

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

Appeal No. 45-04

DECISION

IN THE MATTER OF THE APPEAL OF:

DAMIAN J. PADILLA, Appellant,

Agency: Department of Public Works, Parking Management Division, and the City and County of Denver, a municipal corporation.

The hearing in this appeal was held on August 26th and 27th, and was concluded on September 16, 2004 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Dolores Atencio, Esq. The Agency was represented by Assistant City Attorney Christopher M. A. Lujan. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision.

FINDINGS AND ANALYSIS

This is an appeal of the termination of Appellant Damian Padilla, a Parking Enforcement Supervisor with the Parking Management Division of the Department of Public Works (Agency). The Appellant was terminated on March 23, 2004 for violations of Career Service Rules (CSR), the Revised Municipal Code of the City and County of Denver (D.R.M.C), and the City Charter. The timely appeal asserts that Appellant's termination was in violation of the Career Service Authority (CSA) disciplinary rules, and constituted discrimination on the basis of his race, Hispanic. The appeal requests relief in the nature of reinstatement and back pay.

I. NATURE OF DISCIPLINE

Appellant was terminated because the appointing authority concluded that he violated the above rules based upon the following actions:

1. On January 22, 2004, Appellant used his influence as a supervisor to have a vehicle immobilization boot to be removed from his personal vehicle,
2. On February 11, 2004, Appellant had his name and address removed from his parking history before it was furnished to a Vehicle Boot Investigator (VBI) who requested it,
3. On July 3rd and 9th, 2003, Appellant had two of his own parking tickets submitted for cancellation to the parking magistrate, and

4. On July 23, 2003, Appellant asked a VBI to refrain from ticketing Appellant's vehicle.

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

(1) Gross negligence or willful neglect of duty,

(3) Dishonesty, including but not limited to: altering or falsifying official records or examinations; . . . using official position or authority for personal profit or advantage; or any other act of dishonesty not specifically listed in this paragraph,

(8) Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason . . .

(17) Conduct which violates the Charter of the City and County of Denver or the Revised Municipal Code; specifically, D.R.M.C. § 2-51, requiring employees to conduct themselves within the spirit and letter of the ethics code, and D.R.M.C. § 2-61, prohibiting an employee from taking official action on any matter in which he has a substantial employment, contractual or financial interest, and

(20) Other unspecified conduct; specifically, City Charter § C5.25-2 requiring dismissal to be made only for just cause, and CSR § 15-10 mandating that employee conduct shall at all times reflect credit on the Career Service.

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

(6) Carelessness in the performance of his duties, and

(11) Other unspecified conduct.

At the pre-disciplinary meeting held on March 10, 2004, Appellant participated with representative Lena Russell, and provided written and verbal statements in response to the allegations. [Exh. 4.] On March 23, 2004, Appellant was mailed a notice of dismissal. This appeal was filed on April 1, 2004.

Agency Exhibits 1 – 16, 25 – 31 and 35 – 39 and Appellant's Exhibits A – B, E – I, K and N were admitted into evidence without objection or by stipulation. Agency Exhibits 17 – 24 and 34 and Appellant's Exhibits D, J and T were admitted over objection. Appellant's Exhibit S was excluded after objection.

II. ISSUES

The issues presented for decision are (1) whether Appellant committed the conduct alleged by the Agency, (2) whether that conduct violated the cited Career Service Rules, (3) whether the penalty of termination complies with CSR § 16-10, and (4) whether the termination discriminated against Appellant on the basis of his race, Hispanic.

III. FINDINGS OF FACT

This decision is based upon the following findings of fact. Appellant was a Parking Enforcement Supervisor from April 1999 to the date of his termination in March 2004. He worked for the Agency a total of about eight years. His job duties required him to supervise Vehicle Control Agents (VCAs), Vehicle Boot Inspectors (VBIs), dispatchers, and some clerical employees in the Parking Enforcement Division of the Public Works Department. VCAs issue tickets for parking violations, including meter violations. The tickets are official documents of the municipal court. VBIs immobilize vehicles that have acquired three or more unpaid parking tickets by locking a device called a boot onto one of the vehicle's tires.

As a Parking Management employee, Appellant was subject to the same parking rules as non-employees. Parking Management policy permits employees to use the same procedures as any other citizen to contest a parking citation if they obtain prior approval from the division director before requesting dismissal of a ticket on the basis of official city business. [Exh. 31, p. 2.] Appellant acknowledged receipt of that policy on May 8, 1995. [Exh. 31, p. 3.] Division policy prohibits even a single instance of pressuring an employee to cancel a ticket or otherwise "trying to defeat the system", on pain of "strong disciplinary action, which could include immediate termination." Appellant acknowledged receipt of that policy on Nov. 21, 2000. [Exhs. 30 and F.] At all times relevant to this appeal, Appellant was on notice of the policies governing personal parking violations, and the seriousness with which the Division regarded any such violation. Appellant owed \$200 in parking tickets on Feb. 11, 2004, and was eligible to be booted. The tickets were accumulated from July 3, 2003 to Sept. 11, 2003. [Stipulation dated Aug. 19, 2004; Exhs. 15 and 16.]

On July 3, 2003, at the start of VBI Darnell Brooks' shift, Appellant asked Mr. Brooks to "watch out for" his vehicle. Mr. Brooks interpreted that as a request not to write a ticket on Appellant's car if he found it to be parked illegally. Mr. Brooks forgot about the request, and wrote a citation on Appellant's automobile at 3:25 that afternoon. After realizing that it was Appellant's vehicle, Mr. Brooks took the first step toward canceling the ticket by writing "cancel, meter broke" on the ticket, although he knew the statement was not true. He stated that he attempted to cancel the ticket because Appellant, a supervisor and co-worker, asked him to watch his car, and because he did not want Appellant to think that he had intentionally written the ticket in spite of Appellant's earlier request of him to watch out for his car. Mr. Brooks testified that his

evaluation can be adversely affected if he submits too many parking citations for cancellation.

Later that same day, Appellant initialed and dated the request for cancellation written on the ticket. [Exh. 11.] A supervisor's initials on a ticket submitted for cancellation indicates that he has reviewed and approved the request for cancellation. Lindsey Strudwick testified that Agency procedure requires a supervisor to read the entire printed ticket before approving it, but Appellant and Phil Ortega stated at hearing that some supervisors read only the handwritten reasons for cancellation if there are many cancellations to approve that day. Appellant testified that he initialed both tickets without realizing they were written on his personal vehicle. The city parking magistrate later denied the request to cancel the ticket by writing the word "valid" next to the citation number. [Exh. 14.] The citation was entered into Appellant's Parking History Report. [Exh. 15.] It remained unpaid until April or May 2004, after Appellant's termination. [Testimony of Appellant.]

On July 9, 2003, Appellant asked Mr. Brooks if he could park on his beat until Appellant got a chance to move his car. When Appellant later moved his car, he found a ticket on it. He approached Mr. Brooks with a ticket in his hand, and said, "[y]ou got me." Mr. Brooks offered to cancel it and told Appellant to leave it in his box. Appellant wrote that he "really didn't think anything of it at the time . . . Lawrence [Garcia] tells me all the time if I need to park on his beat to just let him know. These types of occurrences are a common practice within the teams." [Exh. 4, p. 2.] Mr. Brooks later found the ticket in his office mailbox in a manila envelope. [Exh. 10.] Mr. Brooks concluded from its presence there that Appellant wanted him to submit it for cancellation. Mr. Brooks testified that he didn't want a "situation", so he wrote "cancel, keys locked" on the citation in order to "get rid of the ticket." Appellant later initialed and dated this ticket as approved for cancellation, again, he stated, without realizing the ticket was his. It was submitted to the parking magistrate for cancellation. [Exh. 12.] The magistrate found the ticket valid, and it was added to Appellant's parking record, where it remained unpaid until after Appellant's termination. [Exhs. 14 and 15; and cross-examination of Appellant.]

Appellant testified that VCA Lawrence Garcia offered several times to make sure Appellant didn't get a ticket if he ever "needed to park on his beat." Appellant understood that Mr. Garcia was thereby offering to forego writing a ticket on Appellant's car even if it was parked illegally. Mr. Garcia testified he had turned down five or six previous requests by Appellant to park on his beat, but that after Appellant loaned him \$3,800 in April 2003, he felt intimidated and pressured to comply with his request. [Exhs. 8, E, H, and I; and testimony of Lawrence Garcia.] On July 23, 2003, Appellant contacted Mr. Garcia on his private radio number and asked him to watch out for his car, which Appellant told him was parked at 1413 Tremont Street. Mr. Garcia forgot and wrote a ticket on Appellant's car later that day. Mr. Garcia then wrote a note on the ticket that was untrue, and submitted the ticket for cancellation without informing Appellant about the ticket. [Exh. 9.] The ticket was deemed valid by the parking

magistrate, and was added to Appellant's parking record. [Exhs. 14, 15.] It too remained unpaid until after Appellant's termination.

Appellant was Mr. Garcia's lead worker for six months in 1998 – 1999. They became friends in 1999, and socialized during and after work. Mr. Garcia borrowed a total of \$6,800 from Appellant during their friendship. He paid all amounts due under the April loan agreement by Sept. 2003. Shortly thereafter, Mr. Garcia agreed to pay Appellant an additional \$250 if Appellant would sign a note showing Mr. Garcia's mortgage company the source of the funds he had used for a down payment. In Feb. 2004, Appellant told Mr. Garcia at a Superbowl party that his car was on the boot list, and that he had no money to pay his overdue parking tickets. In response to that statement, Mr. Garcia repaid Appellant the \$250 in cash in order to allow Appellant to pay his parking tickets. [Testimony of Lawrence Garcia.]

Appellant admitted that he asked both Mr. Brooks and Mr. Garcia if he could park on their beats, and that this was a common practice. Appellant never reported this practice to management, despite his position of greater responsibility as a parking enforcement supervisor. Appellant applied the pressure of his supervisory authority to subordinate employees in an effort to defeat the system of parking enforcement. On July 3, 2003, Appellant requested Mr. Brooks to watch for his vehicle. On July 9th, Appellant placed his ticket in Mr. Brooks' inbox for cancellation. As a result of Appellant's actions, Mr. Brooks felt compelled to cancel two of Appellant's tickets in order to avoid a "situation" with Appellant. On July 23, 2004, Appellant called Mr. Garcia on his private radio frequency and asked him to watch for his car. That pressure caused Mr. Garcia to overcome his previous refusal to allow Appellant to park illegally without legal consequences. In succumbing to Appellant's pressure, both Mr. Brooks and Mr. Garcia took two significant risks with their employment: a lower evaluation and disciplinary action. While the first did not occur, the second one did. Both VCAs were issued written reprimands for their parts in canceling Appellant's three July tickets.

On January 22, 2004, Boot Dispatcher Francine Garcia received a call from VBI Riene Candelaria, who requested a ticket number and other plate numbers used by the same driver ("combines") for a boot-eligible car she had located in downtown Denver. When the license plate appeared on Ms. Garcia's screen, she noticed that the owner of the car was Appellant, who was her supervisor. Ms. Garcia asked Ms. Candelaria to wait. Ms. Garcia then called Appellant into the dispatch room and told him that his car was in the process of being booted. Appellant told her he didn't know he had that many tickets, and that he needed his car to pick up his children. He added that he did not have the money to pay for its release. Ms. Garcia told him that it wouldn't be booted if she told the booter that it was set for court. Appellant agreed with Ms. Garcia's decision to tell Ms. Candelaria that it was being contested in court. Ms. Garcia and Appellant both knew that none of Appellant's citations had in fact been contested. Ms. Garcia then called Ms. Candelaria within Appellant's hearing, and told her that it was not a good boot, because it was set for court. Appellant did not correct this untrue statement, and accepted the resulting personal financial benefit. Appellant never set the tickets for hearing. [Exhs. 4, 7.]

Ms. Garcia testified that the letters "HRG" on the computer screen indicate that a ticket is set for hearing before the parking magistrate. A dispatcher must instruct a booter not to boot a vehicle if a ticket is set for hearing. Ms. Garcia admitted that the screen she pulled up on Appellant on January 11th did not indicate that any of his tickets were then set before the magistrate.

Ms. Garcia also testified that Anderson Moore gave her authority to instruct a booter not to boot a car if emergency circumstances existed, such as the driver's need to go to the hospital or a funeral, or the presence of children in the car. She stated that this authority did not exist if a car had already been booted. Ms. Garcia stated that she made this "judgment call" on January 22nd because Ms. Candelaria did not tell her she had already booted the car. However, Ms. Garcia instructed Ms. Candelaria not to boot Appellant's car because it was set for court, not because of an emergency. Therefore, whether or not the car was booted before Ms. Candelaria spoke with dispatch is irrelevant to the issue of whether Appellant's action was improper under the Career Service Rules.

Ms. Garcia testified that she did not feel pressured to make this decision by Appellant's status as her supervisor, and that she would have done the same thing for any citizen. She was suspended for five days for her part in releasing the boot from Appellant's vehicle. A month after the event, Ms. Garcia wrote a statement about the incident on the advice of her attorney. [Exh. 7.] Ms. Garcia was suspended for five days for her actions.

Vehicle Boot Investigator Riene Candelaria testified that on January 22, 2004, she located a boot-eligible car at 1295 Welton Street. She followed the usual procedure by booting the vehicle first, and then calling Boot Dispatcher Francine Garcia to get a ticket number and a list of combines. Dispatcher and former VBI Tamela Sims confirmed that the usual procedure for booters is first to boot the vehicle, and then to call dispatch. On that day, Ms. Garcia asked Ms. Candelaria to stand by. After ten minutes, Ms. Garcia called her back and instructed her to remove the boot because the matter was set for hearing on the following week. Ms. Candelaria thought this was odd. She told Ms. Garcia that the car was already booted, and asked her if she wanted her to release it. Ms. Garcia responded that there was a computer problem. Ms. Candelaria removed the boot as instructed, and recorded the incident on her daily immobilization log. At the end of the day, she rewrote her log in order to comply with the standards for legibility upon which her reports were measured. Exhibit 6 is a complete and accurate copy of her rewritten log. The log entry states, "4:12 - 4:27, I booted 662IXA (one of Appellant's license numbers), but there must have been a computer glitch because dispatch asked me to remove boot because this plate is set for hearing." [Exh. 6.]

Two weeks later, she entered the license plate in her computer to see whether the tickets had been paid. She became suspicious when it showed that the same amount was still due despite the passage of the court date. In her experience, there is an uneven amount due when a party has appeared in court, because the amount

usually includes court costs. Ms. Candelaria then called dispatch twice to get the address of the vehicle owner, but received no response. On Feb. 11th, she learned from the parking magistrate that the vehicle belonged to Appellant. Ms. Candelaria had just attended an Agency-sponsored ethics seminar in January. She decided that she now possessed information of a possible conflict of interest by a parking supervisor, and that she was obligated to report the information to her supervisors. She called Director of Parking Management Anderson Moore from her home that night, and relayed the information to him. He asked her to give a written statement the next day. [Exh. 5; testimony of Riene Candelaria.]

On Feb. 12, 2004, Mr. Moore commenced an investigation into the allegation of ticket-fixing and abuse of supervisory authority, and placed both Appellant and Ms. Garcia on investigatory leave. [Exh. 25.] A week later, three news organizations published stories about the investigation, and highlighted the resignation two years ago of the division's previous director over allegations of fixing five of his own parking citations. [Exhs. 35 – 38.] Mr. Moore participated in interviews with Appellant, Ms. Candelaria, Ms. Garcia and Messrs. Brooks and Garcia, and considered their statements as well as relevant Agency documents and reports such as Exhibit 13, departmental policies and procedures, the Career Service Rules and the city Code of Ethics. The investigation concluded with a notice of contemplated discipline on March 2, 2004. [Exh. 3.]

At the pre-disciplinary meeting held on March 10, 2004, Appellant presented a written statement. Appellant acknowledged that he had asked Mr. Brooks not to ticket his vehicle, and that he knew Mr. Brooks intended to "cancel it and leave it in [my] box." He also admitted that he knew Ms. Candelaria lied to a booter in order to prevent his car from being booted. Appellant apologized for his bad judgment, but argued that others in the department had made similarly poor decisions and they should also be punished. [Exh. 4.] Appellant offered to resolve the problem by keeping his car out of Denver until the overdue fines were paid. Appellant's statements and demeanor did not indicate an understanding that what he had done was a serious violation of the ethics and departmental rules. [Testimony of Anderson Moore.]

Before making the disciplinary decision, Agency appointing authority Anderson Moore considered Appellant's absence of prior disciplinary action as well as his work record, which contained two outstanding and one exceeds expectations ratings over the past three years. [Exh. A.] Mr. Moore regarded Appellant as a talented employee who had given much to the Agency. Mr. Moore requested and was granted an extension of the investigatory leave in order to complete a thorough investigation and to assure himself that the decision he reached was fair to the Appellant and the Agency.

Mr. Moore concluded that Appellant used his position as a supervisor in Parking Management to request that subordinates assist him in avoiding enforcement of the law by making false statements. Appellant thereby placed his personal interest above the interest of the Agency. Mr. Moore found that Appellant failed to correct the problem by paying the fines, and that he attempted to excuse his actions by citing others'

misconduct that he had himself failed to report, in violation of his obligation as a supervisor. The seriousness of the course of misconduct was found to outweigh the impact on the individual of terminating a long-time city employee. Mr. Moore ultimately determined that the appropriate penalty was termination. Mr. Moore considered and rejected lesser discipline because of Appellant's lack of remorse, as shown by his statement as well as his failure to take any steps to correct the problem. He also considered that a lesser discipline could not restore the trust that the Agency and subordinate employees must have in a supervisor responsible for enforcement of the parking laws. Finally, he considered that Appellant's influence as a former supervisor would continue if he were demoted to a VCA position, and that influence would adversely affect operations among the other VCAs, several of whom were adversely affected by his actions.

At the prehearing conference held on July 29, 2004, the Agency representative indicated that the Agency did not intend to rely upon the incident of Feb. 11, 2004 to support this discipline. The Agency did not present any evidence as to that incident. Therefore, the events of Feb. 11th are not considered in this decision in support of the Agency action.

IV. ANALYSIS

A. Rules Violations

In an appeal of disciplinary action, the Agency bears the burden to establish by a preponderance of the evidence that it had just cause for the action taken. GUSTERN, Appeal No. 128-02. The Agency must prove that the misconduct occurred, and that it was a violation of the Career Service Rules. Here, the Agency asserts that Appellant's conduct violated the following rules:

1. CSR § 16-50 A. (1) Gross negligence or willful neglect of duty

"Negligence" is defined as the failure to use reasonable care, or the failure to act in a reasonably prudent manner given the circumstances. See e.g. LaVine v. Clear Creek Skiing Corp., 557 F. 2d 730 (10th Cir. 1977). "Gross negligence" is defined as "more than ordinary inadvertence or inattention," Prosser and Keeton on the Law of Torts, §34 at 212 (5th ed. 1984), "an indifference to present legal duty and . . . utter forgetfulness of legal obligations so far as other persons may be affected." Altman v. Aronson, 121 N.E. 505; 1919 Mass. LEXIS 741.

The Agency established by a preponderance of the evidence that Appellant was grossly negligent in initialing two tickets for cancellation on July 3rd and 9th of 2003 under the circumstances present. Those circumstances included his knowledge of the ethics code and departmental policy, that Mr. Brooks could be disciplined or suffer a lower evaluation if he did what Appellant asked, Appellant's understanding of the Agency's need to restore public trust after a previous ticket-fixing scandal, his knowledge that he was parked illegally on those days, and that he had asked Mr. Brooks not to ticket his car on both days. Appellant thus consciously disregarded the

high probability that the tickets were his own, and the serious consequences of his indifference to the facts. At hearing, he excused his actions by stating that it was his practice not to read them if there were many tickets submitted to him for cancellation on a particular day. However, he did not support that rationale by any testimony that his time did not permit reading each ticket on the dates in question. It is concluded that Appellant acted with gross negligence in failing to determine whether the tickets submitted for cancellation on July 3rd and 9th were written on his own illegally parked vehicle.

2. CSR § 16-50 A. (3) Dishonesty

“Dishonesty” within the meaning of this rule includes “altering or falsifying official records . . . using official position or authority for personal profit or advantage . . . or any other act of dishonesty not specifically listed in this paragraph.”

The Agency proved by a preponderance of the evidence that Appellant used his official position and authority by allowing Francine Garcia to make a false statement on Jan. 22, 2004 in order to obtain a personal and financial advantage; i.e., avoiding a boot on his vehicle and the expense of having it released. The evidence is clear that Ms. Garcia told Ms. Candelaria that the matter was set for court, with knowledge that the statement was untrue, in order to perform a favor for her supervisor. Appellant accepted the favor with knowledge of the falsity of the statement.

Appellant also abused his authority by requesting that subordinate employees Brooks and Garcia refrain from ticketing him on July 3rd, 9th and 23rd in 2003. Appellant knew Mr. Brooks would comply, and thereby breach departmental policy, because “it’s what we did”; i.e., it was in keeping with a practice of helping each other avoid parking citations, according to Appellant. Appellant had reason to know that Mr. Garcia would comply, despite his previous refusals of five or six similar requests by Appellant, because Appellant had recently loaned him a substantial sum of money and thus obtained a claim of personal loyalty from Mr. Garcia. A supervisor’s authority over a subordinate employee’s evaluations and livelihood establishes easily understandable pressure on that employee to grant a supervisor’s request for a favor. CSR § 16-50 A. (3) acknowledges that innate pressure. Mr. Garcia was under even more obvious and compelling pressure to grant the requested favor: his status as a debtor to Appellant. Appellant knowingly took advantage of this pressure on Mr. Garcia in making his request. Both VCAs acted in contravention of their own self-interest in granting the favor to a supervisor, and as a result suffered adverse employment action. Appellant thereby abused his authority and position in order to obtain a personal profit and advantage, in violation of subsection (3).

3. CSR § 16-50 A. (8) Intimidation

The evidence as a whole established by a preponderance of the evidence that Appellant intimidated Lawrence Garcia by repeatedly pressuring him to violate the policy prohibiting efforts to defeat the parking enforcement system. Appellant used the

loyalty that would be the ordinary byproduct of a substantial financial loan to increase that pressure. Appellant admitted that he considered it an accepted practice to ask VCAs not to ticket his vehicle if the meter ran out before he moved it while at work, despite his knowledge of the ethics code and policy barring any such practice. [Exhs. 28, 30.] Mr. Garcia stated that he "felt pressured and intimidated to wrongfully dismiss a valid citation on [Appellant's] vehicle." [Exh. 8.] His testimony was credible and consistent with this statement.

Appellant also intimidated VCA Brooks by calling him on his personal radio signal to ask him to watch for his car until he could move it. When Appellant nonetheless received a ticket, Appellant unmistakably signaled his wishes to have it cancelled by waving the ticket at Mr. Brooks with the words, "[y]ou got me", and then permitting Mr. Brooks to submit it for cancellation. It was clear from Appellant's statement that Mr. Brooks' response, that he would cancel it, was the response Appellant expected. "I really didn't think anything of it . . . [t]hese types of occurrences are a common practice within the teams." [Exh. 4.] Mr. Brooks' reaction to the pressure was to immediately do what was expected, because he didn't want a "situation" that may arise if he failed to do what his supervisor requested. The evidence indicates that Appellant engaged in intimidation of his subordinate employees in order to gain a personal advantage, in violation of CSR § 16-50 A. (8)

4. CSR § 16-50 A. (17) Municipal Code Violation

Denver's Code of Ethics requires that employees comply with both the letter and spirit of the ethics code and strive to avoid situations which create impropriety or the appearance of impropriety. D.R.M.C. § 2-51. "[An] employee shall not take direct official action on a matter before the city if he . . . has any substantial . . . financial interest in that matter. A substantial interest shall be deemed to exist if (1) he . . . is the other party in the matter." CSR § 2-61(a).

Appellant initialed two of his own parking citations in order to process them for cancellation. On July 3, 2004, he asked the Vehicle Control Agent not to ticket him if he was parked illegally. On July 9th, Appellant knew that he had received the ticket, and consented to the VCA's offer to cancel the ticket. [Exh. 4, p. 2.] Appellant's gross negligence in taking direct official action on a city matter to which he is a party constituted a breach of the code of ethics, and therefore a violation of CSR § 16-50 A. (17).

5. CSR § 16-50 A. (20) Other Misconduct

The Agency also cites CSR § 15-10 in support of its dismissal action, which states in relevant part, "[t]he conduct of every employee during work hours or at any time while representing the agency, department, or City shall reflect credit on Career Service and the City and County of Denver." The Agency's evidence amply supports a finding that Appellant's misuse of his position to avoid enforcement of the parking laws attracted unfavorable publicity to the Agency and the City, and failed to reflect credit on

Career Service and the City and County of Denver, in violation of CSR § 15-10, and thus violated CSR § 16-50 A. (20).

6. CSR § 16-51 A. (6) Carelessness

The Agency proved that the actions taken by Appellant in July 2003 and January 2004 were taken intentionally or with reckless disregard for the consequences of those acts. Since I find that none of the actions were taken as a result of a failure to employ reasonable care, it is determined that the Agency did not establish that Appellant violated CSR 16-51 A. (6).

7. CSR § 16-51 A. (11) Other misconduct

Since I have found specific violations of the Career Service Rules, it is not necessary to rule on whether Appellant also violated CSR 16-51 A. (11).

B. PENALTY

Appellant next contends that the Agency failed to comply with Career Service Rules governing the imposition of discipline, including a requirement to consider the complete absence of any other discipline and a failure to impose intermediate, or progressive, discipline. CSR §§ 16-10 and 16-20.

The Career Service Rules state that:

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

The disciplinary action taken must be consistent with this rule . . .

CSR § 16-10, emphasis added.

"Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed." CSR § 16-20 (2).

Appellant claims that termination is inappropriate based upon his lack of previous discipline. CSR § 16-10 does not render a clean employment record an absolute barrier to the imposition of discipline. All that is required is that an appointing authority take the

past record into consideration in its determination of what discipline is appropriate. The Agency satisfied this requirement when Mr. Moore considered Appellant's absence of past discipline as a part of his determination of the discipline to be imposed. [Testimony of Anderson Moore.]

The Agency is required under Rule 16 to determine the level of discipline in accordance with the gravity of the misconduct, taking into consideration an employee's past disciplinary history. Here, it is clear from the evidence as a whole that the Agency conducted a thorough, six-week investigation into the allegations, and fully considered both the information presented by Appellant and his absence of past discipline. The appointing authority also considered the discipline imposed on three other employees who had a part in Appellant's misconduct. Since Appellant as their supervisor had knowledge of Ms. Garcia's improper actions, requested personal favors from Messrs. Brooks and Garcia in violation of policy, and accepted the benefit of those actions, he was determined by the Agency to bear the greatest responsibility.

After appointing authority Anderson Moore determined the facts, he evaluated what penalty was appropriate under the circumstances. Mr. Moore observed that, while Appellant expressed concern about the punishment to be imposed, he did not demonstrate an understanding of the seriousness of the infractions by either his behavior, apology, or by paying or offering to pay the still-outstanding parking tickets. Mr. Moore testified that Appellant's demeanor at the pre-disciplinary meeting did not indicate remorse for his own actions, but rather concentrated on blaming and implicating others. Mr. Moore further offered that if Appellant had paid the tickets and apologized for his actions, even at that late date, "the results would have been completely different." Mr. Moore considered other, less drastic, discipline, such as a suspension or demotion, but ultimately rejected them because they would not have been in proportion to the seriousness of the offenses committed or calculated to correct the situation or achieve the desired performance, consistent with CSR § 16-10.

The evidence supports the action of the appointing authority. As of late January 2004, Appellant knew that his vehicle was boot-eligible, and had the money to pay off all of the overdue fines from money repaid by Lawrence Garcia. Despite these facts, Appellant still declined to either set his tickets for hearing or pay them until some time after his termination. Appellant continued to deny the full extent of his misconduct and to deflect blame by accusing others of similar infractions, none of which were proven. Finally, and most seriously, Appellant admitted in his statement and at hearing that his actions were in accordance with a general practice of avoiding enforcement of the parking laws. Appellant thereby violated policy, the ethics code, and his personal responsibility as a supervisor to enforce the parking laws and report all violations of those laws. The Agency considered each of these facts in its decision to bypass progressive discipline and to impose the penalty of termination.

I find that the Agency took into consideration Appellant's lack of a past disciplinary history, but found that that factor was outweighed by the seriousness of the misconduct, in accordance with the requirements of CSR § 16-10. I also find that

termination was reasonably related to the seriousness of the offense as a penalty within the range of reasonable alternatives available to a reasonable, prudent agency administrator under the circumstances present herein.

C. DISCRIMINATION CLAIM

Appellant has alleged that his termination was motivated by discrimination on the basis of his race, Hispanic, in violation of Career Service Board policy. CSR §§ 15-101; 19-10 c). Appellant bears the burden of proof as to this claim. Vialpando, Appeal No. 100-03.

Cases decided under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 et. seq. are instructive in interpreting whether there exists a violation of the Career Service rule prohibiting discrimination. The ultimate question in any employment discrimination case is whether an employee was subjected to intentional discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 153 (2000). To establish a prima facie case of race discrimination under a theory of disparate discipline, Appellant must demonstrate that:

1. he is a member of the protected class,
2. he was otherwise qualified for the position of Supervisor of Parking Management;
3. he was discharged by the Agency, and
4. there is reason to believe the discharge was motivated by race discrimination; here, that other similarly situated employees outside the protected class were not discharged for similar conduct, or that there is direct evidence of discriminatory intent.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804; Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159.

Once each element of a prima facie case is supported by evidence, the Agency is then afforded an opportunity to produce evidence that the discharge was imposed for legitimate nondiscriminatory reasons. As the party with the burden of proof and persuasion on the ultimate issue of discrimination, Appellant is then given an "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [Agency] were not its true reasons, but were a pretext for discrimination." McDonnell Douglas, 411 U.S. at 253.

The Agency concedes that Appellant is Hispanic, and thus belongs to a group protected by CSR § 15-100 et. seq. The evidence that Appellant was performing the functions of the position of Supervisor of Parking Enforcement for about eight years in a more than satisfactory manner supports a finding that Appellant was qualified for his position. [Exh. A; Stipulation 4 dated Aug. 19, 2004.] The parties have stipulated that

Appellant was terminated on March 23, 2004, which establishes that Appellant was subjected to adverse employment action under the third element of the prima facie case.

1. Disparate Discipline Theory

In support of the last element of his prima facie case, Appellant first presented evidence that his two African American managers, Lindsey Strudwick and Anderson Moore, gave more favorable treatment to Phil Lewis, an African American employee, and Darrill Delimont, a Caucasian employee. Appellant also asserted that Mr. Strudwick had improperly cancelled parking tickets without suffering discipline.

Mr. Garcia testified that in August 2002 he became concerned that VCA Phil Lewis was canceling his own parking tickets. Mr. Garcia asked Appellant to search Mr. Lewis' parking records to determine if his concerns were well founded. He did so because he was not sure he could approach newly appointed managers Moore and Strudwick just after the ticket-fixing scandal that led to the resignation of the previous Director of Parking Management. Appellant informed Mr. Garcia that the records showed that two of Mr. Lewis' tickets had been permanently suspended, as indicated by the initials PRM on the parking history record. The parking enforcement court has the authority to enter an order permanently suspending a parking citation. Mr. Garcia did not pursue the matter further.

Appellant also offered the testimony of Dispatcher Francine Garcia that in December 2002, supervisor Delimont had ordered her to release a boot on Bryan O'Neill's car. [Exh. J.] Ms. Garcia testified that she did not see any reason on the record for the release of the boot, such as payment of the fines. Dispatchers lack the authority to order the release of a boot. [Testimony of Francine Garcia.] Appellant proffered no evidence that it was a violation of policy for a supervisor to order the release of a boot under all circumstances. Therefore, the evidence is not clear that issuance of the order by Mr. Delimont constituted a violation of policy similar to those committed by Appellant.

In addition, the action of Mr. Delimont is not similar in nature or severity to the actions of Appellant. It cannot be assumed on the evidence presented that the order to remove the boot from Mr. O'Neill's vehicle was motivated by a desire to gain a personal advantage for Mr. Delimont, or that it was anything more than an isolated incident. In contrast, Appellant repeatedly acted to intimidate subordinate employees or to take advantage of his position in order to defeat the parking enforcement system, in violation of Agency policy. [Exh. 30.] Ms. Garcia never brought the incident to the attention of management so that a timely investigation could be done. Some time after this appeal was filed in April 2004, Appellant raised the 2002 release order to Mr. Moore as proof that his termination was unfair. A full investigation into the incident had not been done at the time of the hearing because of Mr. Delimont's unavailability due to the death of his wife.

Appellant also argued that two actions by Mr. Strudwick supported his claim of disparate discipline. First, it is alleged that Mr. Strudwick cancelled the ticket of an African American restaurant owner issued on January 23, 2003. [Exh. T.] On that date, VCA Lonnie Lujan wrote a parking citation at 9 Broadway, in front of a barbeque restaurant at which the VCA Christmas party had been held in December 2002. Mr. Lujan had attended that event, as had Messrs. Moore and Strudwick. The owner of the restaurant, who had introduced himself to Mr. Moore at the Christmas party, came out of the restaurant on January 23rd and demanded that the ticket be cancelled. When Mr. Lujan declined to do so, the owner took the ticket and stated that he would give it to "Lindsey" [Mr. Strudwick], who he claimed was in the restaurant. That night, Mr. Lujan reported the incident to Appellant, who was his supervisor. A week later, Appellant found the ticket in his mailbox with a handwritten note from Mr. Strudwick authorizing cancellation. VCA Lonnie Lujan testified that the ticket was listed as cancelled in an attachment to Mr. Lujan's performance evaluation in March 2003.

Shortly after the ticket appeared in Appellant's box, Appellant and Mr. Lujan reported to Anderson Moore that Mr. Strudwick was canceling tickets inappropriately. Mr. Moore investigated the allegation by questioning Mr. Strudwick about the Jan. 23rd ticket. Mr. Strudwick responded that he had not been at the barbeque restaurant at any time after the Christmas party. Mr. Moore also noted that it is a part of Mr. Strudwick's duties to make recommendations for dismissal of parking citations, and that the parking magistrate had never returned any of his recommendations as inappropriate. Mr. Moore relayed that information back to Appellant, who did not further pursue the matter.

The Agency's investigation was adequate to the allegation. Mr. Moore did not act unreasonably in believing Mr. Strudwick's denial of a personal relationship with the vehicle owner. The fact that Mr. Strudwick and the restaurant owner both are African American is not a sufficient basis for concluding that the cancellation occurred because of race. Likewise, the incident does not support the claim of disparate discipline based on race. It is undisputed that part of Mr. Strudwick's job was to recommend tickets for cancellation, and that none were ruled improper by the parking magistrate, in contrast with those initialed by Appellant in July 2003. [Exh. 14.] Appellant did not establish that Mr. Strudwick gained a personal advantage by any such act. It is undisputed that Appellant's actions resulted in his receipt of a direct personal profit or advantage on four occasions over the course of several months.

Secondly, Appellant claims that Mr. Strudwick should have been similarly disciplined because he cancelled four tickets issued to Denver Public Schools (DPS) fleet vehicles for parking in a space restricted for school use in February 2004. While the Agency does not deny that the cancellations occurred as alleged, Mr. Strudwick testified that it was a part of his job to review other agencies' requests for permission to park city vehicles on a case-by-case basis. Such permission is justified by the Agency if the vehicles are engaged in public business on the theory that it does not generate revenue for one agency of the city to pay another. This evidence constitutes an articulation of a legitimate nondiscriminatory reason for the cancellation of tickets issued to the DPS.

Appellant failed to present any evidence upon which it could be concluded that the cancellation of the DPS tickets was a conflict of interest, or otherwise unethical or improper under departmental or City rules. He also failed to present any other evidence that would support a finding that the Agency's explanation is not true, lacks credibility, or is otherwise a pretext for discrimination. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thus, this allegation does not support a finding of disparate discipline.

Appellant failed to meet his burden to prove that the Agency actions with regard to Messrs. Lewis, Delimont or Strudwick supported its claim of disparate treatment on the basis of race.

2. Direct Evidence of Discrimination Theory

Appellant next contends that he has presented direct evidence of discrimination. Appellant testified that he met with Mr. Moore in October 2003 to discuss his concern and the general perception of the Agency that Mr. Moore allowed African Americans better working conditions, and favored them in his promotion decisions. He recalled that Mr. Moore stated that he understood Appellant's concerns, but disagreed with his conclusion. At the end of the conversation, Appellant testified that Mr. Moore told him that "if it ever came down to it, where he had to take care of a certain person, or a certain kind of a person, he would take care of his before he'd take care of anyone." Appellant interpreted the remark to indicate that Mr. Moore "would take care of African Americans before he would take care of Hispanics or others." [Testimony of Appellant, 9-16-04.]

Pretext may be demonstrated by a showing that a decision was made on the basis of subjective criteria by an employer who demonstrated a tendency toward racial bias. Foster v. MCI Telecommunications Corp., 773 F.2d 1116 (10th Cir. 1985.)

Direct evidence of discrimination establishes that an adverse action was motivated by unlawful discrimination, such as an admission that the decision was made because of an employee's race. If believed by the trier of fact, the evidence may only be rebutted by an employer's persuasive evidence that the adverse action would have occurred even absent discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

The statement here alleged does not constitute an admission of discrimination, but is rather circumstantial evidence supporting the discrimination claim, subject to the McDonnell Douglas analysis. Appellant's interpretation as a direct witness of the statement is entitled to weight, but his personal interest in the controversy must be considered in order to determine the persuasive value of that evidence.

Appellant presents the evidence of the October 2003 remark in support of his theory that, in terminating Appellant, Mr. Moore acted in accordance with his expressed

preference for African American employees. Appellant further supported this theory by his allegation of favorable promotion and other treatment of African Americans in the workplace. The allegation was not supported by any other evidence as to promotions or other favorable treatment based on race. As concluded above, Appellant was unable to establish that Mr. Moore treated Appellant less favorably with regard to discipline than any similarly situated employee of any other race.

The evidence as a whole indicates that Mr. Moore acted toward Appellant in a race-neutral manner, as demonstrated by the manner in which he made the disciplinary decision, as well as his rating of Appellant as outstanding or exceeds expectations for the three years preceding the discipline and the Agency's knowledge of Appellant's misconduct. [Exhs. A-1, A-2 and A-3.] See Proud v. Stone, 945 F.2d 796 (4th Cir. 1991) (holding that prior favorable employment action by the same actor raises a strong inference that discrimination was not a determining factor for the adverse action); and Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173 (1992).

There is no evidence that Appellant took any action to report the conversation to anyone until after this appeal was filed. The lack of such evidence is persuasive that Appellant did not then interpret the remark as an indication of bias, since as a supervisor Appellant had a responsibility to uphold the policies of the Agency, including the policy against racial discrimination. CSR § 15-100 et. seq. Appellant's belated recollection of the ambiguous remark does not overcome the Agency's evidence that the disciplinary action was taken based upon legitimate nondiscriminatory reasons.

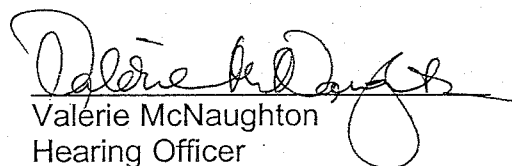
Further, it does not appear that the decision was made based on subjective criteria. Appellant admitted facts which established repeated violations of departmental and city policy governing employee ethics. Appellant failed to prove that any other employee was guilty of similarly serious violations.

On the above facts, it is determined that Appellant failed to meet his burden of proof and persuasion that the Agency engaged in discrimination on the basis of race in its imposition of discipline upon Appellant.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer AFFIRMS the Agency decision dated March 23, 2004.

Dated this 30th day of
December, 2004


Valerie McNaughton
Hearing Officer
Career Service Board