

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

Appeal No. 32-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

RICARDO MONTOYA, Appellant,

Agency: PUBLIC OFFICE BUILDINGS and THE CITY AND COUNTY OF DENVER,
a municipal corporation

INTRODUCTION

For purposes of these Findings and Order, Ricardo Montoya shall be referred to as "Appellant." Public Office Buildings shall be referred to as the "Department." The City and County of Denver shall be referred to as the "City." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held on August 2, 2001, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant appeared *pro se*. Neeti Pawar, Esq., Special Assistant City Attorney, represented the Department, with Tom Migaki appearing as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Appellant:

Appellant

The following witnesses were called by and testified on behalf of the Department:

Tom Migaki

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

B, pp. 58-62

The following exhibits were offered and admitted into evidence on behalf of the Department:

Exhibits 1, 2, 3, 4

The following exhibits were admitted into evidence by stipulation:

Exhibits 1, 3, 4

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None.

NATURE OF APPEAL

Appellant is appealing the denial of his grievance of a written reprimand for alleged violations of CSR §§16-50 A. 8), 18¹) and 20) and 16-51 A. 4), and 11) and is requesting the removal of the written reprimand from his personnel file.

ISSUES ON APPEAL

Whether Appellant violated CSR §§16-50 A. 8), 18) and 20) and 16-51 A. 4) and 11)?

If Appellant violated any provisions of CSR §§16-50 and 16-51, what is the appropriate sanction?

PRELIMINARY JURISDICTIONAL MATTERS

Appellant's appeal raised several issues that were disposed of by the Hearing Officer before the testimony began in this matter. First, Appellant raised a possible conflict of interest with the City Attorney's Office, claiming that Xavier DuRán, Supervising Attorney of the Employment Law Section, had a personal dislike for Appellant. The Hearing Officer pointed to the fact that Neeti Pawar was from the law firm of DiManna & Jackson, not from the Office of the City Attorney, and dismissed this claim as moot. Appellant also raised the issue that the Letter of Reprimand discussed many matters, some dating back to January 1999; and the appeal also discussed matters dating back to 1986. The Hearing Officer indicated that she would not look at every alleged incident of misconduct that dated back over two years. She stated that to permit the clustering of many incidents over a very extended period of time as the basis of discipline violated the concept of progressive discipline as a means to provide warning to an employee about problematic behaviors and an opportunity to correct those behaviors. Ms. Pawar indicated that, despite the breadth of the information contained in the written reprimand, it was actually issued for only two of the incidents described in it. After brief preliminary questioning of the advisory witness, the Hearing Officer limited the case to an incident that occurred on September 27, 2000, and a complaint received from Appellant's co-workers on December 7, 2000. The Hearing Officer also indicated that she was concerned that Appellant wished to enter letters of commendation and other

¹ The Written Reprimand cites the provision as §16-50 A. 4) (being under the influence of alcohol or illegal drugs), and then recites the text for §16-50 A. 18) (conduct violating an Executive Order). Neither side raised this as an issue during the hearing. Since the testimony clearly established that the Appellant was on notice that he was charged with violating Executive Order No. 112, as set out in the text of the Written Reprimand, the Hearing Officer is treating the citation of the wrong subsection as a typographical error.

documents dating back to 1984 as evidence of his good character and commendable work history. The Department agreed that Appellant had an excellent employment history. The Hearing Officer said that she would limit the testimony by both sides to matters that happened in the Fall of 2000 unless the parties could show that any of the other proposed evidence was relevant to that period.

During the hearing, Mr. Migaki indicated that he based the written reprimand upon written statements from Ernest Campos and Ted Huerta, neither of whom were called to testify by the Department. The documents had not been provided as exhibits, either. Mr. Migaki explained that, at the time the Prehearing Statements were due in March 2000, Appellant was still working in the shop and that it was feared that, if Appellant saw the documents, there would be retaliation by him. The Hearing Officer pointed out that the hearing was being conducted in July and that Appellant had been out of the shop since April. Therefore, the alleged fear of retaliation was moot. The Hearing Officer informed the Department that, as Appellant had expressed surprise that Mr. Migaki stated that Ted Huerta's version of the events on September 27 did not support his version, which is what Mr. Migaki claimed, it was necessary for the Department to produce those memos. The Department produced them to both the Hearing Officer and Appellant on or about August 6. The four memos considered by Mr. Migaki as the basis for the issuance of the written reprimand have been consolidated as Exhibit 4. The Hearing Officer informed the parties that she would reopen the matter if these memos raised issues that required further examination. After reviewing the memos, the Hearing Officer has concluded that they speak for themselves and do not require further explanation.

TESTIMONY

1. Appellant has worked for the City for twenty-six years. He was an Electrician I from 1982 until April 2001, during which time he worked for the Department. He served as the Acting Electrical Supervisor from February 1999 through March 2000. In March 2000, Appellant requested to be relieved of the duties of Acting Electrical Supervisor. On April 1, 2001, he was promoted to Electrical Inspector and now works in Building Inspection.

2. During the relevant time period (Fall 2000) Dave Ausler was the Acting Electrical Supervisor and Appellant's immediate supervisor. John Hall (now retired) was the Director of Public Office Buildings. Tom Migaki was Manager of General Services. Appellant also worked with Ernest Campos, Dave Herrera, Lamont Thomas, Steve Vargas, and Ted Huerta.

3. Apparently Mr. Campos had been "on-call" during the weekend of September 15, 2000. He was unwell and went to the hospital for tests and treatment. Ted Huerta, who was acting as the supervisor in Mr. Ausler's absence, decided to cover for Mr. Campos. He made arrangements with Mr. Campos's wife that, if an emergency call came in, he would meet her at the shop with the keys and handle the call. No calls came in that weekend. Mr. Ausler decided that Mr. Campos would still be paid as the "on-call" designee that weekend, instead of Mr. Huerta. Appellant told Mr. Ausler that that was wrong as Mr. Campos was in the hospital and that Mr. Huerta should get paid for the time instead. Appellant apparently said that to do otherwise was fraud and that, if Mr. Campos was paid for the time, Appellant was going to file a grievance.

4. On September 27, 2000, Appellant was walking out of the shop with Mr. Huerta when Ernest Campos walked up to them, pointed at Appellant and, in a loud voice, stated, "Mind your own business."

5. Mr. Huerta, in an October 6, 2000, memo to John Hall, wrote that Dave Ausler told Mr. Campos what Appellant had said about paying him and Mr. Ausler told Mr. Campos not to say anything to Appellant. Mr. Huerta went on to write:

Then Ernie walked down the hall and ran in to Rick by the time clock and Room # 40-41 saying and pointing his finger Rick Mind your own business. In a loud voice about a arms lenth away. (sic)

(See Exhibit 4)

6. Appellant was upset by the confrontation. He called Mr. Ausler on the phone. Mr. Ausler told him that he had told Mr. Campos not to talk to Appellant. Mr. Ausler also indicated that he would take the matter to John Hall.

7. Appellant then went to the Mayor' Office where he was a receiving a pin for work he had performed. He ran into John Hall and Regina Garcia, the Department's Human Resources Officer, at the Mayor's Office. He told them about the incident and how upset he was. Mr. Hall told him to write a memo to him and that he would look into it. (See Exhibit B, pp. 58-62). Appellant never heard anything from Mr. Hall after he sent him his memo.

8. On September 29, Mr. Campos wrote a memorandum in which he explained what had happened on September 15 and his arrangements with Mr. Ausler. He admitted that Mr. Ausler told him that Appellant was going to file a grievance and that Mr. Campos was not to talk to Appellant about it. He also admitted that he ran into Appellant in the hall and told him that he should learn to mind his own business. He stated that Appellant said that he was going to see John Hall about it. Mr., Campos concluded that memo by stating that he thought "all this" would be "over" when Mr. Ausler took over the shop. (Exhibit 4)

9. On October 4, Mr. Campos filed another memo in which he never addressed what happened between him and Appellant on September 27. Instead, he stated, among other things, that Appellant's comment to the effect that he was going to report his co-workers whenever he saw them doing something wrong was retaliatory against those people who wrote letters against him when he was acting supervisor. He cited several alleged incidents of harassment from Appellant. He asked that Appellant be disciplined or transferred from the job. He also had Messrs. Herrera, Thomas and Vargas sign the memo because they felt they were on Appellant's "retaliation list." (Exhibit 4)

10. On or abut December 7, 2000, Mr. Campos, along with Messrs. Vargas, Herrera and Thomas, went to talk with Mr. Migaki to complain about Appellant. They claimed that Appellant was harassing them and making the workplace uncomfortable.

11. Based upon the December 7 complaint and the information in the memorandum about the September incident, Mr. Migaki told Mr. Hall to issue a written reprimand to Appellant for threatening, fighting with, intimidating, abusing his co-workers, violating the Executive Order regarding workplace violence and for his inability to get along

with his co-workers. It was not issued until January 29, 2001. (Exhibit 1) Neither Mr. Migaki nor Mr. Hall spoke to Appellant about the specific allegations made by his co-workers on December 7 prior to the issuance of the written reprimand.

12. Appellant filed grievances on February 22 and 23, 2001. Mr. Hall denied the grievances on February 28, 2001. (Exhibit 2)

13. Appellant filed this appeal on March 12, 2001.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Regulations

CSR Rule 16 governs discipline. CSR § 16-10 sets out the purpose of the Rule:

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.

The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

CSR § 16-20, Progressive Discipline, provides 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, the Charter of the City and County of Denver, or the Revised Municipal Code of the City and County of Denver include:
 - a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency file on the employee;
 - b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
 - c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority;
 - d) Involuntary demotion, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority; and
 - e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.
- 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.

- 3) In those cases when the discipline deemed appropriate is suspension without pay of an overtime-exempt employee, the suspension shall be for at least a whole workweek or multiples of whole workweeks.

CSR § 16-50, Discipline and Termination, provides, in relevant part:

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. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 8) Threatening, fighting with intimidating, or abusing employees or officers of the City and County of Denver for any reason, including but not limited to: intimidation or retaliation against an individual who has been identified as a witness, as a party, or as a representative of any party to any hearing or investigation relating to any disciplinary procedure, or a violation of a city, state, or federal rule, regulation or law.
- 18) Conduct which violates an executive order which has been adopted by the Career Service Board.

Executive Order No. 112 – Violence in the Workplace. (See below)
- 20) Conduct not specifically identified herein may also be cause for dismissal.

CSR § 16-51, Causes for Progressive Discipline, provides, in relevant part:

- 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, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.
 - 4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

City and County of Denver Executive Order No. 112, Violence in the Workplace, issued on February 7, 1995, adopted by the Career Service Board on January 25, 1999, states in pertinent part:

II. General Policy

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

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

- A. Intimidating, threatening or hostile behaviors, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, bringing unauthorized weapons onto city property or other acts of this type clearly inappropriate to the workplace.
- B. Jokes or comments regarding violent acts, which are reasonably perceived to be a threat of imminent harm.
- C. Encouraging others to engage in the negative behaviors outlined in this policy.

VII. Disciplinary Action

Any violation of this policy by employees, including a first offense, will result in disciplinary action, up to and including dismissal....

Analysis

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975).

Because this is an appeal of a grievance arising from a disciplinary action (written reprimand), the Appellant has the burden of proof to demonstrate Department's decision was an abuse of discretion and inappropriate under the circumstances.

The Hearing Officer has reviewed the testimony and the exhibits presented by both sides. In this case, the Department chose not to put Mr. Huerta, Mr. Campos or any other persons with alleged first-hand knowledge of Appellant's misconduct on the stand. Instead, the Hearing Officer had to rely upon four memoranda, one from Appellant, one from Mr. Huerta, and two from Mr. Campos.

Normally, hearsay testimony, which is admissible in this forum, is of little use to

confirm the existence of a fact. That is not the case here. There are elements within the memos that make them reliable recitations of the events on September 27. Mr. Huerta's memo, despite Mr. Migaki's characterization during his testimony to the contrary, actually confirmed Appellant's version of the September 27 incident (i.e., that Mr. Campos came up to Appellant, pointed at him, and, in a loud voice, told Appellant to mind his own business). Mr. Campos's two memos contain both admissions and statements against interest that make his memos reliable. Mr. Campos's two memos are primarily self-serving (i.e., the October 4 memo does not discuss the September 27 incident at all; it was primarily a statement as to why Mr. Campos felt that he was being threatened and harassed by Appellant's statements that he was going to report everything that Mr. Campos and other employees did in violation of the rules). Yet they contain statements against Mr. Campos's interests (i.e., admissions that he was the one who approached Appellant on September 27 despite the instruction not to do so and the admissions about his hospitalization that might, in fact, establish a violation of the Fair Labor Standards Act rules on on-call pay) that make them reliable. Therefore, the Hearing Officer is able to find the information contained in them to be reliable.

Based upon the credible evidence, it is clear that Mr. Campos was the aggressor on September 27 despite Mr. Ausler's warning that he say nothing to Appellant. The alleged violations in the reprimand under CSR 16-50 A. 8) and 18) for threatening, intimidating and harassing co-workers and violation of Executive Order No. 112 (violence in the workplace), respectively, were based upon Appellant's alleged misconduct on September 27. However, it is clear that it was Mr. Campos who was threatening, harassing and intimidating and the one who might have violated the Executive Order, not Appellant. The other problem is the Department waited until December (when Mr. Migaki first told Mr. Hall to issue the written reprimand) or late January (when it was actually issued) before deciding whether to take any action against Appellant for the incident in September. This lag occurred despite the fact that all the statements about the September incident were produced by the knowledgeable parties to Mr. Hall for his review by October 4. It was only after Mr. Campos and others came in to complain in early December that the Department took any action regarding the earlier incident. The Hearing Officer takes this as evidence that, until December/January, Mr. Hall, who was the person who actually issued the written reprimand (and who was not present to testify during the hearing), did not think for over two months that there was anything wrong with Appellant's conduct on September 27. Therefore, Appellant has established that the Department was acting arbitrarily and capriciously when it issued a written reprimand for his conduct on September 27, 2000, over three months after the incident. The violations of CSR §§16-50 A. 8) and 18) are dismissed as unsubstantiated.

To the extent that the allegations under CSR §§16-50 A. 8) and 18) were part of the December complaints of Messrs. Campos, Thomas, Herrera and Vargas, these violations must also be dismissed for a couple of reasons. First, Mr. Migaki's descriptions of those complaints are very vague and conclusory, and, to the extent that he gave any information about content of those complaints during his testimony, that information was clearly hearsay. As stated above, the Hearing Officer can accept hearsay during the hearing. However, the Hearing Officer will not accept uncorroborated hearsay as the sole basis of a violation of the CRS. Since none of the complainants were called as witnesses to explain how Appellant was intimidating and harassing them or was acting in a manner that violated the Executive Order on workplace violence in November and December 2000, the Hearing Officer has insufficient evidence to conclude that Appellant's conduct rose to the level needed to substantiate violations of CSR §16-50 A. 8) and 18). Second, to find that

Appellant was acting in a threatening, harassing or violent manner in November and December without the direct testimony of the complaining witnesses would violate Appellant's due process rights by denying him the right to cross-examine these four persons about their claims.

As to the December 7 complaint from Mr. Campos and three other employees as a basis for a violation of CSR §16-51 A. 4), the evidence establishing that Appellant was not getting along with his co-workers is stronger. Mr. Migaki testified that he received many complaints over the months from Mr. Campos and others about Appellant's actions and attitude towards his co-workers. Mr. Migaki was unable to testify about specific incidents and the four complaining employees were not present as witnesses. The absence of any of these persons as witnesses is of concern for the Hearing Officer, who did not have the opportunity to observe these persons and weigh the credibility of their complaints. The Department stated that these employees had been afraid of retaliation back in March when the Prehearing Statements were provided. But Appellant is no longer working with these men and the Hearing Officer had no opportunity to assess the allegation of retaliation and harassment herself. However, there is another element that enables the Hearing Officer to confirm Mr. Migaki's statements that Appellant was in violation of CSR §16-51 A. 4) – Appellant's own testimony.

Appellant admitted that he did not get along well with Messrs. Campos, Thomas, Herrera and Vargas. He stated that his disagreements with them dated back to the time that he was the Acting Supervisor. Appellant admittedly did not lay low after he resigned from the Acting Supervisor position and did not get along well with those he formerly supervised throughout the Fall of 2000. Therefore, he violated CSR §16-51 A. 4).

The violation under the "catch-all" provisions, CSR §16-50 A. 20) and §16-51 A. 11), are dismissed. Appellant's misconduct is covered by specific provision of CSR §16-51 A. The catchall provisions in Rule 16 exist for the rare instances when an employee engages in an activity that that CSA Board did not think of when listing specific misconduct that might constitute reasonable grounds for dismissal or progressive discipline but which might justify such action by an agency. That is not the issue here. The grounds for Appellant's discipline rest in a specifically defined provision of the CSR.


While the Hearing Officer is finding that Mr. Migaki's conclusion that Appellant violated CSR §16-51 A. 4) was not arbitrary and capricious and is substantiated by the evidence, the Hearing Officer cannot find that there is sufficient evidence to support a written reprimand. Without the testimony of the complaining co-workers that might have substantiated the imposition of a written reprimand for that violation alone, Appellant's excellent work history and commendations (a fact the Department agreed to at the commencement of the hearing), and the lack of previous progressive discipline, the Hearing Officer concludes that Department should have issued a verbal reprimand instead.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer GRANTS the Appeal in part. The disciplinary action is MODIFIED as follows: the Department's determination that Appellant violated CSR §§16-50 A. 8), 18) and 20) and 16-51 A. 11) is REVERSED and

DISMISSED with prejudice. The Department's determination that Appellant violated CSR § 16-51 A. 4) is SUSTAINED. The discipline is MODIFIED to a verbal reprimand.

Dated this 10th day of September 2001.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in the U.S. mail, this 13th day of September 2001, addressed to:

Ricardo Montoya
4444 W. 17th Ave.
Denver, CO 80204

Neeti Pekar, Esq.
DiManna & Jackson
Special Counsel for the Agency
1741 High Street
Denver, CO 80218

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 13th day of September 2001, addressed to:

Xavier DuRán
Assistant City Attorney

Tom Migaki
Manager, General Services

