

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

Appeal No. 63-08

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

PHILIP B. MORGAN, Appellant,

vs.

DENVER POLICE DEPARTMENT, IDENTIFICATION AND RECORDS BUREAU, and
the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Feb. 9 - 11, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing, and was represented by Todd R. McFarland, Esq., an attorney licensed in the State of Maryland. The Agency was represented by Assistant City Attorney Andrea Kershner. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

On August 15, 2008, Appellant Philip Morgan filed this direct appeal challenging his August 4th dismissal by the Denver Police Department's Identification and Records Bureau ("Agency" or "Department".) The appeal also alleges religious discrimination, harassment based on religion, retaliation based on religious belief, and appeal of a grievance denial.

The parties stipulated to the admissibility of Agency Exhibits 1 – 4, 11 – 14, 15, 17 – 18, 24, 27, and 28. Appellant also stipulated to the admissibility of the following portions of the following exhibits: Exh. 5-3, 9-4 to -7, Exh. 10-1 to -4, 10-7, and 10-10 to -15, Exh. 19-3 to -8, Exh. 20-2 to -3, Exh. 25-1 to -2, 25-22, Exh. 30-2 to -5, and Exh. 34, columns 1 – 5. Agency Exhs. 55 – 58 and Appellant's Exh. A were admitted during the hearing. Appellant withdrew his Exhibits B – M.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR)?

2) Did Appellant establish by a preponderance of the evidence that the dismissal was caused by discrimination on the basis of Appellant's religion?

3) Did Appellant establish by a preponderance of the evidence that Appellant suffered harassment on the basis of his religion?

4) Did Appellant establish by a preponderance of the evidence that Appellant suffered retaliation on the basis of his religion, and

5) Did Appellant establish by a preponderance of the evidence that the Agency action violated any rule, charter or ordinance that negatively affected Appellant's pay, benefits or status?

6) Did the Agency establish by a preponderance of the evidence that dismissal was within the range of penalties that could be imposed upon Appellant by a reasonable administrator for the violations proven under the rules?

III. FINDINGS OF FACT

Appellant Phil Morgan was hired on April 1, 2004 as an Administrative Support Assistant III (ASA III) for the Denver Police Department's Records Bureau within the city's Department of Safety. As a civilian employee of the Police Department, Appellant is a member of the Career Service personnel system, and may appeal discipline under the Career Service Rules. Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR § 19-10 A.1.a. In contrast, police officers belong to the Classified Service, which provides the rights to organize and bargain collectively and appeal rights under an alternate merit personnel system. Compensation, seniority, and the number of hours in the work week are mandatory subjects of collective bargaining for classified employees, while the length of work shifts and method of assignment to shifts are permissive subjects of bargaining. Denver Charter, § 9.8.3. A, D. The Department's Collective Bargaining Agreement (CBA) with the employee organization representing police officers mandates that vacations are granted based on seniority. [Testimony of Daniel J. O'Hayre.]

The Records Bureau uses a bidding system for assignments to shifts and days off for all its employees, regardless of whether they are members of the Career Service or Classified Service. Requests for shift assignments and days off are granted by order of seniority after a bidding process because the Agency has determined that seniority is a more equitable method of distributing shift assignments. Employees vote every three months for their first, second and third shift, or detail, preference. [Testimony of O'Hayre; Exhs. 25, 28.] At the time of Appellant's hire, the Records Bureau operated seven days a week, with at least one employee on each of the two weekend shifts.

During his 2004 interview process, Appellant informed the panel that Saturdays are his Sabbath. Appellant is a member of the Seventh Day Adventists, a religion that honors Sabbath from sunset on Fridays to Saturdays at sunset. Panel member Sgt. Sandra Eggleston told him that employees voted for their days off based on seniority, but that it was likely he would have Saturdays off, except for covering other employees'

vacations. Appellant agreed to this arrangement, and accepted the offer of employment.

For the first three years of Appellant's employment, Appellant was able to be off on most Saturdays because a co-worker with more seniority, Kevin Carlheim, voted for Sunday and Monday days off, allowing Appellant to have Saturdays off. Appellant worked on the Saturdays Mr. Carlheim was unavailable as a favor to the Department, a goal he believes is consistent with his religion. [Exh. 10-4.] On one of those days, Linda Everham agreed to trade her day off with Appellant and work his Saturday. At the time, she was not aware Appellant's desire to have Saturdays off was based on his religion. Sgt. Eggleston attempted to minimize the number of Saturdays Appellant was required to work. Appellant testified that he worked beyond sunset on Fridays without objection, since he felt it would be wrong to leave work before his Friday shift ended at 10:00 pm.

In April 2006, the Records Bureau began to plan its conversion to a full 24/7 operation and merger with the Data and Auto Theft Records Units. One of the key goals of the merger was to permit patrol officers to have access to accurate information from the Versadex database regarding stolen car reports during a stop or arrest, and minimize city liability arising from such issues. The consolidated unit was to enter information into the National Crime Information Center (NCIC) database, make sure the Geocodes were correct, and allow the Police Department to allocate services based on emerging crime patterns and trends. Failure to maintain an accurate database was known to delay investigations and cause charges to be dismissed for failure to comply with the applicable 72-hour filing deadline. Lack of accurate information can also hamper an officer's safety and ability to take appropriate actions at a traffic stop. [Testimony of Sgt. Dodge.]

Planning for the transition was extensive. Lt. Vincent Gavito, Bureau supervisor Sgt. Magen Dodge, sergeants from the Identification Unit, and the Division Chief worked for twelve months to allocate resources, employees, facilities and equipment, and integrate employees from the Data and Auto Theft Units. The transition team also arranged training for new and existing employees in the Versadex and NCIC databases, as well as auto theft and pawn records. [Testimony of Lt. Gavito.]

From 2006 to late 2007, Bureau employees were given updates and time lines regarding the anticipated changes. Management informed the staff at various meetings that their shifts may change because they would be voting with the two other units to be merged, both of which had employees with various seniority levels. [Exh. 10-2.] In May 2007, employees from the Auto Theft Unit were merged into the Bureau under an agreement that allowed them to keep their unit seniority. Only the employees from the Auto Theft unit had the training and experience in records related to stolen vehicles, and so their expertise was at a premium until all Bureau employees were trained in those areas. The usual department rule requires employees to start over in seniority when they voluntarily transfer into a different unit. The agreement with the Auto Theft employees was based on the fact that their transfers were involuntary, and the Bureau needed their skills and experience to handle stolen vehicle records until all employees received that training. Most of the Auto Theft employees had more seniority than Bureau personnel, including Appellant. [Testimony of Capt. Sich.]

Sgt. Dodge informed her staff that shift votes would be accomplished by position once cross-training in all information management systems was complete. On Aug. 27, 2007, the Bureau conducted a pre-vote "so that at final vote, in November, everyone will have an idea as to where they will fall within a shift's seniority." [Exh. 25-1.] At that time, Appellant submitted his preference for Detail 3, the 1 pm to 9 pm shift. [Exh. 25-22.] Appellant testified he was not concerned during the transition phase about losing his Saturdays off, since he had not yet been given the details of how the consolidation would work.

On Nov. 9, 2007, Captain Sylvia Sich updated Appellant and all other employees about the consolidation by email:

The Records Section will become a full 24/7 bureau in 2008. As the transition continues the quarterly vote will allow employees to change shifts every three months and experience the work on different shifts. Until the cross training and the consolidation transition has been completed, it will be necessary to have the experts of each duty in the Records Section, spread evenly across the shifts. Until all of the employees are trained in all areas of the Records Section, it is possible that you may not be on the shift that your seniority allows you to vote. **Please remember that this is a temporary situation until everyone is trained.** Once training has been completed the shift vote will be conducted by seniority in position.

Every effort will be made to accommodate your shift preference. Please keep an open mind if you are moved to a shift that is not your first choice, remember it may only be for 3 periods.

If you have any questions or concerns please feel free to contact me or Sergeant Dodge.

[Exh. 27-1, emphasis in original]

In the Nov. 2007 shift vote, Appellant again voted for Detail 3, then defined as 2 pm to 10 pm, as his first choice, and Detail 2, 6 am to 2 pm, as his second choice. [Exh. 27-11; 28-1.] Appellant had already begun his cross-training in data and auto theft. He was aware that there were increases in the minimum staffing requirements for the weekend shifts, and that Capt. Sich was preparing the new schedule. With a hire day of April 1, 2004, Appellant was 17th in Bureau seniority out of its 30 employees, which then included those transferred from Auto Theft. [Exh. 24-1.]

A week before the Bureau's Dec. 30, 2007 transition to 24/7 operation, days off for the first quarter of 2008 were posted. The memo showed that Appellant was scheduled to work on Saturdays for that quarter. On Dec. 23rd, Appellant informed his supervisor Bonny Osthoff and Sgt. Dodge that he could not work on Saturdays, and

requested it as a permanent day off based on his religious practices and beliefs. That same day, Appellant sent an email to Capt. Sich and Lt. Gavito requesting permission to continue having Saturdays as his day off. [Exh. 9-7.] Lt. Gavito discussed the matter with Capt. Sich, who informed him that a request for a permanent day off was not possible during the transition period because of the scheduling issues caused by vacancies, lack of training, and light-duty employees. Capt. Sich and Lt. Gavito concluded that granting Appellant's request for a permanent Saturday off would be impractical and inconsistent with the purpose of seniority to treat employees as equitably as possible.

On Dec. 26, 2007, Lt. Gavito informed Appellant of this decision by reply to his email. He reminded Appellant that days off were granted by seniority and staffing needs, and that the change to a 24/7 operation affected everyone. Lt. Gavito acknowledged that "when you were hired working on Saturday was a conflict for you. However, you must now realize that the work in the bureau has changed". He assured Appellant that "Sergeant Dodge, Captain Sich and I are working as fast as we can to get additional people hired [and trained] to bring our staffing up to a reasonable level to cover all shifts . . . your change is not a permanent one and we do anticipate more flexibility in the future." [Exh. 9-6.] Capt. Sich received Appellant's Dec. 23rd email on Dec. 31st, upon her return from a two-week vacation. She responded that she was "looking into your request to have Saturdays as a guaranteed day off". She asked Appellant to send her any documents referring to Saturdays off as a condition of his employment. Appellant replied that the agreement was not in writing. [Exh. 9-4.] The request was also referred to the City Attorney's Office. [Exh. 5-3.]

Appellant did not report for work on Saturday, Jan. 5, 2008. Capt. Sich consulted with the Agency's Human Resources Analyst Yvonne Schrum regarding Appellant's request for a guarantee of Saturdays off. "Philip did not mention his need for Saturdays off until December 23rd . . . During this transitional period in the Records Bureau, staffing is critical since we are already dealing with several vacancies, additional sick use will impact Records greatly." Capt. Sich also noted that neither Appellant nor Mr. Carlheim had the seniority to vote Saturdays off after the consolidation of departments in 2008. [Exh. 10-2.] On Jan. 10, 2008, Capt. Sich informed Appellant via email that "[i]t would not be practical to change the schedule for period 1 [Jan – Mar. 2008] at this time." [Exh. 30-3.]

On Jan. 6, 2008, Pastor Robert L. Lister of the Park Hill SDA Church sent a letter to Capt. Sich supporting Appellant's request for Saturdays off based on the tenets of their shared religion. He suggested five alternatives: changing Appellant's shift or department, swapping shifts with another employee, substituting Sundays or holidays for Saturdays, permitting a flexible schedule, or making a temporary accommodation while a permanent one is being arranged. [Exh. 15-1.]

On Jan. 11, 2008, Appellant met with Capt. Sich and Ms. Osthoff to discuss a proposed shift trade for Jan. 12th. Capt. Sich explained that the trade could not be approved because it spanned two separate weeks, and the other employee would not be able to work the required 40 hours during one of the work weeks. Appellant informed them that he would not work on Saturdays in the future, and that he will be looking for

another job within the city. When asked why he had worked Saturdays in the past year, Appellant explained that he was returning a favor for Mr. Carlheim, in accordance with “[t]he practice of ‘practical Christianity’”. [Exh. 10-4.] Appellant did not report for work on Saturday, Jan. 12th. [Exh. 5-3.]

On Jan. 17th, Capt. Sich, Sgt. Dodge, and Ms. Osthoff met with Appellant to discuss those absences and communicate the City Attorney Office's ruling regarding his request for Saturdays off. The conversation was recorded in a Supervisor's Situation Record (SSR). [Exh. 5-3.] Appellant was informed he could pursue trades with other employees if it could be done in compliance with the Fair Labor Standards Act (FLSA). He was given contact information at CSA Training and Development to assist him in applying for other city jobs. Appellant was also warned that future Saturday absences would result in unauthorized leave without pay and discipline. [Exh. 10-3.] On Jan. 22, 2008, Appellant was notified that his use of unauthorized leave on Saturdays made him ineligible for overtime under CSR § 9-91. [Exh. 30-4, 30-5.]

After the January meetings with Capt. Sich, Appellant decided that he would no longer work on Saturdays. He believed that his initial agreement at hire required the Bureau to grant him Saturdays off on a permanent basis for his religious practice. He informed Capt. Sich and Sgt. Dodge of that belief and his decision via email on Jan. 21, 2008. [Exh. 30-4, 30-5.] Appellant also felt that the Bureau's agreement to permit the recently-transferred Auto Theft Unit employees to retain their previous seniority violated his own seniority rights. Finally, he believed the Bureau should have arranged shift trades with other employees for him. Appellant testified that he considered the three options later offered by the Bureau [Exh. 3] as a method to “put the ball back in my court”, and not as accommodations of his religious practice. He continued to vote for Saturdays as his day off every period, attempted some shift trades, and began to apply for other positions within the city. [Testimony of Appellant.]

Appellant's attempts to trade shifts in early 2008 were not successful. During the first few months of 2008, Mr. Carlheim was hospitalized, making him unavailable to trade days off with Appellant. Capt. Sich disapproved a proposed trade with another employee for Jan. 12th because the days being traded “spanned two separate weeks, putting the employee at 48 hours for one week and 32 hours the next”, in violation of the Fair Labor Standards Act (FLSA). [Exhs. 10-4, 30-2.] in addition, any trades with Mr. Carlheim would have affected the seniority rights of Cathy McLane, a co-worker who ranked in seniority between Appellant and Mr. Carlheim. [Exh. 24-1.]

In February 2008, Linda Everham learned that Appellant was not working on Saturdays. He informed her that it was because of his faith, and that the Department was aware of that. Ms. Everham knew that Appellant was applying for other city positions, and suggested that Appellant transfer to Detail 1, where he would have a better chance of avoiding Saturday work. At that time, Bureau employees were allowed to vote for their preferred detail once a month. Appellant told Ms. Everham that working Detail 1 would not allow him to have time with his wife, which was important to him. [Testimony of Linda Everham.]

In March, Ms. Everham was promoted to the position of supervisor in the Records Bureau upon Ms. Osthoff's retirement. Ms. Everham testified that the Bureau was in the middle of training many new hires to cover the additional functions in the consolidated unit, and, as a result, scheduling fully trained personnel for each shift was difficult. Although Ms. Everham understood Appellant's stand as a fellow Christian, she also knew that granting his request would have required the Bureau to overlook the seniority rights of other employees, which would create an undue hardship to the Bureau, in her view. As a result of Appellant's fourteen Saturday absences from March to June, 2008, Ms. Everham was required to schedule more senior employees to cover those Saturdays. Three of those employees complained to Ms. Everham and each other that their seniority rights were being ignored. They expressed the belief that they were being disciplined by having to work on Saturdays. That situation added to other problems caused by the consolidation and change to a 24/7 operation. [Testimony of Linda Everham.] During the same period, other employees complained to Sgt. Dodge of the hardship caused by Appellant's failure to report on Saturdays. The Bureau was so understaffed that relief for vacations, sick leave, or breaks was unavailable, and Sgt. Dodge was forced to use overtime pay every month to fill the voids. Several employees began looking for other jobs because of the burden of weekend work outside of their bid-for work schedule. [Testimony of Sgt. Dodge.]

On Feb. 29, 2008, Appellant was served with a pre-disciplinary letter related to five unauthorized Saturday absences from Jan. 5 to Feb. 9, 2008. After the pre-disciplinary meeting held on Mar. 17th and receipt of Appellant's response [Exh. 14], Division Chief Daniel O'Hayre decided to notify Appellant in writing that he could be disciplined for future absences. On April 10, 2008, Capt. Sich sent a letter to Appellant enumerating three options he could use to obtain Saturdays as his day off: 1) continue to vote for Saturdays off, 2) pursue shift trades with other employees, and 3) apply for transfers to other agencies. The letter further warned Appellant that "any failure to report to work without prior authorization will be considered unauthorized leave without pay and may be subject to formal discipline." [Exh. 3.]

During the first eight months of the transition while new employees were being trained, the consolidated unit was understaffed in trained personnel, resulting in overtime and lack of coverage for breaks, vacations, and sick time. Appellant ranked fifth in seniority on Detail 3, which had a minimum staffing level of four employees. Two employees on that detail, Rachel Fain and Donna Allen, were trained in auto theft records, an area in which the unit was severely understaffed. The Bureau therefore assigned them to shifts and days off based on the unit's need for their training rather than their seniority, which was lower than that of Appellant. By August 2008, unit scheduling operated on the basis of seniority alone. [Testimony of Sgt. Dodge.]

Capt. Sich testified that granting Appellant's request would have forced the Department to ignore other employees' superior seniority rights, pay overtime, or compromise the Bureau's ability to have trained employees on each shift. She further stated that the Bureau considers the seniority of trained personnel in making decisions regarding scheduling requests, shift trades, and unit coverage. At the time of the decision to deny Appellant's request for Saturdays off, the Bureau was still cross-training

its current employees, and hiring and training new employees in an attempt to reach full staffing levels for all shifts.

In March 2008, Appellant met with HR Analyst Yvonne Schrum for assistance in applying for city jobs. She offered to help him revamp his resume and hone his interview skills. Appellant informed her that he only needed help in identifying job openings. Between January and July 2008, there were twelve openings for full-time ASA IIIs, the classification held by Appellant. [Exh. 57.] Appellant applied for two of those openings. He was referred to the hiring agency in both cases, but was ultimately rejected for hire. He also applied for thirteen other positions during that time, including ASA IV, 311 Assistant, Associate IT Technician, Photo Enforcement Agent, Fingerprint ID Clerk, and NCIC Agent. [Exh. 34.] Appellant applied for all positions for which he believed he was qualified.

The Career Service ASA III classification is shared by positions having certain common skill sets. The next level in the class series, ASA IV, contains specialized duties or qualifications in addition to the skill sets needed by ASA IIIs. As a current ASA III, Appellant was not required to test for openings in that classification, and had the right to be placed on the eligible list for each ASA III vacancy as long as he actually applied for the vacancy. [Testimony of Ms. Schrum, CSA Recruiting Supervisor Troy Bettinger.]

In June 2008, CSA published a city-wide job posting for 13 anticipated ASA IIIs openings. [Exhs. 55, 56.] The jobs covered by that announcement are listed at the testing center and all agencies, posted on the webpage, and sent by email to interested parties who request such notification. Appellant registered for the email announcements, and received notices of the vacancies covered by the city-wide posting. He did not apply for the city-wide posting because he believed he would be automatically included on the eligible list based on his April 14th application for a specific ASA III opening. [Exh. 34-2.] In response to Appellant's request for a transfer, CSA employee Marilyn Lujan advised Appellant that he had to apply for each vacancy and go through the process in order to transfer to a different position. [Testimony of Appellant.] The city-wide job announcement states that "[a]pplicants who are eligible for transfer . . . will be automatically placed on an eligible list and referred to open positions." [Exh. 55.] Since Appellant did not apply under the city-wide posting, his name was not included on the eligible lists submitted to the hiring agencies. The first eligible list of qualified applicants for the city-wide announcement was not created until the end of July, having been delayed by the Democratic National Convention held in Denver. [Testimony of Mr. Bettinger; Exh. 58]. After Appellant's dismissal on Aug. 4, 2008, he was ineligible for future employment with the city for a minimum of five years. CSR § 16-75 C.

Lt. Daryl Miller assumed command of the Records Bureau in mid-May 2008, replacing Lt. Gavito. Sgt. Dodge briefed Lt. Miller that Appellant was not coming to work on Saturdays because of his religion. Appellant later told Lt. Miller that he did not have to come to work on Saturdays because it was the Lord's Day. Appellant did not ask Lt. Miller for any accommodations regarding his religious beliefs or practices. After reviewing Appellant's attendance and the April letter offering Appellant three options to obtain Saturdays off, Lt. Miller wrote and sent a second pre-disciplinary letter, which alleged twenty-one unauthorized absences between January 5 and June 28, 2008. [Exh. 2.] At the pre-

disciplinary meeting held July 21, 2008, Appellant stated that he had a verbal agreement with the Bureau that he was to get Saturdays off unless he was needed to fill in for another employee. Appellant said he had traded shifts with other employees and worked some Saturdays in the past, but that he would not work if scheduled on any future Saturdays.

Division Chief Tracie L. Keesee of the Research Training and Technology Division oversees operation of the Records Bureau, among other departmental units within her division. She attended the pre-disciplinary meeting as a part of her duty to make recommendations to the Deputy Manager of Safety on disciplinary matters within her Division. Chief Keesee concluded that Appellant was absent on the dates stated in the disciplinary letter for religious reasons, and recommended termination based on the business needs of the Department. Those needs included the cost of overtime to cover the absences, and the Department's difficulty in maintaining minimum staffing levels of trained personnel during the unit's transition period, which lasted from January to early fall of 2008. [Testimony of Division Chief Keesee.]

Manager of Safety Alvin LaCabe has delegated to Deputy Manager Melvin Joe Thompson the obligation to handle disciplinary matters for the Department's Career Service employees. In performing that duty in this disciplinary matter, Mr. Thompson reviewed the entire file, including the issues of religious accommodation raised by Appellant and the staffing issues raised by the Bureau. Mr. Thompson is aware that seniority plays a part in voting days off and vacations, but he believes seniority can be overridden by business needs of the department. Mr. Thompson testified that his decision to terminate may have been changed if he learned that the Bureau violated seniority in granting days off. Mr. Thompson did consider the Jan. 17, 2008 Supervisor's Situation Report on the Jan. 5th and 12th absences as prior discipline. This disciplinary letter is also based in part on those absences. [Exh. 1-2.] Given the large number of no-call, no-shows and the urgency of the Bureau's minimum staffing needs during the transition, Mr. Thompson would have recommended either termination or a long suspension, even in the absence of prior discipline. Mr. Thompson reviewed Appellant's personnel and disciplinary files, received the recommendations of Mr. Keesee and Ms. Schrum to terminate, and consulted with Mr. LaCabe. Based on the number of days of unauthorized absence in a unit with minimum staffing levels that operates on a 24/7 basis, Mr. Thompson determined that Appellant violated CSR § 16-60 S, and that termination was appropriate. [Testimony of Deputy Manager Thompson.]

IV. ANALYSIS

The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator. Appellant bears the burden of proving his claims based on discrimination, harassment, retaliation, and the denial of a grievance. C.R.S. § 24-4-105(7); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

1. 16-60 S. Unauthorized absence from work

Appellant admits that he was absent without authorization on the twenty-one days in question between Jan. 5 and Jun. 28, 2008. Thus, the Agency established a violation of CSR § 16-60 S.

2. Religious discrimination

Under Title VII of the Civil Rights Act of 1964, an employer is prohibited from discriminating against any individual based on religion. 42 USCA § 2000e-2(a)(1). “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 USCA § 2000e(j), as amended 1973. The Career Service Rules permit an appellant to appeal an action “resulting in alleged discrimination . . . because of . . . religion”. CSR § 19-10 A.2.a.

The Agency admits for purposes of this appeal that Appellant is a member of the Seventh Day Adventist religion, holds a sincere religious belief that the Bible commands him not to work from sunset on Fridays to sunset on Saturdays, and that the Agency was aware of that belief. It is undisputed that Appellant was scheduled to work on twenty-one Saturdays between Jan. 5 and Jun. 28, 2008, and that Appellant was absent on those days without authorization. The Department concedes that those absences were because of Appellant’s religious beliefs. Thus, the evidence is unquestioned that Appellant’s religious practice and belief conflicted with an employment requirement. As the case was fully tried on the merits, the existence of a prima facie case and shifting burdens of proof are no longer relevant. Ansonia Board of Education v. Philbrook, 479 US 60, 68 (1986). The remaining issues raised by the evidence on this claim are as follows:

- a) Was the Agency’s failure to grant permanent Saturdays off a failure to reasonably accommodate under Title VII?

Appellant argues that the Agency should have accommodated his religious beliefs by granting him Saturdays off on a permanent basis, unless to do so would cause an undue hardship. The Agency counters that its proposed alternatives constituted reasonable accommodations, and it therefore did all that was required under Title VII. In January 2008, Capt. Sich encouraged Appellant to ask other employees to trade days off with him, and to apply for transfers. In April, the Agency proposed that Appellant 1) continue to vote for Saturdays off under the Records Bureau Shift Vote, which is based on seniority, 2) ask other employees to trade shifts with him, and 3) apply for transfers to an agency that could provide him with Saturdays off. [Exh. 3.]

In response, Appellant argues that none of those alternatives should be considered reasonable accommodations because they did not actually resolve the conflict between his religious practice and the work requirement; i.e., they did not eliminate the requirement that he must work on Saturdays. Appellant relies on a number of cases in support of this argument. [Appellant’s Legal Brief, Mar. 2, 2009.] Those cases in turn rely on a finding in

a Supreme Court decision that “[t]he provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work.” Ansonia Board of Education v. Philbrook, 479 U.S. 60, 70 (1986).

The Supreme Court’s holding in Ansonia specifically rejected the same argument made by this Appellant. The Court disapproved the 2nd Circuit Court of Appeals’ statement that “Title VII requires an employer to accept the proposal the employee prefers” unless it would cause undue hardship. Id. at 66.

We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation . . . Thus, where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end.

. . . .

Under the approach articulated by the Court of Appeals . . . the employee is given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict. This approach, we think, conflicts with both the language of the statute and the views that led to its enactment. We accordingly hold that an employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee.

Id. at 68, 69.

Only after rejecting the precise argument made by this Appellant did the Ansonia Court address the issue of whether the employer’s offer of unpaid leave was a reasonable accommodation. It concluded that unpaid leave “eliminates the conflict” between religion and work requirements by allowing an employee to observe a holy day in return for giving up compensation for that day. The Court affirmed a remand to the district court on the issue of whether the work policy, which set limits on use of personal leave for religious and other purposes, rendered the accommodation unreasonable based on the employer’s practices. In short, the Court found that unpaid leave that eliminates the conflict between observance of holy days and work rules is reasonable. It did not hold the reverse: that an accommodation is only reasonable if it eliminates that conflict.

Each federal circuit case cited by Appellant referred to the language in Ansonia regarding elimination of the conflict, but none held that an employer’s accommodation was

unreasonable unless it was the mirror image of that preferred by the employee.¹ Such a holding would ignore the word “reasonable” in the phrase “reasonable accommodation”, and would be inconsistent with Title VII, its legislative history, and cases interpreting the law. American Postal Workers v. Postmaster General, 781 F.2d 772, at 777 (9th Cir. 1986). (“The proposition advanced by the employees in the present case would have the effect of shifting the entire responsibility for accommodation to the employer, by granting an employee the unequivocal right to have every alternative assessed under the ‘undue hardship’ standard. Such a result runs contrary to the basic premise of § 701(j), i.e., mutual cooperation.”) See also Pinsker v. Joint District Number 28J of Adams and Arapahoe Counties, 735 F.2d 388 (10th Cir.1984); Sturgill v. UPS, 512 F.3d 1024, 1031 (8th Cir. 2008) (“[t]he Court in Ansonia did not hold, indeed did not suggest, that an accommodation, to be reasonable as a matter of law, *must* eliminate any religious conflict.”); Brener v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1982) (Title VII does not require an accommodation that “spares the employee any cost whatsoever”). As pointed out in the 10th Circuit’s Sturgill decision, those “few decisions in other circuits declaring that a ‘reasonable’ accommodation must eliminate any religion-work conflict . . . reflect little analysis . . . or relied solely on pre-Ansonia decisions. Sturgill, *supra*, at 1032 – 33. In sum, the majority of federal courts have found that the reasonableness of an offered accommodation turns on the facts of each case.

Therefore, it cannot be concluded that use of the phrase “eliminates the conflict” in Ansonia was intended to require an employer to accept an employee’s preferred accommodation unless it rose to the level of an undue hardship. The Court emphasized the need to analyze the workplace relationship to gauge the parties’ bilateral cooperation to reconcile the conflicting business and religious needs of the parties. It is clear therefore that reasonable accommodation and undue hardship are separate legal concepts requiring separate analyses in religious accommodation cases.

b) Were the accommodations proposed by the Agency reasonable?

The employer bears the burden to prove that it offered a reasonable

¹ Baker v. Home Depot, 445 F.3d 541, 548 (2^d Cir. 2006) (“[E]mployees are not entitled to hold out for the ‘most beneficial accommodation’”); Getz v. Penn. Dept. of Public Welfare, 802 F.2d 72, 74 (3^d Cir. 1986) (upholding finding that employer was not required to accede to employee’s request for additional overtime to cover religious holidays, and concluding that Title VII does not require employers to accommodate “in exactly to way the employee would like to be accommodated”); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1380 (6th Cir. 1994) (“To require an employer to bear more than a *de minimus* cost in order to accommodate an employee’s religious beliefs is an undue hardship”); EEOC v. Ilona of Hungary, 108 F.3d 1569, 1576, 7th Cir. 1997) (“Once the employer has offered an alternative that reasonably accommodates the employee’s religious needs, . . . the employer need not also show that other accommodations preferred by the employee would cause it undue hardship.”); Opuku-Boateng v. California, 95 F.3d 1461, 1475 (9th Cir. 1996) (“[T]he State failed to demonstrate that he could not be reasonably accommodated without undue hardship”); Morrisette-Brown v. Mobile Medical Center, 506 F.3d 1317, 1322 (11th Cir. 2007) (“[T]he inquiry ends when an employer shows that a reasonable accommodation was afforded the employee, regardless of whether that accommodation is one which the employee suggested.”)

accommodation to an employee whose religious practice conflicts with a work requirement, or that it was unable to reasonably accommodate without undue hardship. Thomas v. National Association of Letter Carriers, 225 F.3d 1149, 1156 (10th Cir. 2000).

The reasonableness of an accommodation offer is dependent on the facts of each case. Anderson v. General Dynamics Convair, Etc., 589 F.2d 397, 400 (9th Cir. 1979), cert. denied, sub nom. (“The ‘reach’ of the obligation has simply never been spelled out by Congress or the EEOC. The determination of when the ‘reasonable accommodation’ requirement has been met, and the circumstances under which a particular accommodation may cause ‘undue hardship,’ must be made in the particular factual context of each case.”) “[B]ilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.” Brener v. Diagnostic Center Hospital, 671 F.2d 141, 145-46 (5th Cir. 1982); quoted with approval in Ansonia, supra at 69. See also Lee v. ABF Freight System, Inc., 22 F.3d 1019, 1022 (10th Cir. 1994) (“The defendant’s efforts to reach a reasonable accommodation triggered Mr. Lee’s duty to cooperate”); and Brener, supra at 146 (“employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer.”) Moreover, once it is determined that the employer’s efforts to accommodate were reasonable, the inquiry is at an end. “The employer need not further show that each of the employee’s alternative accommodations would result in undue hardship.” Smith v. Pyro Mining, 827 F.2d 1081, 1086 (6th Cir. 1987). “By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation.” Ansonia, supra, at 68.

The Denver Police Department Records Bureau is charged with providing accurate information about persons and property to police officers and the Department for their use in making a variety of decisions related to law enforcement. During Appellant’s first four years of employment, he had most Saturdays off because Mr. Carlheim, a co-worker with more seniority, preferred and bid for Sundays and Mondays off. Before Appellant accepted the offer of employment, Sgt. Eggleston, the Bureau’s hiring official, confirmed Mr. Carlheim’s willingness to work most Saturdays, and Appellant’s willingness to cover the remainder as a favor to the Bureau. However, when the Bureau’s conversion to a 24/7 operation placed its business needs in conflict with Appellant’s religious practice, both parties were once again required to address the issue of religious accommodation.

The Agency claims that it offered a choice of three reasonable accommodations to Appellant: 1) the opportunity to vote for Saturdays off during the shift bid process, 2) the ability to swap shifts with other employees, and 3) assistance in locating and applying for other positions with no Saturday shifts. It argues that its ability to accommodate was limited by its transition to a 24/7 operation, its public safety function, and the seniority rights of other employees. Ms. Everham and Sgt. Dodge testified that employees with greater seniority were assigned to Saturdays based on Appellant’s consistent failure to report for his shifts. As a result, morale suffered, and the assigned employees complained that their seniority rights were being violated.

As to the first choice, Appellant argues that he continued to vote for Saturdays off, but the Agency’s action in permitting the Auto Theft employees to maintain their previous

seniority had the effect of violating Appellant's seniority. Sgt. Dodge testified to the contrary, that Appellant voted only once for Detail 3 during the transition. The Agency also responded that its decision was not based on Appellant's religion, but on important business needs related to public safety to cover its expanded work during the transition to 24/7 operation with trained employees. Appellant did not rebut this evidence, or file a grievance based on the asserted violation of seniority.

Next, Appellant argues that the Agency should have assisted him in arranging shift swaps with other employees as a part of its duty to reasonably accommodate his religious needs. Appellant testified that he attempted shift swaps with other employees in January, but that the Agency disapproved them based on their violation of the FLSA. It is undisputed that the Agency took no action to facilitate voluntary or mandatory shift swaps after January 2008. The Agency contends that this would have put undue pressure on co-workers, and given Appellant an unfair advantage, at the expense of other employees' seniority rights as exercised in their shift bids. Appellant counters that the Agency made an effort in 2004 to accommodate his needs before he agreed to accept his position, when Sgt. Eggleston spoke to Mr. Carlheim about a regular Saturday shift swap in 2004.

The Agency permitted Appellant to arrange shift trades with Mr. Carlheim, even when they indirectly affected the seniority rights of Ms. McLane, who had more seniority than Appellant, and was next in line for Saturdays off in the absence of Appellant's trades. Appellant actively and successfully sought shift swaps for four years, and the Agency's failure to assist him in arranging swaps in 2008 did not adversely affect his ability to do so. On the contrary, the evidence showed that those employees who had previously agreed to trade shifts were unavailable in 2008, either because of medical leave or a recent promotion to a supervisory position. The mere possibility that the Agency could have done more to accomplish shift swaps does not render the offered accommodation unreasonable.

In a case on similar facts, the Supreme Court found that an employer "cannot be faulted for having failed to work out a [voluntary] shift or job swap" where the union objected to granting an exception to seniority rights. The Court also noted that a swap mandated by the employer would have breached the collective bargaining agreement. TWA, Inc. v. Hardison, 432 U.S. 63, 78 (1977). This identical issue – accommodation of an employee's Sabbath or religious holiday – has been litigated often in federal court. In the overwhelming majority of those cases, an employer's encouragement of voluntary shift swaps has been found to constitute a reasonable accommodation of an employee's religious practice. Thomas v. National Association of Letter Carriers, 225 F.3d 1149 (10th Cir. 2000); Cowan v. Gilless, 81 F.3d 160 (6th Cir. 1996); United States v. City of Albuquerque, 545 F.2d 110 (10th Cir. 1976); Breech v. Alabama Power Co., 962 F.Supp. 1447 (SD Ala 1997); Brener, supra; EEOC v. Caribe Hilton Int'l., 821 F.2d 74 (DC Puerto Rico 1984); Durant v. Nynex, 101 F.Supp.2d 227 (SD NY 2000); McDonald v. McDonnell Douglas Corp., 35 BNA FEP Cas 1661 (ND Okla. 1984); Rising v. Roadway Express, Inc., 26 BNA FEP Cas 431 (DC Mass. 1981). *But see* Baker v. Home Depot, 445 F.3d 541 (2d Cir. 2006); Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994).

The Police Department has both Civil Service employees, who are covered by a collective bargaining agreement (CBA), and Career Service employees, who are not. The

CBA requires that bidding for vacations shall be determined by seniority. As a matter of fairness and uniformity, the Department also uses seniority to award rights to a number of other limited resources, such as shift bids and days off, for all its employees, including Career Service employees such as Appellant. Seniority has been judicially approved as a neutral method of distributing scarce employee resources, such as weekends off or favorable shifts. TWA v. Hardison, *supra* at 79 – 80.

Appellant argues that seniority should not be used to justify the Department's failure to accommodate his religious practice unless it is mandated by a CBA, citing TWA v. Hardison, *supra*. Appellant contends that because the Department used experience and training, in addition to seniority, to make shift assignments during the transition, this seniority system does not deserve the deference owed to a bona fide seniority system. "If the city was free to disregard seniority to meet its business needs [then] it was equally free to disregard it to meet its equally important requirement under Title VII." [Appellant's Legal Brief, p. 3.]

"A seniority system is bona fide under Title VII, and thus immune to successful challenge, if it is free of intentional discrimination whether the system was created before or after Title VII's effective date." 45A Am. Jur. 2d Job Discrimination § 613, citing American Tobacco Co. v. Patterson, 456 U.S. 63 (1982). The mere fact that the Department utilized criteria other than seniority to make shift assignments during an eight-month transition period based on needs arising from its important public safety function does not demonstrate a discriminatory intent in the creation or operation of the seniority system. The religious needs of some employees are not entitled to greater weight than the shift and job preferences of other employees. TWA v. Hardison, *supra* at 81. In addition, Hardison does not hold that a seniority system must be mandated by a CBA in order to justify the reasonableness of an offered religious accommodation. The Supreme Court referred to collective bargaining contracts and seniority systems as separate things when analyzing their effect on the duty to accommodate. Hardison, *supra* at 79.

Finally as to this issue, the Department defends its offer of transfers to another agency as a reasonable accommodation. There were twelve openings for ASA IIIs in other agencies between January and June, 2008. As a current holder of that classification, Appellant had the right to avoid re-testing for those positions, and the right to be placed on the eligibility list for each of those openings if he applied for them. Appellant's applications for two of those openings effectively acknowledged that a successful transfer to an agency with no Saturday shifts would have completely eliminated the conflict between his religious needs and the business needs of the Department.

Transfers have been held to constitute a reasonable accommodation of a Saturday Sabbath, even if, unlike here, the employee was unlikely to obtain the transfer based on others' superior seniority rights. Thomas v. National Association of Letter Carriers, *supra* at 1156.

Title VII envisions reasonable accommodation as an interactive process requiring both parties to cooperate to achieve resolution of the conflict. Here, Appellant took some

action as to each proposed accommodation. He continued to vote for Saturdays off. He attempted on at least one occasion to trade shifts with another employee, but resisted more extensive efforts in the belief that it was the Department's responsibility to arrange shift swaps. Appellant applied for two of the twelve openings for which he was pre-qualified. As a result of the continued conflict, Appellant did not report for duty on twenty-one Saturdays between January 5 and June 28, 2008, and the Department paid overtime and assigned employees with greater seniority rights to cover those absences.

Appellant testified that he suggested at the first pre-disciplinary meeting that he could be switched to Detail 1, where he would not have to work on Saturdays. The tape of that meeting reveals that Appellant suggested he would work any shift that permitted him to have off from sunset Fridays to sunset Saturdays. He also offered to work six days a week. [Exh. 17.] The Agency rejected those suggestions due to its immediate need to cover the Saturday shift with experienced employees during the transition.

I conclude that the Department offered reasonable accommodations in the form of shift votes, shift swaps and transfers, and that Appellant's partial cooperation toward resolution did not render the Department's offers unreasonable.

Since the Department offered accommodations that were reasonable, no undue hardship analysis is required. However, the Department demonstrated that granting Appellant's request for permanent Saturdays off would have led to violations of its seniority system, payment of overtime, lower morale, and understaffing of critical shifts in its public safety functions. In contrast, Appellant showed scheduling flexibility during the first four years of his employment, and assumed a more rigid position after the departmental transition, despite numerous detailed communications and meetings regarding the need for temporary flexibility in scheduling.

I conclude that the Department did not discriminate against Appellant by denying his request for Saturdays off for religious reasons. CSR § 19-10 A. 2.a. Appellant also asserts jurisdiction under Title VII, the federal Civil Rights Act, 42 USC § 2000e, and the federal Code of Regulations, 29 CFR § 1605.2, § 701(j). The Career Service Rules provide the sole jurisdictional basis for appeals heard by the hearing officers. Therefore, I must find that there is no jurisdiction to proceed herein under federal law or regulation.

3. Harassment

In order to establish harassment on the basis of religion, Appellant must present credible evidence that the workplace was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create abusive working environment." Meritor Savings Bank, FSB v. Vinson, 477 U.S 57, 65 (1986). Appellant did not present any evidence of any departmental action related to his religion other than its scheduling his work on Saturdays. As a result, Appellant presented no evidence supporting this claim.

4. Retaliation

Next, Appellant asserts that the Department retaliated against him on the basis of his religion. A prima facie case of retaliation must show 1) the employee engaged in some action opposed to discrimination, 2) he was later subjected to an adverse employment action, and 3) there is a causal link between the two. In re Felix, CSA 46-07, 1 (8/23/07).

The only evidence in support of this claim is that the Department posted a list of employees' days off on Dec. 23, 2007. Immediately thereafter, Appellant protested, and requested that he be granted Saturdays off on a permanent basis. Thus, Appellant engaged in no protected activity, such as a complaint or grievance alleging discrimination, until after he learned he was scheduled to work on Saturdays during the first quarter of 2008. Since the asserted act of retaliation preceded the protected activity, his complaint could not have caused his assignment to work on Saturdays. Therefore, the claim of retaliation was not proven.

5. Appeal of Grievance Denial

This appeal also asserts jurisdiction under CSR § 19-10 A.2.b. to challenge the denial of a grievance. In order to establish such jurisdiction, Appellant must show that he filed a grievance of an action negatively affecting his pay, benefits or status that was in violation of a rule, Charter provision, executive order or policy. Appellant did not submit a copy of a grievance or a departmental denial of any such grievance. Therefore, this claim is dismissed for lack of jurisdiction.

6. Appropriateness of Penalty

The Department found that Appellant violated CSR § 16-60(S) on twenty-one occasions over seven months by failing to report or call on his scheduled work days. Deputy Manager Melvin Thompson, the deciding official, relied upon his review of the disciplinary file, which showed that the Department attempted to accommodate Appellant's religious needs for four years, but was unable to do so during the Bureau's transition. He also relied on Appellant's statement at the pre-disciplinary meeting that he had worked Saturdays in the past, but would not report to work on any future Saturdays. Mr. Thompson concluded that termination was appropriate based on the nature and number of the attendance violations, and Appellant's decision not to work on any future Saturdays in a 24/7 operation.

Appellant argues that termination was inappropriate because he did what the Department asked him to do, and his absences were caused by the Department's failure to accommodate his religious beliefs. As I have already found that the Department offered Appellant reasonable accommodations for the business/religious conflict, I conclude that the termination was not caused by religious discrimination.

Under the Career Service Rules, the penalty imposed for violations of rules "depends on the gravity of the offense [and shall] take into consideration the employee's

past record.” In the case of a termination, the deciding official must determine that no lesser discipline would “achieve the desired behavior or performance.” CSR § 16-20.

The Department considered Appellant’s intentional absences on every scheduled Saturday for seven months serious violations of its rules, especially in light of their occurrence during their transition to a 24/7 operation in a unit important to the safety of its officers, and key to limiting the city’s liability on auto theft issues. It considered the impact on the Department during that time, including use of overtime, loss of morale, disruption of the established schedule, and scheduling other employees in disregard of their seniority. It concluded that a lesser discipline would not succeed in correcting the situation, since Appellant had decided he would not work any future Saturdays.

Mr. Thompson considered Appellant’s two January absences, and the Supervisor’s Situation Report recording those absences, as prior discipline. Since those absences are also included in this disciplinary letter, they cannot be considered prior discipline without subjecting Appellant to double discipline for a part of this same series of offenses. When asked if he would have imposed termination absent the existence of prior discipline, Mr. Thompson answered that he may have, given the number of absences and his decision not to come to work on future Saturdays.

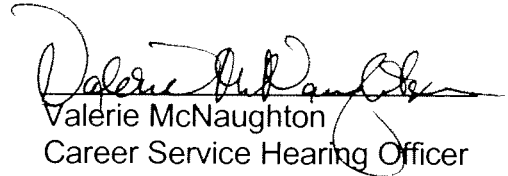
As is the case in all issues on appeal, the degree of discipline is a matter that must be determined de novo. I find that termination was within the range of appropriate discipline. After four years of accommodation to Appellant’s request for Saturdays off, during which both sides displayed flexibility, Appellant refused to accept anything except all Saturdays off at the very time the Department was short-staffed because of its transition to a 24/7 operation. Appellant missed all of his scheduled Saturdays, and declared that he would work no future Saturdays. That decision would have required the Agency to place additional scheduling burdens on its other employees, and adjust its schedule based on reasons other than its operational needs. Shortly after the disciplinary decision was made, the Bureau was fully staffed and the transition complete. The Department anticipated that Appellant’s ability to successfully vote for Saturdays off would have improved at that time based on his increased seniority in relation to the new hires, and informed Appellant of that expectation. Under the circumstances, the Agency was entitled to conclude that termination was the only appropriate discipline, despite the absence of any previous discipline.

Order

Based on the foregoing findings of fact and conclusions of law, the following orders are entered:

1. The Agency’s termination decision dated August 4, 2008 is AFFIRMED.
2. Appellant’s claims of discrimination, harassment and retaliation are dismissed.
3. Appellant’s appeal of a grievance is dismissed.

Done this 6rd day of April, 2009.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision within fifteen days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery below. CSR § 19-60, 19-62. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed by mail, hand delivery, fax OR email as follows to:

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

AND

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