

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 74-10 A.

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JAMES NAPOLI,

Appellant/Petitioner,

vs.

DEPARTMENT OF AVIATION, and the City and County of Denver, a municipal corporation,

Agency/Respondent.

This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision on the grounds outlined below.¹

I. FACTUAL BACKGROUND

Appellant was employed for two years as a painter in the Agency's field maintenance section. For some time, the culture of the paint crew included pranks and horseplay. However, as a result of injuries and heightened safety concerns, Agency management instituted a "zero tolerance" policy against any form of horseplay in the workplace. On July 21, 2010, and August 4, 2010, Appellant was present at two staff meetings in which the new zero tolerance policy was announced. Following the August 4th meeting, Appellant's supervisor heard Appellant say, "I'm not going to quit the horseplay until they fire me."

On August 9, 2010, three co-workers witnessed Appellant and another employee shoving each other in a playful manner, followed by Appellant pushing the other employee into the door of a paint truck. On August 12th, Appellant was driving the paint truck to a training site while most of his co-workers were in the "doghouse," the rear

¹ The record on appeal includes a reply brief filed by Appellant. However, CSR 19-65 (C) does not permit the filing of a reply brief unless specifically requested by the Board.

portion of the truck where the painting apparatus is located. Mr. Hernandez, who was in charge of the crew that day and was riding in the doghouse, communicated with Appellant through headphones and told him repeatedly to slow down. Appellant continued to drive at the same speed over bumps and through potholes, which caused the crew members in the doghouse to be thrown around and some hit their heads on the truck's roof. Mr. Martinez, who was riding with Appellant in the cab, also told him to slow down. Appellant called Martinez a "crybaby."

When the crew arrived at their destination, Hernandez advised Appellant through the headphones that he was jumping out. Because the paint carriage extends out from the body of the truck, it is difficult to impossible for the driver to see co-workers behind the truck. For that reason, drivers are specifically trained to not move the paint truck during operations until verbally instructed by a paint operator at the back of the vehicle. Consistent with this safety procedure, Hernandez instructed Appellant not to move the truck.

Hernandez and another employee, Mr. Ewen, went behind the truck to adjust the paint carriage. Meanwhile, another employee, Mr. Benavidez, went to the right rear side of the truck to urinate. When Appellant saw what Benavidez was doing, he drove the truck forward to expose him. Appellant was unaware that Ewen was on the other side of the truck directly in front of the paint carriage. As the truck moved forward, Ewen had to quickly jump out of the way to avoid being struck by or dragged under the carriage. Benavidez saw Appellant looking back at him in the right-side mirror laughing.

All four coworkers were angry and upset with Appellant's conduct and at the hearing, expressed concerns, hesitation, or reservations about working with him in the future. Martinez and Benavidez both described Appellant's conduct as "dangerous horseplay."

At his pre-disciplinary meeting, Appellant stated that the allegations made against him were false. However, he admitted that he had been instructed not to engage in horseplay but claimed that he sometimes "forgets about the order." On October 5, 2010, the Agency terminated Appellant's employment.

The Hearing Officer found that Appellant's conduct on August 9 and 12, 2010, violated CSR 16-60 (J), (failing to comply with the lawful orders of an authorized supervisor), and CSR 16-60 (O) (failure to maintain satisfactory working relationships with co-workers). The Hearing Officer also determined that the Agency had failed to connect any of Appellant's alleged misconduct to three other rules: CSR 16-60 (B) (carelessness in performing duties and responsibilities); CSR 16-60 (K) (failing to meet established standards of performance), and CSR 16-60 (M) (threatening, fighting with, intimidating, or abusing City employees). Nevertheless, the Hearing Officer affirmed the Agency's termination of employment based on the three incidents that occurred on August 9 and 12, 2010.

II. FINDINGS

A. Appellate Jurisdiction

Appellant seeks Board review under CSR 19-61 (B) (an erroneous rule interpretation), CSR 19-61 (C) (policy setting precedent) and CSR 19-61 (D) (insufficient evidence). However, CSR 19-61 (B) requires more than a conclusory statement that some unidentified rule was interpreted incorrectly.² Appellant also claims that under CSR 19-61 (C) the Hearing Officer's decision creates an undesirable policy-setting precedent. Specifically, Appellant suggests that if the decision is allowed to stand, "any City employee is subject to being terminated, without warning or opportunity to come into compliance, for alleged violations they were unaware they had committed." Opening Brief, p. 27. Here, the precedent Appellant suggests is contrary to the undisputed facts of this case: Appellant received at least two actual notices about the Agency's zero tolerance policy regarding horseplay in the workplace. This is not a situation of an employee being terminated without warning.

The Board finds, however, that it has jurisdiction to review the Hearing Officer's decision under CSR 19-61 (D) (insufficient evidence).

B. Sufficiency of the Evidence

Under CSR 19-61 (D), the Board may reverse the Hearing Officer's decision only if it is not supported by the evidence in the record and is clearly erroneous. Appellant spends a good part of his Opening Brief disputing the evidence that supported the Hearing Officer's findings and conclusions. While the testimony during the hearing was undoubtedly conflicting, it is the Hearing Officer's responsibility to judge the credibility of witnesses, determine motive, bias or prejudice, and decide the weight to be given to all the evidence. In fact, the Hearing Officer's conclusion that Appellant's conduct on August 9 and 12, 2010, violated CSR 16-60 (J) was specifically based on his determination that the testimony of Appellant's co-workers was more credible than Appellant's testimony. Decision, p. 5, 6. As for CSR 16-60 (O), the testimony of the four employees who rode with Appellant on August 12th supported the Hearing Officer's conclusion that Appellant failed to maintain satisfactory working relationships with his co-workers. All four were upset with Appellant's behavior and expressed concerns, hesitation or reservations about working with him in the future.

When the evidence is conflicting, the Board may not substitute its own conclusions for those of the Hearing Officer simply because there may be evidence in

² Instead of identifying a specific career service rule and demonstrating how that rule was erroneously interpreted by the Hearing Officer, Appellant cites prior career service decisions in which the hearing officer modified the discipline imposed by the agency. These cases, however, do not establish an erroneous rule interpretation for purposes of CSR 19-61 (B). The appropriate level of discipline in a particular case must be determined by the circumstances presented in that case, not by a comparison with the level of discipline imposed on other City employees in other career service appeals.

the record supporting a different result. *See, Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008). The Board is required to review the Hearing Officer's decision under a "clearly erroneous" standard. Here, the record demonstrates more than sufficient evidence supporting the Hearing Officer's findings and conclusions and his decision is therefore not clearly erroneous.

C. Degree of Discipline

Appellant spends a great deal of time comparing the discipline he received with the discipline imposed on other Agency employees under dissimilar circumstances (i.e., putting oil in a co-worker's shoe, throwing a latex glove at a co-worker, or challenging a co-worker to a fight outside of the workplace). However, the career service philosophy with regard to discipline focuses on the employee's own conduct, not the conduct of others.³ *See, In re Misty Jones*, Appeal No. 88-09 (CSB, 9/29/10, p. 3); *In re Jared Simpleman*, Appeal No. 31-06 (CSB, 8/2/07, p. 2-3).

There are also significant drawbacks to relying on comparative discipline. First, it hinders an agency's ability to make changes in performance or conduct standards as new business needs arise. Second, it expands the scope of the career service hearing beyond the employee's own conduct, thus increasing the time, effort and expense associated with a career service appeal. Additionally, it would create a new area of appeal to the Career Service Board: whether the Hearing Officer's findings regarding the similarities or dissimilarities of other employees' conduct are supported by the evidence and not clearly erroneous. And finally, a comparative discipline approach does not focus on an important factor in assessing an appropriate level of discipline in a given case: the degree to which an employee has taken responsibility for his/her actions and demonstrated a willingness to correct undesirable behavior.

The guidelines that must be used in assessing the appropriate level of discipline in a career service appeal are found in CSR 16-20:

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

We find the Hearing Officer correctly analyzed the reasonableness of Appellant's dismissal under CSR 16-20. There is no question that Appellant's conduct on August

³ Denver City Charter § 9.4.15 provides that the discipline affirmed or imposed by the Hearing Officer on a member of the classified service (police and fire personnel) shall be consistent with the discipline received by other members of the classified service under similar circumstances. The Charter contains no such provision with regard to career service employees.

12th seriously endangered his co-workers. Contrary to Appellant's argument, the fact that Mr. Ewen was not injured is immaterial; Appellant's conduct put Mr. Ewen at substantial risk of bodily harm, in violation of the Agency's policy against engaging in horseplay, in violation of Mr. Hernandez' order not to move the truck and in violation of the Agency's safety procedures. As the Hearing Officer noted, "[a] single egregious violation of the Career Service Rules, alone, justifies dismissal even in the absence of a prior disciplinary record."⁴

Although Appellant contends that he should have received a level of discipline less than dismissal, his attitude throughout the disciplinary process demonstrates an unwillingness to acknowledge and correct the behaviors that led to his dismissal. During the hearing, Appellant denied Mr. Martinez' testimony about his driving pattern on the way to the training site and denied Mr. Benavidez' testimony that he was laughing when he pulled the truck forward. Appellant claimed that Mr. Hernandez gave him a hand signal to pull the truck forward, while Mr. Hernandez testified that he always uses the headset, not a hand signal, and denied giving Appellant any signal to move the truck forward. Appellant claimed to have a fuzzy understanding of the word "horseplay," but at the same time, testified emphatically that he did not engage in any horseplay after the August 4th meeting. At his pre-disciplinary meeting, Appellant claimed he forgot about the no-horseplay directive when that directive was given only days before he intentionally engaged in horseplay.

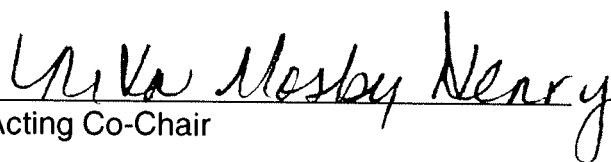
For these reasons, termination of employment was an appropriate and reasonable level of discipline.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision of April 12, 2011, is **AFFIRMED**.

SO ORDERED by the Board on August 4, 2011, and documented this
18th day of August, 2011.

BY THE BOARD:


Acting Co-Chair

Board Members Concurring: Nita Henry, Michelle Lucero and Amy Mueller.

⁴ Appellant's disciplinary history included a prior written reprimand.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **Findings and Order** on August 10, 2011, in the manner indicated below, to the following:

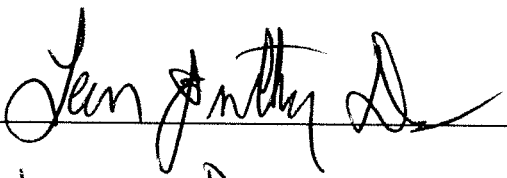
James Napoli, mjj122803@msn.com (via email)

Jacob E. Martinez, Esq., jmartinez@newelldecker.com (via email)

City Attorney's Office, dlefilng.litigation@denvergov.org (via email)

HR Services, HRServices@denvergov.org (via email)

CSA Hearing Office, CSAHearings@denvergov.org (via email)



Leon Duran