involvements between 20th Street employees and professional boxers.
34. On September 18, 2000, Ms. Spring ended Appellant's on-call assignment at the 20th Street Gym. Mr. Lopez had arranged for the presence of a police escort to assure Appellant left the premises immediately. The police did not allow Appellant to gather his things or say goodbye to anyone. Ms. Spring testified she did not request this escort and had nothing to do with it. Mr. Lopez testified he ordered the police escort because of concerns over Appellant's questions about Ms. Spring's car and because of his general impression of Appellant as resistive. Appellant testified he requested the opportunity to resign and the request was refused. Appellant testified he has requested the opportunity to return to 20th Street on a volunteer basis and has been refused.
35. Ms. Spring testified that the reasons for ending Appellant's assignment related to his performance problems; particularly in the areas of Appellant's inability to follow rules, regulations, and supervisory direction, and because of Appellant's apparent ongoing outside conflicts of interest, which she suspected based on the faxes she had seen (*see, e.g.*, Exhibit 7). Ms. Spring testified that she did not end his assignment because of training professionals while on duty. She testified that she did not terminate Appellant, but rather ended his on-call assignment, in order to preserve his eligibility for rehire within the city system over the next five years. (*See*, CSR Rule 4-93) However, Ms. Spring testified that in Appellant's exiting performance evaluation she did not recommend him for rehire because she consulted with Human Resources concerning Appellant's performance problems and they advised her to do this. (Exhibit 2)
36. Shortly after September 18, 2000, Ms. Spring approached Mr. Villhauer and offered him Appellant's old position as head coach for the amateur boxing program. She expressed to him that she was sensitive to the fact that he and Appellant were long-time friends, and asked him to think about it. Shortly thereafter, Villhauer took over Appellant's old position as "head boxing coach," and began running the Amateur program with emphasis on youth participation.
37. Ms. Spring and Mr. Lopez testified that the amateur boxing program has flourished under Mr. Villhauer's direction. They both testified that youth attendance and participation has increased substantially over the past year, and that parents are more involved with their children's participation. Ms. Spring testified that Mr. Villhauer stays late at work and helps with special

projects and programs, that he is cooperative, respectful, polite, effective, and successful in furthering program goals.

38. Exhibit O is an "Official Bout Agreement" faxed to the 20th Street Gym on July 3, 2001,² evidently to the attention of Mr. Villhauer from "Top Rank Inc." It indicates "Momentum Enterprises Inc." as the promoter, "Robert Rice" as the "professional combatant," and August 24, 2001 as the date of the event. The space indicating the manager's name is left blank. The name "Shann Filhaur" is hand-printed across the top of the document. The document is unsigned. Mr. Villhauer testified that he knew nothing about the agreement, and that he called Momentum Enterprises the day after he received the document. He testified he was told that they did not know where this document came from or how they got Mr. Villhauer's name, but that there was no fight scheduled on that date to their knowledge. Mr. Villhauer testified that he checked the Internet for any bouts scheduled on that date at the location indicated, and found that there were none as yet.
39. Mr. Villhauer testified that it was his belief the reason Appellant was terminated was because there was "virtually no amateur boxing program." He further testified that he has never seen Ms. Spring give any employees special or preferential treatment.
40. In or around February of 2001, Ms. Spring became aware of a developing potential conflict involving Mr. Stevens, who had formed a relationship with professional football player Javonn Langford. Mr. Langford had begun coming to the 20th Street Gym as a member to learn about boxing. Ms. Spring asked Mr. Stevens what the nature of the relationship was, and Mr. Stevens explained that Mr. Langford just wanted to learn to box. Ms. Spring adjudged this activity to be within acceptable practices at that time. However, the activities between Langford and Stevens apparently then began to take on a more serious character, and Mr. Stevens began engaging in activities which resembled professional training of Mr. Langford. At that time, Ms. Spring approached Mr. Stevens and told him he would have to choose between being a 20th Street employee and becoming a professional boxing trainer. She testified that Mr. Stevens elected to resign at that time, and left the facility in good standing and on good terms with management.
41. No police escort was arranged for Mr. Stevens' departure. He was permitted the opportunity to return to 20th Street as a volunteer. Mr. Stevens is not presently employed at 20th Street Gym, nor does he serve as a volunteer there.
42. In or around February of 2001, Ms. Spring promoted Robert Lopez, an Hispanic male and former Program Coordinator, to the position of Assistant Supervisor for 20th Street Gym.
43. Mr. Lopez testified that of the current full- and part-time employees at 20th Street, there are six Black employees, ten White employees, ten Hispanic employees, and one individual who is part Italian and part Hispanic. Four of these, one Black individual and three Hispanics, are new hires since September 18, 2000. One Hispanic employee, Mr. Lopez himself, was promoted during that time period. Appellant's previous position is currently covered by Mr.

² This date was between the first and second days of the hearing in this matter. The Agency came forward with this document and offered it during the second day of hearing.

Villhauer and an Hispanic male volunteer who assists him. Mr. Lopez testified that the facility intends to hire the volunteer as an employee to assist Mr. Villhauer, but the volunteer has not yet submitted the required paperwork.

PRELIMINARY MATTERS

1. The Agency's Motion to Quash Subpoenas and Motion in Limine.

On the first day of hearing, prior to its commencement on the merits, the Agency filed a Motion to Quash Subpoenas. The basis for this Motion was primarily that most of the subpoenas in question had been served on Appellant's witnesses less than two business days prior to the commencement of the hearing in violation of CSR 19-23 b) 2) (requiring service more than two business days in advance of the hearing commencement).

The Agency further proffered a verbal Motion in Limine, requesting that the hearing officer disallow all of Appellant's witnesses and exhibits, since he did not provide the required information about them at the preliminary hearing on June 7, 2001 pursuant to Hearing Officer Michael R. Bieda's Prehearing Order of May 15, 2001. That Order was one of many directives to Appellant to provide a final and complete list of his witnesses, their addresses and telephone numbers, and a final and complete list of exhibits, as required in prehearing procedure.³ Paragraph 8 of the May 15 Order specifically indicates that a defaulting party would be precluded from calling witnesses or offering exhibits at the hearing.

Appellant responded that he was not capable of personally locating most of his witnesses until the previous two days, thus they were served late. He further responded that he had been in an accident on the morning of June 7, 2001 and could not attend the preliminary hearing, but called the Career Service Office that morning to inform the Office of his complications in attendance. However, Appellant conceded he still did not thereafter provide a final list of witnesses and their addresses and phone numbers to the Agency, or otherwise make an attempt to cure the default. Appellant further stated he understood the preliminary hearing to be merely an opportunity to add any items that had not already been endorsed in preliminary procedures up to that time.

The hearing officer partially granted the Agency's Motions as follows. First, as to the disputed witnesses, the hearing officer allowed Appellant to call one witness for whom he had already provided a current telephone number.⁴ Otherwise, the hearing officer found Appellant's claim that he was previously not able to locate these witnesses after nine months of preparation and numerous directives from Hearing Officer Bieda to do so, but suddenly found them all a day or two before the hearing, lacking in credibility. She therefore granted the Agency's Motions as to Appellant's other witnesses. Second, as to the Exhibits, the hearing officer granted the

³ It appears from the various and extensive documentation in the file that Appellant had repeatedly failed to provide the addresses and telephone numbers of his witnesses as typically required under standard preliminary procedures and as repeatedly directed in the Prehearing Orders.

⁴ It was learned during the second day of hearing that Appellant had failed to subpoena this witness, so the Career Service Authority could not compel his presence.

Agency's Motion concerning any documents not previously listed as exhibits in Appellant's prehearing pleadings. Appellant was allowed to offer any exhibits which the Agency indicated had already been timely and specifically endorsed to it as exhibits prior to June 7, 2001.

2. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a claim of racial discrimination, pursuant to the CSR Rules set forth as follows in relevant part:

5-42 How Status is Attained

- ...d) Non-career: Every career service employee who is appointed to an on-call position shall hold non-career status for the duration of the appointment...

5-64 Employees in Non-Career Status

An employee in non-career status:

- 1) may be terminated at any time;
- 2) may not appeal any employment decision, except on grounds of discrimination...

* * *

Appellant in this case alleges he has been discriminated against due to his status as a member of a protected minority group.

The hearing officer has jurisdiction over issues contemplated in the CSR Rules and violations thereof, specifically CSR Rule 19-10 c), which includes claims of racial discrimination as follows in relevant part:

Discriminatory actions: Any action of any officer or employee resulting in alleged discrimination because of race, color, creed, (or) national origin...

* * *

Jurisdiction was not disputed by either party to this case.

3. 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.

In cases such as this one, where Appellant is an on-call employee and therefore does not possess career status, he can be terminated at any time for any reason excepting discrimination.

See, CSR Rule 5-64, above. The Agency need not show just cause for its termination of Appellant's assignment. Cf., In the Matter of the Appeal of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99).

Where Appellant claims discrimination, he bears the affirmative burden of proving, by a preponderance of the evidence, that the Agency's adverse employment action was taken against him because of his protected minority status. Appellant must first show that he is qualified for protection by affirmatively making a *prima facie* showing of discrimination (i.e. a demonstration that the individual is a member of a protected class, that he is qualified for the position sought, that the Agency ended his assignment, and that his termination did not result from the lack of an available position). See, Kendrick v. Penske Transportation Services, Inc., 220 F.3d 1220, 1226-27 (10th Cir. 2000), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Appellant need not provide direct proof of discrimination in the first instance. Rather, the *prima facie* requirement simply eliminates the most common legitimate reasons for an adverse employment action, and is considered sufficient to create a rebuttable inference. *Id.* at 1227.

If Appellant makes such a showing, the burden of proof then shifts to the Agency to rebut the *prima facie* inference by articulating a legitimate, non-discriminatory business purpose for its actions. The Agency need not affirmatively prove the absence of discriminatory intent at this point. It need only produce sufficient evidence to lead the trier of fact to rationally conclude that the employment decision was not motivated by Appellant's race. See, E.E.O.C. v. Flasher Co., Inc., 986 F.2d 1312, 1316-17.⁵

If the Agency makes such a showing, Appellant must then demonstrate by a preponderance that the Agency's stated legitimate business purpose is a pretext for discrimination. See, McDonnell Douglas, above. In order to prove a pretext, Appellant must demonstrate that, first, the Agency's stated legitimate justification is an excuse and was not the real reason for its actions, and second, that its actions against Appellant were actually directly motivated by his race, color, creed or national origin. See, Flasher, above, at 1321-22 (*see*, keynote [33]).

DISCUSSION

The following facts are not disputed. Appellant, an Hispanic male, is a member of a protected class. He was qualified for the on-call position he held. The Agency ended his assignment, and the position continued to exist after the end of his assignment. These facts establish a *prima facie* showing that Appellant's case is qualified for examination as a discrimination claim.

The Agency articulated a legitimate business reason for ending Appellant's assignment. The Agency asserts that the action directly resulted from Appellant's poor performance and work

⁵ The Court in Kendrick reminds us that the first two elements of the burden-shifting analysis apply primarily to Motions for Summary Judgment. Once these preliminary hurdles have been cleared, the matter proceeds to a full trial on the merits, the burden-shifting model drops from the equation, and the remaining issue is whether Appellant has demonstrated by a preponderance that the action was taken against him because of his protected status. This burden lies at all times with Appellant. *Id.*; *see also*, Felton v. Trustees of California State Univ. and Colleges, 708 F.2d 1507, 1509 (9th Cir. 1983).

habits, and it proffered credible testimony to support this assertion. The Agency has therefore satisfied its burden sufficiently to shift the burden of proof back to Appellant to demonstrate, by a preponderance, that the Agency's explanation is a pretext for an intentional act of racial discrimination against him.

Appellant's evidence of pretext.

Appellant has offered the following evidence to demonstrate the Agency ended his assignment because of his race. Appellant first alleges disparate treatment between himself and two similarly situated, similarly qualified white employees, Mr. Stevens and Mr. Villhauer, as evidence of discrimination. He points out that all three had a history of engaging in professionally-related boxing activities prior to the advent of the new administration, and that the Agency asserts those affiliations as one of the reasons for ending Appellant's assignment.

Appellant further posits that immediately upon notification of the ending of his assignment, he was given a police escort from the premises, humiliated in front of other employees and patrons, prohibited from gathering his belongings, denied the opportunity to resign, and denied the opportunity to come back to the facility as a volunteer. On the other hand, Mr. Stevens was given the opportunity to resign as a result of his professional affiliations, was given no police escort, and was permitted to return to the facility on a voluntary basis.⁶ Mr. Villhauer was not only retained, but was placed in Appellant's old position despite his former professional affiliations. Appellant offers this evidence in support of his claim that he was treated disparately from these other similarly situated, non-minority individuals.

Appellant further argues that Ms. Spring had little opportunity to observe Appellant in his line of duty under any circumstances, let alone the new administration's guidelines. Appellant asserts that Ms. Spring did not begin full-time at the facility until August, and her brief hours made it impracticable for her to have a well-informed opinion of his performance. Appellant asserts that the facility was closed for cleaning from approximately September 11 to September 18, 2000. He argues that given the new duties were effective as of September 11, and his termination took place on September 18, she had not given Appellant any opportunity to reform his practices or to prove himself capable of performing under the new administration's rules and guidelines before his employment was terminated.

Finally, Appellant posits that Ms. Spring made him take down all the portraits of the Hispanic fighters from the gym walls because they were "uninviting." Appellant argues that this is additional evidence of a pattern of animus against Hispanics on the part of Ms. Spring.

For all these reasons, Appellant posits that the Agency's stated reasons of his poor performance and lack of adaptability were a mere pretext for discrimination against him.

⁶ Appellant argued that Mr. Stevens was allowed to work at the facility without being U.S.A.-certified, further evidencing favoritism. However, Ms. Spring testified she was not aware whether Mr. Stevens was certified, but that he did not undertake any types of instruction requiring certification. In addition, Appellant himself testified that one of his responsibilities while head boxing coach had been to assure the coaches were certified. Therefore, the hearing officer has disregarded this argument.

The Agency's response.

The Agency responds to Appellant's charge of discriminatory treatment as follows. The reason Appellant's assignment was ended and he was treated differently than Mr. Stevens and Mr. Villhauer was related to Appellant's performance, which was poor in contrast to these other two individuals. It was Appellant's performance problems, not his race or national origin, which prompted the adverse employment action.

The Agency further offered evidence tending to establish that Appellant had underestimated the length and amount of time Ms. Spring had to personally observe Appellant's performance and attendance habits. It asserted that Ms. Spring began part-time at the facility in May, and was full-time around the third week of July. She observed Appellant on duty during their common hours from that time until August 26 (the date the Agency posits the facility was closed for cleaning), and then from September 11 (the date the Agency posits the facility reopened) to September 18, the day his assignment was ended.⁷ Therefore Ms. Spring observed Appellant for a period of approximately five weeks, not including her part-time exposure from May to July. Furthermore, the first sentence of the Agency memo (Exhibit 4) clearly indicates the new performance guidelines set forth at the August 17, 2000 meeting were effective immediately, not on September 11 as Appellant argues. Rather, it is the new work *hours* which were not to be effective until September 11. Finally, Ms. Spring had the benefit of input from Mr. Lopez, who had worked with Appellant for over a year and a half and was very familiar with his work habits.

The Agency further responds that Appellant's police escort arose from a perceived threat by Appellant, not his race, and was further requested not by Ms. Spring, but by Mr. Lopez, himself another Hispanic male. Finally, the Agency argues that there is no other evidence tending to support a pattern of discrimination against Hispanics, but that instead the contrary is the case. The Agency asserts that the pictures of Hispanic fighters were taken down off the walls because all of the pictures were taken down so that the walls could be cleaned, not through some effort to "sanitize" the facility of Hispanic presence and influence.⁸ The Agency additionally offered credible testimony tending to establish that the ratio of minority employees, including Hispanics, is quite high at the 20th Street Gym (eleven out of 26), and that of the four hirings since Appellant's departure, all have been minority individuals, three of them Hispanic. Further, the only promotion in the Agency during that time has been that of an Hispanic individual.

Analysis of the evidence.

1. Appellant's claim of disparate treatment

Appellant's primary theory of this case has been his alleged disparate treatment by the Agency in contrast to Mr. Stevens and Mr. Villhauer, whom Appellant argues were similarly situated, non-minority individuals. As the case law discussed below illustrates, a party alleging

⁷ Appellant and Ms. Spring differed in their recollections of the dates of the closing. However, Mr. Villhauer clearly recalled the facility being closed for cleaning as of August 27, 2000, which he was reasonably certain to be the date of the Rice fight based on his certification card, because he recalls being at that fight during the facility's closure. The hearing officer finds this peripheral detail persuasive in determining the correct dates of the facility's closing.

⁸ It is not clear from the evidence what was the fate of any of the pictures once the gym was cleaned.

discrimination can prove disparate treatment as a challenge to an Agency's stated legitimate business reasons, but he must prove several things in order to demonstrate those reasons are a pretext for *discrimination*. First, he must demonstrate that he is, indeed, similarly situated with the other individuals in question. Second, he must prove that he was, in fact, treated differently from those individuals for substantially similar offenses. Third, he must establish that the disparate treatment was directly motivated by racial animus against him.

In order for individuals to be "similarly situated," they must initially "deal with the same supervisor and [be] subject to the same standards governing performance evaluation and discipline." Aramburu v. The Boeing Company, 112 F.3d 1398, 1404 (10th Cir. 1997), citing Mazzella v. RCA Global Communications, 642 F. Supp. 1531, 1547 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987). Furthermore, they "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." *Id.* (emphasis added). Circumstances to be considered when determining whether individuals are similarly situated include work history. Aramburu, above, at 1404.

Appellant, Mr. Stevens and Mr. Villhauer did deal with the same supervisors and were subject to the same standards governing their performance. The hearing officer further concurs with Appellant in his assertions that their previous outside professional affiliations were also very similar, and that Appellant was not given the same chance they were to reform his outside activities under the new administration.

However, this was only one reason for the Agency's decision to terminate his assignment, and an apparently minor one at that. First, it is apparent from the Agency's focus at trial that it was more concerned with the amount of time Appellant's outside activities consumed while he was on duty and time missed due to travel for these activities. There is no evidence to suggest that the other two individuals Appellant claims were similarly situated engaged in the degree of phone calls and other such activities as Appellant did while on duty. When Mr. Spring did eventually perceive an on-duty conflict on Mr. Stevens' part, she asked him to resign. In addition, whereas Appellant is apparently similarly situated to Mr. Stevens and Mr. Villhauer respecting prior professional involvements, he is not at all similarly situated to them in terms of performance and other work-related issues. It was on these issues the Agency witnesses focused in their testimony.

Both Ms. Spring and Mr. Lopez rendered very similar accounts of Appellant's ongoing performance problems. Their testimony was not only credible, but also mutually corroborative, and furthermore involved the opinions and observations of another Hispanic male. Even if Ms. Spring had not had long to observe his performance habits, her brief observations were verified by Mr. Lopez, who had ample opportunity for over a year and a half to observe Appellant and know his work habits well. In addition, Appellant was resistive toward Ms. Spring's supervision, unfocused, and apparently had great difficulty in responding to facility regulations or direction, at times to the point of being disrespectful. This was not new upon Ms. Spring's arrival and she knew that from reports by Mr. Lopez.

There is no evidence whatsoever that these things are true of Mr. Stevens or Mr. Villhauer. On the contrary, these two employees received very favorable performance

assessments by the same testifying agents. In addition, the Agency offered credible testimony tending to establish that the amateur boxing program had been languishing while in Appellant's charge, but that Villhauer's leadership turned the program around upon his placement in Appellant's old position.

Based on this information, a preponderance of the evidence does not suggest that Mr. Stevens and Mr. Villhauer engaged "conduct similar to the [Appellant's] without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it." Mazzella, above, at 1547. Therefore, the three men were not "similarly situated" in terms of their work history. The hearing officer concludes under this persuasive case law that Appellant was not disparately treated when he was terminated for the reason of ongoing performance problems.

2. Appellant's police escort as disparate treatment.

Another example Appellant argued was evidence of disparate treatment was the occurrence of his departure under police escort. Mr. Lopez testified he arranged for a police escort because, in essence, he perceived the potential for escalation upon Appellant's departure. Mr. Lopez credibly testified that knowing Appellant and Ms. Spring as he did, he imagined what he would do under those circumstances if Ms. Spring were a family member, and decided that he would arrange for an escort because he, too, was concerned for her safety.

Whether Appellant actually *intended* to threaten anyone, of which the hearing officer is not convinced, Appellant's intent is not the question. The final analysis must rest on the reasonableness of the perceptions by the acting agents, and whether, by a preponderance of evidence, the stated reasons for their actions are an excuse for an act of racial discrimination against Appellant.

The hearing officer had the opportunity to observe Appellant's demeanor during the hearing. Appellant is vivacious, assertive, aggressive in his communicative pursuits, quick with responses, argumentative, intelligent, passionate, and frequently brash and somewhat difficult to read and understand. He has difficulty following instructions when they run against his compulsion to act otherwise. Finally, he does not always think before speaking, and tends to shift gears unpredictably from one topic to another, at times appearing to say whatever is necessary at the moment to make his point. He also has the presence, size, bulk and build of a typical high-impact athlete.

In short, Appellant is an imposing individual. While Appellant's statement and his general demeanor might or might not have been misread by Agency officials concerning whether he intended to pose a threat, the hearing officer concludes that such a perception by those officials was not unreasonable. It is not out of the question that in the context of just having had one of many work-related debates with Ms. Spring, such a badly-timed question might cause her alarm. The hearing officer found the demeanor of both Mr. Lopez and Ms. Spring during their testimony that they *perceived* potential danger to be very credible. The credibility of this concern is supported by both their subsequent actions. Ms. Spring's credibility is corroborated by Mr. Lopez' perception that a police escort might be necessary. Most importantly, she was not the one who requested the police presence. It was Mr. Lopez, an Hispanic male, who requested the police

presence. Therefore it cannot reflect on alleged discriminatory intentions against Appellant on the part of Ms. Spring, who was the decision-maker in this case.

The circumstances under which Mr. Stevens left the Agency, on the other hand, were entirely different than those of Appellant. Whereas Ms. Spring felt a great deal of resistance and contention between herself and Appellant, she testified that she and Mr. Stevens had a good working relationship. At no time did anything happen which might give her the same sort of pause as Appellant's behaviors and relationship with her had. On the contrary, she found Mr. Stevens to be respectful and inclusive of her guidance and supervision. When she perceived the type of conflict she had prohibited in the new administration of the facility, she approached him and asked him point-blank what was up. When he admitted that he was probably crossing the line, she told him he had to make a choice. Mr. Stevens did not put up any resistance, but instead accepted her ultimatum.

The Agency did not arrange for a police escort for Mr. Stevens because it did not perceive the need for one. Appellant offered no evidence tending to establish that Mr. Stevens was perceived as a threat by anyone. Mr. Stevens was therefore not similarly situated to Appellant in the circumstances of his resignation. The hearing officer concludes by a preponderance of the evidence that the police escort, while understandably humiliating and degrading for Appellant, and possibly unnecessary, had nothing to do with his national origin, and does not constitute disparate treatment.

3. Appellant's claims of a pattern of discrimination against Hispanics.

The Agency rebutted Appellant's asserted evidence of a pattern of racial discrimination against Hispanics as follows. First, Ms. Spring testified she requested that all the pictures be taken down, not just the ones of Hispanic fighters, because the facility was being cleaned. Appellant never offered any information establishing which pictures were put back up or left down, or what the fate of the pictures or the walls was. This evidence does not demonstrate any racial connection between the Agency's actions and Appellant's termination.

In addition, the Agency responded with statistical evidence of the demographic makeup of the employees at the facility which tends to refute Appellant's assertion that it has engaged in a pattern of discriminatory animus against Hispanics. Eleven out of the 27 employees at the 20th Street Gym are of Hispanic influence. While the hearing officer is not certain whether this is a fair reflection of the current demographic makeup in the Denver area, it does not appear on its face to be unreasonable. Appellant, who bears the burden of demonstrating discrimination, did not offer any evidence to show this ratio supports his contention of a pattern of racial animus toward Hispanics on the part of the Agency.

4. Appellant must prove disparate treatment was the direct result of discrimination.

As previously stated, it appears as though Appellant was similarly situated to Mr. Stevens and Mr. Villhauer on the narrow point of prior professional affiliations, and that he was therefore arguably treated disparately when the Agency cited this as a reason for ending his assignment without giving him the same chance to reform as it did the other two. Furthermore, Ms. Spring testified during the first day of hearing that under the new policy, 20th Street employees can

engage in professional training on their own time off city grounds. Yet during the second day of hearing, one of her stated reasons for firing Appellant was a "conflict of interest" arising from Appellant's outside activities.

However, even assuming this alleged disparate treatment were the sole reason for Appellant's dismissal, this in itself is not sufficient to establish a case of discrimination. "A mere finding of disparate treatment, without a finding that the disparate treatment *was the result of intentional discrimination based upon protected class characteristics*, does not prove a claim under Title VII." Flasher, above, at 1313 (emphasis added). "Title VII does *not* make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal." Id. at 1319 (emphasis in original). Appellant bears the burden of demonstrating by a preponderance of evidence *that the reason for the disparate treatment was racial animus toward Appellant* on the part of the Agency. Id. at 1320.

The Court in Flasher set forth a number of non-discriminatory reasons for disparate treatment which might be irrational or even accidental, but not illegal. Some of those are differences in management styles of various supervisors, the passage of time and changes in management policies, the individualized circumstances of the employees in various cases which offer some mitigating factors in the case of the less-severely punished, the value of the employee to the company, or even personal likes and dislikes unrelated to an individual's race. Id. at 1319-20.⁹

"Under Title VII, the [Agency] does not have to prove why the differential treatment occurred; it is up to the [Appellant] to prove why it did occur -- and to prove that it was caused by intentional discrimination against a protected class..." Id. Therefore, even assuming the Agency treated Appellant differently in terms of his outside affiliations by not giving him a chance to reform under the new regulations, it was his burden to show the *reason* for that disparate treatment was *racial bias*. "If, after trial, no motivation or reason for the differential treatment has been established by either side to a preponderance of the evidence, the judgment must be for the [Agency]." Id.

The hearing officer has been shown no connection between the ending of Appellant's assignment and any racial animus on the part of the Agency, toward Appellant in specific or Hispanics in general. Under CSR Rule 5-64, the Agency can terminate Appellant, as an on-call employee, at any time for any reason excepting discrimination. The Agency is under no burden to show that all its reasons were not discriminatory in nature, or even that all of them made sense. Instead, it is Appellant who bears the burden of proving the Agency's action was one of intentional racial discrimination. In light of the above analysis, the hearing officer concludes that Appellant has not demonstrated this by a preponderance of the evidence. The Agency must therefore prevail in this case.

⁹ In this case, the absence of performance problems in the cases of Mr. Stevens and Mr. Villhauer are a mitigating factor in their treatment by the Agency, *vis* that of Appellant.


CONCLUSIONS OF LAW

1. Appellant demonstrated a *prima facie* case of racial discrimination by showing that he is a member of a protected class, that he is qualified for the position in question, that the Agency ended his assignment, and that his termination did not result from the lack of an available position.
2. The Agency articulated a legitimate business reason for its decision to end Appellant's on-call assignment when it provided credible evidence tending to establish that Appellant's poor attendance and performance habits were the reasons for its actions.
3. Appellant failed to demonstrate by a preponderance of the evidence that the Agency's stated legitimate business reasons for its actions constituted a pretext for discrimination:
 - a) Appellant demonstrated some evidence of disparate treatment between himself and two other employees when the Agency cited activities constituting a conflict of interest as one of its reasons for ending Appellant's assignment, without giving Appellant the same opportunity to cure the defect as it gave the other two individuals.
 - b) Appellant failed to demonstrate by a preponderance of the evidence that any alleged disparate treatment by the Agency was motivated by intentional racial discrimination against Appellant.
 - c) Appellant failed to demonstrate by a preponderance of the evidence that he was otherwise similarly situated to the other two employees in question.
 - d) The Agency rebutted Appellant's assertions of disparate treatment by demonstrating significant mitigating circumstances, namely additional problems in Appellant's work history which were not present for the allegedly similarly situated individuals, sufficiently justifying the differences in treatment between them and Appellant.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to end Appellant's on-call assignment is AFFIRMED.

Dated this 30th day of July, 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 15th day of August, 2001, addressed to:

Steve Mestas
915 S. Braun Dr.
Lakewood, CO 80226

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 15th day of August, 2001, addressed to:

Robert D. Nespor
Assistant City Attorney

Amy Greenburg
Department of Parks and Recreation

Lucacia Sena