

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

Appeal No. 74-10

DECISION

IN THE MATTER OF THE APPEAL OF:

JAMES NAPOLI, Appellant,

vs.

DEPARTMENT OF AVIATION,

and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, James Napoli, appeals the termination of his employment by his employer, the Denver Department of Aviation (Agency). A hearing concerning his appeal was conducted by Bruce A. Plotkin, Hearing Officer, on January 18, 2011 and March 18, 2011. Napoli was represented by his attorney-at-law, Jacob Martinez, Esq. The Agency was represented by Andrea Kershner, Assistant City Attorney. Agency exhibits #1-9 and G-2 were admitted, as were Appellant exhibits A, G -1, G -3, G -10, and G -13. The following witnesses testified for the Agency: Alejandro Hernandez; Anthony Maestas; Juan Martinez; Ray Moreno; Angelo Benavidez; Cornelio Quiel Ewen; Ron Morin; Rachel Bland; and Ken Greene. The Appellant testified on his own behalf and also presented the following witnesses: Marvin Newton; Tim Furguson; and Derrick Stubbs. At the end of Appellant's evidence, the Agency's motion to dismiss his disability discrimination claim was granted and the case was decided on the remaining agency claims. For reasons which follow, the Agency's termination of the Appellant's employment is AFFIRMED.

II. ISSUES

The following issues were presented for appeal:

- A. Whether Napoli violated any of the following Career Service Rules: 16-60 B., J., K., M., or O.;
- B. If Napoli violated any of the aforementioned Career Service Rules, whether the Agency's decision to assess the penalty of dismissal was reasonably related to the seriousness of the proven offenses pursuant to the purposes of discipline Career Service Rule 16-20;

III. FINDINGS

Napoli was employed as a painter in the Field Maintenance Section of the Agency for two years. His duties included the safe operation of heavy equipment paint striping machines. The paint machines are complex and inherently dangerous. They weigh up to 30,000 pounds when fully loaded. The paint carriage contains components which extend from the body of the vehicle, making it difficult or impossible for the driver to see co-workers at the back. For that reason, safe operation of the equipment is emphasized to Agency workers, frequent training sessions are conducted, and paint truck drivers are specifically trained not to move the paint truck during operations until verbally instructed by a paint operator at the back of the vehicle who communicates with the driver by earphone/microphone headsets. In addition, the paint nozzles spray paint at 700 pounds per square inch. In short, considerable care is required during the operation of paint vehicles.

For some time, the culture of the paint crew included pranks and horseplay; however, following incidents of minor injuries due to horseplay, and heightened safety concerns following the death of a painter who was run over by a paint vehicle, management committed to eliminating horseplay entirely from the workplace.

On July 21, 2010, Ken Greene, Deputy Manager of Maintenance for the Agency, announced at a monthly meeting, attended by Napoli, a new zero-tolerance policy against horseplay in any form. He stated any incident would be met with disciplinary action.

On August 4, 2010, the Director of Field Maintenance, Ron Morin, reiterated the zero-tolerance message in a meeting attended by Napoli. In a question and answer follow-up at the meeting, Napoli asked if the prohibition included physical contact. Morin answered "absolutely. Anything that anyone considers horseplay and is considered inappropriate in the workplace."

On August 9, 2010, the Appellant and a co-worker, Marvin Newton, were shoving each other in a playful manner. Napoli shoved Newton repeatedly into the door of a truck. Three co-workers witnessed the incident.

On August 12, 2010, at the morning meeting of the paint crew, Ray Moreno, supervisor of the paint crew, placed Alex Hernandez, a crew member, in charge of the paint crew to conduct a training exercise for a new paint truck. Moreno told the crew to follow Hernandez' instructions as if he [Moreno] were giving the orders. "Whatever he says goes. Do as asked by Alex." [Exhibit 7-69]. Napoli drove to the training site with one co-worker in the passenger seat and the rest of the crew in the "dog house," the rear cab from where the paint apparatus is operated. The vehicle is not suspended for comfortable transportation so that even minor bumps can launch occupants of the dog house off their feet and cause their heads to bump the roof. Several times on the way to the training site, Hernandez told Napoli through the headphones to slow down because occupants were being bounced around in the back. Napoli chuckled and continued driving at the same speed, over bumps and through pot holes. Martinez also told Napoli to slow down. Napoli called him a crybaby.

When they arrived at the training site, Hernandez instructed Napoli "I'm jumping out, do not move the truck," in accordance with the crew's standard procedure. Crew member Cornelio Quien Ewen, accompanied by Hernandez, went to the back left side of the truck where he adjusted the paint carriage which extends horizontally from the body of the truck. [See Exhibit 9]. Quien Ewen was positioned just in front of the paint carriage. Meanwhile, another crew member, Angelo Benavidez, went to the back right side of the truck to urinate. When Napoli, saw Benavidez urinating against the truck, he drove forward to expose Benavidez, but forgot, or did not realize, Quien Ewen was on the other side. Quien Ewen jumped back and out of the way¹ to avoid being struck by or dragged under the paint carriage. Benavidez looked up when the truck moved forward and saw Napoli looking back at him in the right-side mirror, laughing. Hernandez, thinking Benavidez approved Napoli's moving the truck, screamed at Benavidez who denied giving any such instruction to Napoli. Hernandez then yelled at Napoli "you cannot do that." Hernandez, Quien Ewen, Benavidez, and Martinez were all upset by Napoli's conduct, and all expressed reservations about working with him subsequently. Martinez stated "these are big, dangerous machines. They're not toys." "That machine weighs in excess of three tons...you've got different sharp edges out there. Now just to be playing around like that, that's not good." Martinez added "I can't stress enough how important it is that the driver be in sync with the operator in the back. He HAS to know what's going on the back, and he'd [Napoli] been in the back seat several times, so HE knows what it's like." [Martinez testimony][emphasis in the original testimony].

After the training session, Hernandez reported to Moreno that he no longer wanted to work with Napoli because he was concerned for his safety. Benavidez and Quien Ewen no longer felt comfortable working with Napoli after the incident. [Benavidez testimony; Quien Ewen testimony]. After the incident, Martinez stated "after that I did tell Ray [Moreno] that, as far as I was concerned, I just wanted to be as far away from him [Napoli] as I could be, and then, even in the break room, where we sit having a break, I usually sat across the table from him, so I just put some distance between him and myself." [Martinez testimony]. Martinez described Napoli's fast driving and moving the paint truck forward without clearance as "dangerous horseplay." *Id.*

The Agency held a pre-disciplinary meeting on September 24, 2010. Napoli made a statement in which he acknowledged being directed not to engage in horseplay. He stated he sometimes forgets about the order.

On October 5, 2010, the Agency issued its notice of dismissal, signed by Deputy Manager of Aviation, Field Maintenance Division Ken Greene. This appeal followed timely on October 13, 2010.

¹ Quien Ewen demonstrated how he moved, jumping straight back about 3 feet from an imaginary paint carriage and spinning to one side. The demonstrative evidence was unchallenged.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction: As an employee of the Career Service personnel system, Napoli may appeal discipline under the Career Service Rules. Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR § 19-10 A.

Subject matter jurisdiction is proper under CSR §19-10 A.1.a., as the direct appeal of a dismissal. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to dismiss Napoli complied with the directives of the disciplinary rule, CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

A violation under this rule occurs for performing an important duty poorly, and must be distinguished from CSR 16-60 A., neglect of duty, a violation of which is the utter failure to perform a known duty. Greene testified that horseplay constitutes careless performance of one's duties. [Greene testimony]. Unless a causal link is established between horseplay and a specified duty, the performance of which was diminished by the horseplay, then horseplay, alone, is insufficient to establish poor performance of duty. Greene did not specify what duty Napoli performed poorly as a result of his horseplay; however, there was ample evidence that Napoli was under a duty to drive the paint truck safely on August 10 and he refused to do so even after being reminded to slow down. He was also under a duty not to advance the truck until cleared to do so by Hernandez, but moved the truck to expose a colleague urinating on the back of the truck. His driving, in those situations, was neglectful of his duties to drive safely and to obey Hernandez' command not to move the truck; but his actions were not careless, as defined by this rule. Similarly, after he was ordered not to engage in horseplay on July 21, 2010, Napoli neglected the order by shoving Newton into the paint truck on August 9, but this neglect was not a careless performance of any duty. The Agency failed to prove a violation of this rule.

2. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

This rule contains two discrete violations, failure to comply with an order and failure to perform assigned work, whether or not under direct order.

The Agency claimed two incidents involving Napoli, after the announcement of zero-tolerance for horseplay, justified its finding him in

violation of this rule: an alleged shoving incident on August 9, 2010, and the training incidents of August 12, 2010, described above. Napoli claimed he did not shove Newton on August 9, and he did not violate the no-horseplay order on August 12.

With regard to the alleged shoving incident on August 9, Agency witnesses Maestas, Hernandez, and Martinez said they saw Napoli and Newton playfully shoving each other and saw Napoli shove Newton into the side of a City truck. Martinez and Hernandez wrote incident reports about what they observed. [Exhibits 2-2; 7-75; 7-76]. Newton denied the incident was horseplay. He explained he was having a heart-to-heart conversation with Napoli about personal matters and the two began to hug when they tripped over a hose and lost their balance, causing Newton to fall into the door of the nearby truck. Newton's testimony is not only irreconcilable with the observations of Maestas, Hernandez and Martinez, but is also inconsistent with Napoli's recollection of the incident. Napoli testified Newton alone tripped over the hose and fell, untouched by Napoli, into the truck door. [Compare Newton testimony, Napoli testimony]. The following additional factors are also determinative of which version of the incident is more credible. Newton and Napoli were close friends. Maestas, Hernandez and Martinez had a good relationship with Napoli until the 8/12 incident which had not yet occurred, therefore they had no reason on August 9 to collude against Napoli. Martinez, Hernandez, and Maestas wrote consistent recollections of the incident, and all three were clear the shoving was intentional, not inadvertent conduct. All three observed both men shove each other repeatedly, which is inconsistent with the testimony of both Newton and Napoli, who both remembered a single, inadvertent misstep. On balance, the recollection of the incident, as alleged by Maestas, Hernandez and Martinez, is decidedly more credible. Consequently, I find Napoli engaged in horseplay with Newton on August 9, 2010, in violation of Greene's and Morin's direct order on July 21, 2010, and in violation of Moreno's direct order on August 6, 2010.

With regard to the August 12, 2010 training day incidents, the issue is also one of credibility. In the first incident, Agency witnesses testified Napoli only laughed when he was told to slow down, and continued to drive the paint truck into pot holes and over bumps, on purpose, to throw them around in the dog house. Napoli replied he was not told to slow down, and that even if Hernandez made such an announcement through the headset, the headsets are frequently faulty and may not have been working. In the second incident, Agency witnesses alleged Napoli moved the paint truck in order to expose a co-worker urinating, and by moving the truck, endangered another co-worker. Both incidents, according to the Agency, were a violation of Hernandez' direct order regarding moving the truck, a violation of his no-horseplay order, and was a breach of earlier Agency orders against horseplay. Napoli countered that Hernandez gave him a visual sign to move forward, and therefore, he did not violate either the no-move order or the no-horseplay order.

Benavidez testified he saw Napoli laughing at him in the side mirror as Napoli moved the truck forward. This testimony remained unrebutted. Napoli's laughing is indicative of horseplay, since he was observing Benavidez urinating on the side of the truck and driving forward at the time. Napoli did not challenge that Quiel Ewen had to jump out of the way to avoid being struck or

dragged under the paint carriage, and gave no explanation why Hernandez would signal him to move forward without knowing whether it was safe to do so. Hernandez denied he gave a hand signal for Napoli to move forward and added he always gives only a verbal command through the headset. [Hernandez rebuttal testimony]. Napoli provided no reason to dispute this testimony. Benavidez testified the headsets were working that day, as he and others in the dog house were discussing their anger over Napoli's horseplay through the headsets on the way back from training. Napoli did not rebut Benavidez. Martinez testified with certainty that Napoli sped up after Hernandez told him to slow down, bouncing Hernandez' such that his head touched the ceiling of the dog house. Martinez also testified Hernandez' character is "gentle as he could be." Napoli did not rebut this testimony. Based on these considerations, it is more credible that Napoli refused Hernandez' order to slow down, and it is more credible that Hernandez gave a direct command to Napoli not to move the paint truck without his permission, and that Napoli did so. Both actions were violations of direct orders by Hernandez and were violations against no-horseplay orders by other superiors. Consequently, both actions violated CSR 16-60 J.

Napoli also alleged "horseplay" is such a vague term that it fails to provide notice what conduct is prohibited, so that a prohibition against it is unenforceable. He referred specifically to Morin's statement at the August 4, 2010 meeting in which Morin stated horseplay is "anything that anyone considers horseplay and is considered inappropriate in the workplace." While Morin's response was broad, the term itself has a commonplace understanding which encompasses physical contact, at least a modicum of impropriety, and lightheartedness. [See, e.g., definitions in MIRIAM WEBSTER and THE CONCISE OXFORD ENGLISH DICTIONARY (rough or boisterous play); MACMILLAN DICTIONARY (the rough lively play of children); or most pertinently, the Cambridge ADVANCED LEARNER'S DICTIONARY (rough, noisy behavior, especially when people push each other as a joke). Napoli claimed to have a fuzzy understanding of the terms "horseplay" and "lighthearted play" when others used the words, for example by his question as to the meaning of "horseplay" during the August 4 no-horseplay meeting, and asking his attorney to clarify "lighthearted" during hearing; yet, he was sure what "horseplay" meant when he used the terms. "I never engaged in horseplay after that [August 4 announcement]." "I know for a fact that I never engaged in horseplay." "[Moreno] would show me those boxing moves, and while he was showing it to me... I was wanting to play back with him [and] realized that there was no horseplay and I refrained from it." "Horseplay was always initiated by Moreno after the announcement." [Napoli testimony]. In light of his understanding, Napoli's vagueness claim fails.

3. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). The Agency claimed Napoli violated this rule by his breach of the following duties, derived from written work duties known as a Performance Enhancement Plan (PEP).

- a. Cooperates with others to ensure the organization's success. Acts to build mutual trust among team members. The Agency measures this PEP duty by the following standards.
1. Cooperates with others to ensure the organization's success. Acts to build mutual trust among team members.
 2. Freely and intentionally shares ideas with others by utilizing all team members and their ideas to accomplish tasks and objectives.
 3. Makes decisions based on business needs and not personal preferences.
 4. Deals with anger, frustration, and disappointment in a mature manner.
 5. Generally practices what they preach. Demonstrates a high regard for truth and accuracy.

[Exhibit 7-39, 7-40].

It was not at all clear what evidence the Agency intended as proof that Napoli failed to meet any of these standards. Also, the Agency approved Napoli's performance, as it rated his performance "successful" or "exceptional." [Exhibit 7-39, 40]. No violation of the duty to cooperate is found.

b. Treats team members with dignity and respect; maintains personal demeanor which is positive and upbeat. The Agency offered no evidence which demonstrated Napoli failed to meet this duty. It is not apparent Napoli's conduct, either in his shoving horseplay or his paint truck horseplay was a failure of dignity or respect. Moreover, his last work review rated him as "successful" and "exceptional" for the above standards measuring success for this duty. [Exhibit 7-41]. No violation is found here.

c. Demonstrates good interpersonal relations with staff, employees, public and other departmental personnel. While Napoli's behavior at the August 12 training caused some co-workers to mistrust working with him, that conduct was addressed more specifically under CSR 16-60 O., below. It is unclear what conduct the Agency believed was a violation of this duty. No violation is found.

d. Treats all people with dignity; is not disrespectful or demeaning to others; deals effectively with culturally diverse workforce; demonstrates tact and sensitivity to others [sic] perspective, personality work style, and ethnic/cultural values. It is unclear how the first clause differs from the duty stated above. In order to prove a violation of any standard under this rule, the Agency must do more than cite the standard. It must connect the dots between its proof and the standard, or at least present evidence in such a manner that the connection is readily apparent. [See, e.g. *In re Cullen*, CSB 165-04, 5 (1/18/07); *In re Encinias*, CSB 02-07, 4 (10/18/07)]. Without one or the other, the hearing officer is forced to guess, or to step into the role of prosecutor to infer connections between evidence and rules which may or may not have been intended. Neither is a proper function for the hearing officer, and usurps the agency's obligation to prove its claims. This claim remains unproven.

e. Supports a respectful workplace by demonstrating actions that are positive whether verbal and/or non-verbal. The Agency cited more specific rule violations than the broad aspirations of this standard. In addition, it is difficult to imagine what evidence would support an employee's failure to demonstrate positive actions which "support a respectful workplace." Under this standard in Napoli's PEP, and not found elsewhere in the evidence, the standards for compliance include "observation, peer feedback, and customer feedback." Certainly there was no customer feedback concerning this standard; it is unclear if Hernandez, as supervisor, considered Napoli's conduct on August 9 or August 12 disrespectful, and of whom; similarly, it was unclear if Napoli's co-workers considered his actions on August 9 or 12 disrespectful, rather than simply dangerous. Finally, language in Napoli's PEP which most closely resembles this duty is the even more-vaguely stated duty found at Exhibit 7-40, which states "Treats team members with dignity and respect; maintains personal demeanor which is positive and upbeat." Napoli was rated "exceptional" for this duty, and Newton testified without rebuttal that Napoli treated everyone with dignity and respect, citing a barbeque for the team hosted by Napoli. [Newton testimony]. No violation is found.

4. CSR 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason.

Here, as above, it is not evident what conduct the Agency believed was a violation of this rule. The evidence was devoid of facts which might establish threats were made, and neither of the incidents cited by the Agency could be reasonably construed as a fight. The open issue is whether Napoli's now-established horseplay, in driving the paint truck too fast, or exposing a co-worker who was urinating, or causing another co-worker to jump out of the way, was abusive. The Agency did not make the connection and it is not apparent such conduct, even while improper for other purposes, constitutes abuse. It is insufficient proof for an agency to offer examples of an appellant's bad conduct and present a smorgasbord of possible violations without connecting the two. Where the connection between an appellant's conduct and a rule violation was not made by the Agency, and the connection is not otherwise apparent from the evidence, no violation is found.

5. CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers, other City employees, or the public.

Four co-workers stated they would hesitate, or refuse to work with Napoli following the August 12 training incidents: Hernandez; Benavidez; Quiel Ewen; and Martinez. Napoli did not raise any significant question about their credibility, and stated only Moreno might have something against him. Newton stated "a couple guys" were "after" Napoli, but did not specify anyone. While Newton, Ferguson, and Stubbs testified they would not hesitate to work with Napoli after the August 12 incidents, their testimony is irrelevant to the effect on the four who were affected. This violation is established by a preponderance of the evidence.

The Agency's principle claims were proven. Napoli acknowledged he had notice of the Agency's new no-horseplay policy as of August 4, 2010. He engaged in horseplay on August 9, 2010, and twice more on August 12, 2010, the latter of which carried imminently grave consequences. Those acts of horseplay constituted violation of several Career Service Rules, thus discipline was warranted. The next section explores whether the Agency's choice of dismissal was warranted under the Rules.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by the disciplinary rule, CSR 16-20, to consider the severity of the offense, the employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

A. Severity of proven offenses.

Napoli complained others received lesser or no discipline for continuing to engage in horseplay after the zero-tolerance policy was announced. He cited the following examples.

1. Moreno referred to him as "Jimmy Balls." Moreno admitted he did so, but stopped as soon as the zero-tolerance policy was announced.

2. Two other employees were suspended, not terminated, for engaging in horseplay after the zero-tolerance announcement. They poured oil into the shoes of a co-worker. In another incident, a tape-wrapped latex glove that was thrown at a co-worker hit him in the face and knocked off his glasses. First, Morin refuted the timing of the incidents, testifying, without rebuttal, that both incidents occurred on February 22, 2010, well before the zero-tolerance policy announcements in July. Second, it is apparent those acts were substantially less dangerous than Napoli's actions on August 12. Third, both employees in the prior incidents took responsibility for their actions,² while Napoli continued to deny any wrongdoing.

Napoli claimed dismissal cannot be warranted where his work review ratings were overall "successful." He referred specifically to the category of teamwork and working cooperatively with others for which he was rated "exceptional" in his 2008-09 work review. [Exhibit 7-39]. First, this review covered a period prior to the announcement of zero-tolerance, so the agency rules changed, but Napoli did not. Second, the same 2008-09 work review cautioned "he tends to kid around a lot and sometimes loses focus on the job at hand..." [Exhibit 7-40].

B. Past Record

The critical factors in this case were management's repeated warnings regarding zero tolerance for horseplay, Napoli's deliberate decision to ignore them, and, after being forewarned, his continued horseplay on 8/12 which

² Morin's implementation of the Agency's zero-tolerance policy was prompted by those incidents. [Morin testimony].

endangered co-workers. Under those circumstances, his actions on 8/12 were egregious violations of Career Service Rules. A single egregious violation of the Career Service Rules, alone, justifies dismissal even in the absence of a prior disciplinary record. Consequently, the Agency was justified in not following the progressive discipline model.

C. Penalty most likely to achieve compliance.

Throughout the entire disciplinary process, and through hearing, Napoli continued to deny wrongdoing. His unwillingness to acknowledge wrongdoing makes it difficult to find he would change the behaviors that led to his dismissal. Notably, Morin testified "if he would have come in and take responsibility for his actions and said that he was wrong in doing what he did, I'm certain that I could have probably forgave him for that, or had a conversation with Mr. Greene about maybe a lesser penalty."

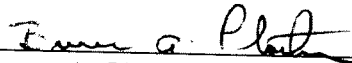
At his pre-disciplinary meeting, Napoli claimed he simply forgot about the no-horseplay directive, but this appears unlikely in light of his being told about it in at least three meetings, likely on other occasions, and particularly in light of his quip to the effect that "they'll have to fire me before I stop horse-playing" at the end of the August 4 no-horseplay meeting. While no one disputed Napoli's claim that he spoke in jest, his response affirms his acknowledgement of the directive only days before the two incidents for which he was dismissed, making it unlikely he forgot the directive.

Based upon the discussion, above, the Agency's election to dismiss Napoli was neither clearly excessive nor based upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), citing In re Delmonico, CSA 53-06, 8 (10/26/06).

VI. ORDER

The Agency's decision to dismiss Napoli from employment on October 5, 2010 is **AFFIRMED**.

DONE April 12, 2011.



Bruce A. Plotkin
Career Service Board Hearings Officer

I certify that, on April 12, 2011, I delivered a correct copy of this DECISION to the following in the manner indicated:

Mr. James Napoli, mjj122803@msn.com	(via email);
Jacob E. Martinez, Esq., jmartinez@newelldecker.com	(via email);
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