

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

Appeal No. 138-04

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

GABRIEL W. MORENO, Appellant,

Agency: Department of Parks & Recreation, and the City and County of Denver, a
municipal corporation.

The hearing in this appeal was held on April 11 & 12, 2005 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Don A. McCullough, Esq. The Agency was represented by Assistant City Attorney Linda M. Davison. Having considered the evidence and arguments of the parties, the Hearing Office makes the following findings of fact, conclusions of law and enters the following decision:

FINDINGS AND ANALYSIS

This is an appeal of the dismissal of Appellant Gabriel W. Moreno, a Recreation Coordinator with the Department of Parks and Recreation for the City and County of Denver (Agency). The dismissal imposed on September 9, 2004 was administered for violations of Career Service Rules (CSR) and Executive Order 112. The timely appeal asserts that his dismissal was in violation of the Career Service Authority (CSA) disciplinary rules, and requests reversal of the dismissal action and reinstatement with back pay and benefits.

I. **NATURE OF DISCIPLINE**

Appellant was dismissed based upon the appointing authority's conclusion that he violated Career Service Rules and Executive Order 112 by instructing his nephew to assault his supervisor Phil Madrid at Swansea Recreation Center on July 16, 2004 in retaliation for a recent disciplinary suspension.

The Agency charged Appellant with violations of the following subsections of CSR § 16-50 A., Discipline and Termination:

(3) Dishonesty, including but not limited to: altering or falsifying official records or examination; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or

advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.

(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 violating Executive Order 112 prohibiting workplace violence, and

(20) Other unspecified conduct.

Appellant was also charged with violations of the following subsections of CSR § 16-51 A., Causes of Progressive Discipline:

(4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public, and

(20) Other unspecified conduct.

At the pre-disciplinary meeting held on August 31, 2004, Appellant participated with his representative Don A. McCullough, Esq. and a witness, Nicole Griffith. Appellant and Ms. Griffith gave verbal statements, and Mr. McCullough presented the written statements from Appellant and another witness, Donny Montoya. [Exhs. B and C.]

In imposing the penalty of dismissal, the Agency considered Appellant's statements and his past disciplinary history, which included a 30-day suspension in 2004 and a suspension for 65 days in 2000. [Exh. 3 - 2.]

II. ISSUES

1. Whether the Agency proved that Appellant committed violations of the Career Service Rules by a preponderance of the evidence, and

2. If so, whether the penalty of dismissal is reasonably related to the seriousness of the offenses in question in conformity with CSR § 16-10.

III. EVIDENCE

Appellant's Exhibits A – H and J – PP were admitted by stipulation. Exhibit I was admitted over the Agency's objection. Agency's Exhs. 5 and 6 were admitted into evidence without objection.

The following facts are undisputed. Phillip Madrid is the Recreation Director at Swansea Recreation Center at 2650 East 49th Avenue in Denver, and was Appellant's supervisor from March 2004 until the date of Appellant's termination. Mr. Madrid testified that he had known Appellant for many years as both a volunteer and an Agency employee. Appellant had confided to Mr. Madrid that he was unhappy at his then-current assignment. In March 2004, Mr. Madrid selected Appellant for a vacancy at Swansea based in part upon his desire to give Appellant a fresh start.

On May 21, 2004, Appellant was suspended for thirty days. On July 8th, the day of his expected return, shortly before the start of his regular shift, Appellant informed the Agency's Human Resources Director Alvin Howard he could not work because he was nervous and stressed. Mr. Howard informed Appellant that he could request FMLA leave. Appellant picked up an FMLA packet from Mr. Howard's secretary and left. Mr. Howard placed Appellant on sick leave pending approval of FMLA leave.

Appellant told his nephew Donny Montoya that Mr. Madrid had disciplined him for his outside employment. Mr. Montoya's brother Craig also knew of the disciplinary action taken against Appellant by Mr. Madrid, as indicated by his statements on July 16, 2004, the day of the assault.

On July 16th, Appellant drove to Swansea Recreation Center with his nephew Donny Montoya. Mr. Montoya went into the center to deliver Appellant's leave slips for the past six days to Mr. Madrid while Appellant waited in the truck. Staff member Lydia Pena informed Mr. Montoya that Mr. Madrid was not in, and that he would be back between 2 and 2:30 that afternoon. Mr. Montoya went back to the truck to inform Appellant of those facts. At Appellant's request, Mr. Montoya re-entered the center and delivered the leave slips to Ms. Pena, informing her he would be back to pick them up. [Exh. H, pp. 2 – 3; testimony of Appellant, Lydia Pena and Donny Montoya.]

At about 2:30 p.m. that day, Mr. Montoya arrived back at the center, accompanied by his wife, Nicole Griffith, their two small children, and his brother Craig Montoya, who had been repeating "[t]hat motherfucker needs his ass kicked" during the drive. Donny Montoya parked his SUV in the parking lot facing the center's main entry, entered the center, and asked for Phil Madrid. Mr. Madrid identified himself. Donny Montoya asked Mr. Madrid for the signed copies of the leave slips delivered that morning. Mr. Madrid informed him that the copies would be mailed to Appellant, and Donny Montoya returned to his vehicle. He told those in the vehicle that Appellant would get the slips in the mail. Craig Montoya repeated, "[t]hat motherfucker needs his ass kicked", left the SUV and entered the center. Donny Montoya quickly backed out of the lot and turned north onto Clayton Street. He stopped in the middle of the block between 49th and 50th Streets. [Testimony of Donny Montoya and Nicole Griffith; Exh. I, p. 7.]

In the center, Craig Montoya asked Mr. Madrid about membership fees. When Mr. Madrid turned to show him the fee schedule, Craig Montoya hit and kicked Mr. Madrid eight to ten times, knocking him to the ground. Craig Montoya ran out of the

center, through the parking lot and turned north onto Clayton. Recreation Coordinator Jimmy Mull ran out of the center and followed Craig Montoya who was sprinting through the parking lot. When Craig Montoya reached the corner of 49th Avenue and Clayton, Mr. Mull heard him shout “[g]o go go”, and then get into the SUV, which was stopped in the middle of the block between 49th and 50th Avenues. [Exh. I, p. 8; testimony of Jimmy Mull.] Donny Montoya testified he was retrieving his cell phone and cigarettes from the street when his brother Craig ran onto Clayton Street. When Craig Montoya got back in the car, he told his brother and Ms. Griffith, “[h]e got what he deserved.”

As a result of the attack, Mr. Madrid suffered a torn rotator cuff, bruises, a black eye, and permanent loss of motion in one arm. He had an operation in September to repair the rotator cuff injury.

Detective Brian Cotter investigated the assault. On July 27, 2004, Donny Montoya phoned Detective Cotter and told him he didn’t know who assaulted Mr. Madrid, but that he’d seen his intoxicated brother Craig Montoya nearby, and that his brother was “angry about Mr. Madrid.” In that statement, Donny Montoya denied Craig got into his car. [Exh. I, p. 3.] On August 30th, Donny Montoya sent a letter to Mr. Howard and Deputy Manager of Recreation and Facilities Services Daniel Betts about the assault. Therein, he admitted his brother Craig was in his car with Donny’s family at the center. Donny also stated he had placed his cell phone and cigarettes on the top of the vehicle before going inside. When Donny came back to the car, Craig Montoya, told him “Mr. Madrid deserved to get his ass kicked.” Craig Montoya then left the car and went inside the center. Donny drove out of the lot “because I wanted nothing to do with whatever Craig was going to do.” When he turned into the street, his phone and cigarettes fell off the car roof. He stopped the car to get them, and saw Craig Montoya running out of the center. Donny let Craig get in the car because his children asked him not to leave him. [Exh. C.]

At the hearing, Donny Montoya added that he had backed out of the lot. After returning to the car, Craig said, “[y]eah, he got it,” or “[t]hey got what they deserved.” Donny Montoya then called Appellant and told him his copy of the leave slips would be mailed to him.

IV. ANALYSIS

The City Charter requires that the facts at issue in a Career Service appeal must be determined *de novo*. C5.25(4). Such a determination requires an independent fact-finding hearing and the resolution of factual disputes. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975.) The Agency has the burden to establish each violation alleged by a preponderance of the evidence. CRS § 13-25-127.

A. CSR 16-50 A. 3): Dishonesty

Appellant was first charged with a violation of CSR 16-50 A. 3) prohibiting dishonesty, including altering or falsifying official records and lying to supervisors,

among other acts of dishonesty. The disciplinary letter asserts that the termination was based on Appellant's act of instructing his nephews to assault his supervisor in retribution for suspending Appellant. The letter does not allege that Appellant made a false statement or committed any other act of dishonesty, and likewise the evidence does not reveal a factual basis for a charge of dishonesty under CSR 16-50 A. 3).

B. CSR 16-50 A. 8): Threatening or intimidating a party to disciplinary procedure

The Agency argues that Appellant directed his nephews to assault his supervisor Phil Madrid in retaliation for his imposition of a 30-day suspension on Appellant. Appellant argues in response that the evidence does not establish by a preponderance of the evidence that Appellant ordered the assault. Appellant presented testimony that the assailant acted on his own. Craig Montoya, it is argued, was at the center for reasons unrelated to Appellant, and took it upon himself to avenge his uncle. Donny Montoya and Ms. Griffith both testified they were planning to drop Craig off at their sister's house when they took a side trip to the center to pick up the leave slips for Appellant. Both also stated Craig Montoya was under the influence of alcohol during the drive to the center, and repeatedly expressed his belief that Mr. Madrid "needed his ass kicked" for suspending Appellant.

The Agency contends the circumstantial evidence supports a finding that Appellant ordered the assault. If the assault was not planned, Donny Montoya would not have come to the center on the unnecessary task of delivering leave slips and picking up the supervisor's signed copies. Craig Montoya would not have worn work-out gloves into the center, and Donny Montoya would not have stopped his car out of sight of the center and picked up Craig Montoya, who ran out of the center and called for Donny Montoya to "go go go" when he saw the SUV.

Appellant responds that there were human explanations for the circumstances highlighted by the Agency. Appellant testified he was trained by a prior supervisor to turn in his leave slips on the day following the close of the pay period, which was July 16th. He asked his nephew to pick up the copy of the leave slip signed by the supervisor in order to keep his records complete, and to avoid having contact with Mr. Madrid, whom he no longer trusted. Donny Montoya and Ms. Griffith testified that Craig was with them in the SUV so they could take him to their sister in Westminster, since she was used to coping with him in his intoxicated state, and they wished to get him out of their house, where he had been staying. Donny Montoya testified he backed out of the lot after Craig got out of the vehicle because he wanted to avoid being involved in whatever Craig planned to do. He further stated he stopped in the middle of Clayton Street because his cell phone fell off the roof of his vehicle, and he let his brother back in at the behest of his children, who were upset.

The evidence is disputed on the issue of whether Craig Montoya was drunk at the time in question. Appellant argues that Craig Montoya's intoxication caused him to

act on his own. The Agency submitted the testimony of Messrs. Madrid and Mull, who both observed that Craig Montoya did not appear to be under the influence of alcohol.

There were four witnesses to the events of the afternoon of July 16th. The Agency's witnesses, Messrs. Madrid and Mull, both testified Craig Montoya did not appear to be intoxicated. Appellant's witnesses, his nephew Donny Montoya and his wife Nicole Griffith, testified that Craig Montoya had been drinking heavily over the course of the past two days, and was very intoxicated. If Craig Montoya drank a half pint or more of Jim Beam that morning, as stated by Donny Montoya, it is unlikely he could have performed the sheer physical work of the assault on Mr. Madrid, causing extensive injuries, the assault on Mr. Mull, and outpacing Mr. Mull in the 348-foot chase to the SUV, all without making his intoxication apparent to either Mr. Madrid or Mr. Mull, the latter a former police and security officer. [Exh. C, p. 1.] I find that alcohol was not the proximate cause of the assault.

The parties also presented conflicting evidence on why Donny Montoya stopped his vehicle on Clayton Street after pulling out of the center's parking lot. Appellant claims that Donny Montoya parked in order to retrieve the items that had fallen from the roof of his car. The Agency asserts he stopped the car to wait for Craig Montoya to emerge from the center, and give him a ride away from the center after the assault.

Donny Montoya's testimony that he stopped the car because his cell phone and cigarettes fell off the roof is not believable. First, there appears to be no reason for Donny Montoya to have taken out his cell phone or cigarettes and placed them on the roof when he parked in front of the center. Second, it seems unlikely that such items would have avoided falling when Donny Montoya was trying to back out of the lot "fast". Third, Mr. Mull did not see Donny Montoya when he saw the SUV parked on Clayton Street, at the very time when Donny Montoya testified he was retrieving his cell phone and cigarettes from the street. Mr. Mull testified only that he watched Craig Montoya get in the passenger side of the vehicle, which then drove up the street. Finally, the events in the center and the run across the parking lot must have consumed more time than Donny Montoya's quick exit from the parking lot and retrieval of fallen items on Clayton Street. I conclude that Donny Montoya parked and waited for his brother to emerge from the center, pursuant to a pre-arranged plan.

I find that Appellant communicated to Donny Montoya his desire to have Mr. Madrid physically harmed because of Appellant's anger over his suspension, which he deeply believed to be unjust. Appellant then gave Donny and Craig Montoya a pretense to go to the center and meet Mr. Madrid by means of the leave slips. Based on his long-term employment with the Agency, Appellant must have known that it was unnecessary to make a special trip to deliver sick leave slips to a supervisor before returning to work, and even more unnecessary to pick up his signed copy on the same day as delivered. Appellant's failure to deliver sick leave slips for July 16 – 23 on or before the day following the close of the next pay period contradicts his explanation that he felt required to deliver the leave slips at issue on July 16th, the day after that month's first pay period. Mr. Howard testified that he told Appellant he didn't need to send in

sick leave slips while he was on sick leave. Appellant testified Mr. Howard instructed him to deliver his leave slips directly to Mr. Madrid. I find it is unlikely that Mr. Howard, an experienced human resources manager, said anything Appellant could have construed as an instruction to personally deliver leave slips to the very supervisor who caused the stress leading to the sick leave. Since Mr. Howard granted the sick leave and suggested that Appellant apply for FMLA leave, Appellant's failure to deal with him on the leave slip issue disregards logic and Agency procedure, and thus is not credible. Based upon credible evidence, I find Appellant's pursuit of a personal delivery of the leave slips to Mr. Madrid was more likely than intended to allow his nephews to identify Mr. Madrid for the purpose of an assault.

The behavior of Donny Montoya the afternoon of July 16th also supports an inference that Appellant directed or requested the assault on Mr. Madrid. Donny Montoya drove Craig Montoya to the place he knew Mr. Madrid would be, in spite of the fact that he and his wife recalled Craig Montoya was drunk, and stated his belief that Mr. Madrid "needed to get his ass kicked". After Donny Montoya left the center and returned to his car, there was a delay of two minutes before Craig Montoya left the car and Donny Montoya backed out of the lot. [Testimony of Phil Madrid; Exh. I, p. 8.] That delay is not consistent with Donny Montoya's testimony that Craig Montoya ran out of the vehicle as soon as Donny Montoya came back and informed them he was not given the signed leave slip. It is consistent with the Agency's argument that Donny Montoya communicated to Craig Montoya that Mr. Madrid was in the center, and that he described Mr. Madrid for the purpose of having Craig Montoya execute the assault on the right person.

Mr. Mull's testimony is deemed the most objective, as he is not the listed victim to the assault, and is no longer an employee of the Agency. The testimony of Appellant's family members is considered less disinterested. Moreover, Donny Montoya admitted lying to the police when first questioned about this matter, and admitted to two prior convictions of giving false information to police. [Exh. I, p. 3.]

Because the assailant emerged from the same car as the person requesting Appellant's leave slips, Mr. Madrid believed that Appellant had directed it in response to his disciplinary suspension. Based on the foregoing, I find that Appellant intended the action to intimidate his supervisor in the performance of his duty to impose discipline upon him. The Agency has established that Appellant intimidated or retaliated against Mr. Madrid for his part in a disciplinary action in that he requested or directed his nephews to assault Mr. Madrid, in violation of CSR § 16-50 A. 8).

C. Violation of Executive Order 112

The Agency asserts that Appellant was guilty of threatening, intimidating or retaliating against Mr. Madrid because of his role in Appellant's disciplinary suspension issued in May 2004, in violation of CSR §§ 16-50 A. (18), and Executive Order 112. Exh. DD.] "The City and County of Denver is committed to maintain a safe work environment free from all forms of violence and harassment." Executive Order 112

prohibits “A. Intimidating, threatening or hostile behavior, physical assault . . . and other acts of this type clearly inappropriate to the workplace.” . . . C. Encouraging others to engage in the negative behaviors outlined in this policy.”

As found above, Appellant directed his nephews to intimidate and assault Mr. Madrid while he was performing the duties of his position at his work location. The assault was witnessed by another staff member, Mr. Mull, who was himself assaulted while attempting to stop the attack on Mr. Madrid. Both employees were in the reception area of the public recreation facility at the time of the incident. Appellant was aware that Mr. Madrid would be unprotected by anything but a counter when the nephews would arrive. Appellant’s action in arranging the assault was in direct violation of the subsection of Executive Order 112 quoted above, and thus violated CSR §§ 16-50 A. (18) prohibiting conduct which violates an executive order.

D. Failure to Maintain Satisfactory Working Relationships

The evidence supporting the Agency’s allegation of a violation of CSR § 16-51 A. 4) is that Appellant arranged the assault of his supervisor Mr. Madrid because of his anger toward him over the imposition of discipline, and by that means failed to maintain a satisfactory working relationship with Mr. Madrid. The Agency also presented testimony that Appellant stated he could not return to work for Mr. Madrid, and requested a transfer to a different assignment because of this dispute.

Appellant does not deny he felt the April suspension was unfair, or that he no longer trusted or wished to work for Mr. Madrid. However, Appellant denies he ordered the assault or had any involvement in causing it.

Detective Cotter related that Appellant told him he felt wronged and falsely accused by Mr. Madrid. Mr. Howard testified Appellant told him he could not return to work under Mr. Madrid. Based upon a statement by Appellant’s doctor, then-Director of Recreation Bill Peterson arranged to have Appellant transfer to Montbello in order to accomplish Appellant’s request to avoid working for Mr. Madrid. [Exh. F.] Appellant admitted he told Mr. Madrid at a staff meeting that Mr. Madrid made him feel stupid. Appellant did not take advantage of Mr. Howard’s earlier efforts to create understanding between Appellant and his co-workers; instead he returned to the workplace and became angry about the next assignment given to him. It is apparent from the evidence that Appellant failed to maintain an adequately cooperative attitude that would have allowed him to accomplish his work in the team atmosphere necessitated by running a recreation center.

It is therefore concluded that the Agency established a violation of CSR § 16-51 A. 4).

E. Other Unspecified Conduct

Because I have found that the Agency has proven the Appellant committed violations of specific Career Service Rules, I do not reach the issue of whether Appellant violated either CSR § 16-50 A. (20) or 16-51 (11).

V. PENALTY

The sole remaining issue is whether termination is reasonably related to the seriousness of the offense, taking into consideration Appellant's past disciplinary record, in compliance with CSR § 16-10.

Discipline is reasonably related to the seriousness of an offense if it is within the range of reasonable alternatives available to a reasonable, prudent agency administrator. GUSTERN, 128-02, at 20 (decision dated 12-28-02.), *citing Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo.App. 1986.) Discipline is not excessive if it is substantially based on considerations that are supported by a preponderance of the evidence. GUSTERN, *id.*

Appellant's past record included two lengthy suspensions since 2000, both of which involved conflicts with his co-workers. The 30-day suspension in 2000 was based upon an assault on a fellow employee. Daniel Betts, the appointing authority who imposed the discipline, testified that he considered the number and seriousness of Appellant's past disciplinary infractions, their similarity, and the need to impose progressive discipline beyond a lengthy suspension. He testified he found Appellant's explanation of the events leading to the assault unworthy of belief, and was influenced by the fact that a supervisor was targeted for his discipline of Appellant while he was in an unprotected location serving the public.

I find that the penalty imposed was consistent with the purposes of progressive discipline to deter inappropriate behavior and performance under CSR § 16-10, and was within the range of penalties available to a reasonable administrator.

ORDER

The Agency's termination of Appellant dated September 8, 2005 is hereby AFFIRMED.

Dated this 25th day of
May, 2005.

Valerie McNaughton
Hearing Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this ____ day of May, 2005, addressed to:

Gabriel W. Moreno
308 Emery Road
Northglenn, CO 80233

Don A. McCullough, Esq.
950 S. Cherry St., S. 710
Denver, CO 80246

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail, this ____ day of May, 2005, addressed to:

Linda Davison
Assistant City Attorney
Litigation Section

Alvin Howard
Department of Parks and Recreation
