

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

Appeal No. 07-03

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

VERLINDA M. QUINONES, Appellant,

Agency: DENVER DEPARTMENT OF HUMAN SERVICES,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

Hearing Officer Joanna Lee Kaye held a hearing in this matter on April 16, 2003 in the Career Service Hearings Office. Assistant City Attorney Niels Loechell represented the Denver Department of Human Services ("DDHS" or "the Agency"). Verlinda M. Quinones ("Appellant") was present and was represented by Cheryl Hutchinson of the AFSCME.

MATTER APPEALED

Appellant challenges the Agency's decision to issue her a written reprimand for alleged acts of misconduct in her reaction to receiving a parking ticket in the Agency parking area after the end of her shift. Appellant seeks to have her written reprimand reversed and removed from her personnel file.

For the reasons set forth below, the Agency's action is **AFFIRMED** and **MODIFIED**.

ISSUES

1. Whether the Agency was within its authority to discipline Appellant for acts which occurred after the end of her shift.
2. Whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the alleged acts.
3. If so, whether the acts constitute violations of CSR rules or other controlling authority, giving the Agency just cause to discipline Appellant.
4. If so, whether the form of discipline (written reprimand) is reasonably related to the seriousness of the offenses in question, taking into consideration Appellant's past record.

FINDINGS OF FACT

Based on the evidence in the record, the hearing officer now finds the following to be fact:

1. Appellant is a twenty-three year veteran of the DDHS. At the time of the incident in this case, Appellant was an employee of the Adult Services Division. She has no prior disciplinary actions.
2. There is an outside parking area near the building where DDHS is housed, which includes a row of perpendicular parking places. In the past, signs located in this outside parking area indicated a portion of the area was reserved for DDHS 30-minute visitor parking. At some point prior to the events in this case, the signs in the 30-minute parking area were changed to indicate the parking area was reserved for DDHS employees by permit only.
3. The DDHS building and grounds are policed by a unit of officers from the Denver Police Department ("DPD"). Sergeant Bernardo Arabalo has been a sergeant for the DPD for four years, and the Police Administrator for DDHS police unit for three years. Sgt. Arabalo's administrative policy at DDHS is the exercise of "maximum discretion." Under this policy, officers are to use the least amount of intervention possible. Arrest is utilized only as a last resort, after techniques of advisement, de-escalation; and other less invasive approaches have failed.
4. On December 9, 2002, Appellant worked an 8:00 a.m. to 12:30 p.m. shift. During her shift, Appellant called her sister, Marlene Alvarado, and asked her to pick Appellant up at around 12:30.
5. Ms. Alvarado misunderstood Appellant and thought she said 12:00. Ms. Alvarado arrived at DDHS at around 12:17 p.m. that day and backed her car into a parking space in the 30-minute parking area. The parking space in question is approximately twenty-five yards from the front door of the building. Ms. Alvarado had her toddler daughter with her in a car seat on the passenger's side of the back seat. Ms. Alvarado did not notice that the sign controlling the space in which she had parked required an employee permit.
6. Ms. Alvarado waited in her car in the parking space. After a few minutes, she became concerned that she might have arrived too late and missed her sister. She decided to go into the building to check if Appellant had already left. Ms. Alvarado took her daughter into the lobby of the building and approached the front desk to request that Appellant be paged.
7. While Ms. Alvarado was inside the building, Vehicle Control Agent Brenda Salinas pulled up in front of Ms. Alvarado's car and noted there was no permit visible. She got out to check the dashboard for a permit, but there was none. Agent Salinas wrote a ticket for "Other Prohibit Parking-Posted" (Exhibit 3). Under "comment," Agency Salinas indicated "Staff 30 Min No ID."
8. Meanwhile, Ms. Alvarado and her daughter encountered Appellant, who had just clocked off duty, in the lobby. Appellant, her sister and the child walked out of the building together. Ms. Alvarado saw Agent Salinas' vehicle parked in front of the left front bumper of her car.

She and Appellant then observed the parking agent get out of her vehicle and put ticket on the windshield.

9. Ms. Alvarado and Appellant approached Ms. Alvarado's car as Agent Salinas was returning to her vehicle. Ms. Alvarado said something to Agent Salinas to the effect that she had not been there thirty minutes. The parking attendant responded to the effect that the ticket was because the space was reserved for employees. Ms. Alvarado replied that her sister was an employee. The parking attendant remarked that the space she was parked in required an employee permit. Agent Salinas got into her vehicle. (Exhibit 4.)
10. Appellant then approached the driver's side of her sister's car to retrieve the ticket, as Ms. Alvarado approached the passenger's side to buckle her daughter into the car seat in the back seat. Appellant took the ticket from the windshield. She spoke further to Agent Salinas with a raised voice, called her a "bitch," and stated Ms. Salinas did not "know how the fuck to do your job." Appellant further made an obscene gesture to Ms. Salinas in her vehicle as Appellant walked around the front of the car to get into the passenger's side of the car. (Exhibit 4.)
11. Officer Mauricio Vasquez, just coming on duty because of a 12:30 shift change, was standing in front of the DDHS building. A verbal disturbance caused him to direct his attention to the location of Ms. Alvarado's car. As he turned in that direction, he observed Appellant raise her voice toward Agent Salinas' vehicle, and gesture to the vehicle in an apparently threatening manner. Based on these observations he decided to intervene, and started walking in the direction of Ms. Alvarado's car. (Exhibit 6.)
12. Officer Vasquez testified he did not observe Agent Salinas saying anything, being loud or arguing with Appellant at any time during his observation of the incident.
13. Officer Vasquez approached Appellant at the passenger's side of the car, and told her she should take up any dispute over the ticket with the parking referee. Appellant stated, "Get out of here, mind your own business" to Officer Vasquez, sat down in the passenger's seat, and repeated her statement to Officer Vasquez. (Exhibit 6.)
14. Appellant then attempted to close the passenger door while Officer Vasquez was standing in the way, and he pulled it back open. He asked Appellant for her identification. Appellant refused, saying "I don't have to give you shit." Officer Vasquez repeated this request three more times. Appellant refused each time and tried again to close the passenger door although Officer Vasquez was standing in the way. (Exhibit 6.)
15. Sgt. Arabalo was near the front of the building, about thirty to forty feet away from where Ms. Alvarado's car was parked. He heard "loud yelling" and what sounded to him like an argument. He looked in that direction and observed Agent Salinas and her vehicle, and the passenger of a red car whom he later learned was Appellant. He noted Officer Vasquez walking toward that location, and headed in that direction himself. Officer Vasquez was already at the car speaking to the women when he arrived in front of the car. As he approached he heard Appellant repeatedly refuse Officer Vasquez' requests for identification. (Exhibit 5.)

16. At some point, Ms. Alvarado had gone around to the driver's side of the car, had gotten in and had started the car. Sgt. Arabalo stood in front of the car to prevent it from pulling forward and driving away. Appellant put her head out the open passenger door and asked Sgt. Arabalo if she was required to give the other officer her I.D. Sgt. Arabalo advised her that she should comply with the request to avoid the possible legal consequences of failing to do so. Appellant handed her City identification badge to Officer Vasquez. (Exhibit 5.)
17. Officer Vasquez noted that the I.D. badge had no date of birth on it and asked Appellant for her date of birth. Appellant responded by asking Officer Vasquez if that information was not on her I.D. Officer Vasquez repeated the question. Appellant stated her date of birth, her department, and the name of her supervisor. The officers then stepped back and allowed Ms. Alvarado and Appellant to leave the scene. (Exhibit 5.)
18. Officer Vasquez and Sgt. Arabalo testified that Appellant's behavior during the incident at issue was "hostile," "aggressive," and generally noncompliant. Sgt. Arabalo testified that he has had disputes about tickets on Agency property before, but "never anything like this." He testified that if this incident had taken place in any location other than on City property he would probably have arrested the individual. He further testified that if Appellant had not been a DDHS employee he would have arrested her. However, due to his maximum discretion policy, he elected not to do this. Officer Vasquez testified that arrest also crossed his mind during the incident, but in his discretion he elected not to do so.
19. Sgt. Arabalo asked Agent Salinas to prepare a written report of the incident (Exhibit 4). Agent Salinas prepared this report some time between 12:40 and 2:00 p.m. that same day. Sgt. Arabalo prepared a written incident report himself some time before 2 p.m. that same day (Exhibit 5). Officer Vasquez also prepared an incident report after the incident some time before 2 p.m. that day (Exhibit 6).
20. Sgt. Arabalo, Officer Vasquez and Agent Salinas met with Adult Services Division Director Doris Puga at approximately 2:00 on the afternoon of December 9, 2002. They presented their written incident reports and verbally reported on the incident.
21. On December 12, 2002, Ms. Puga called Appellant in and issued her the written reprimand (Exhibit 2). Appellant was not aware that Ms. Puga intended to issue a written reprimand until it was presented to her at that time. Appellant reviewed the written reprimand at that time, and denied making any improper statements or engaging in any of the inappropriate conduct detailed in the officers' reports (Exhibits 4 through 6).
22. Appellant then timely grieved and appealed her written reprimand (Exhibit 1).

DISCUSSION

1. Burden of proof

The City Charter, C5.25 (4) and CSR 2-104 (b) (4) require the hearing officer to determine the facts of the case "*de novo*." This means that she is mandated to make independent

determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.)

In *de novo* administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. This means that the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

The Agency responsible for disciplining a Career Service employee bears the burden of establishing, by a preponderance of the evidence, that it had *just cause* for the disciplinary action. The hearing officer must also find the severity of discipline is reasonably related to the nature of the offense in question. CSR 16-10; *see, e.g. Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

2. Rules the Agency alleges Appellant violated.

The Agency posits that Appellant's conduct constitutes violations of the following CSR rules:

Section 16-50 Discipline and Termination

A. Causes for Dismissal:

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant...

- ...8) Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason...
- ...14) Failure to use safety devices or failure to observe safety regulations which: results in injury to self or others; jeopardizes the health or safety of others; or results in damage or destruction of City and County property.
- ...17) Conduct which violates the Charter of the City and County of Denver or the Revised Municipal Code of the City and County of Denver.¹
- ...20) Conduct not specifically identified herein may also be cause for dismissal.

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline....

- ...4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.
- 5) Failure to observe departmental regulations.
- 6) Carelessness in the performance of duties and responsibilities.
- ...8) Neglect in the care or use of City and County property.

¹ This subsection erroneously appears in the Agency's iteration of CSR 16-51 in the written reprimand (Exhibit 2).

3. Agency authority to discipline an employee for an alleged incident occurring while the employee is off-duty.

At the close of the hearing, the hearing officer requested written briefs on the issue of whether the Agency was within its rights to discipline an employee for actions taken on Agency property while she was not on duty. Both parties subsequently did submit briefs and were therefore given the opportunity to address this issue. The hearing officer has considered the arguments set forth therein, and now finds that the Agency was within its rights to issue a disciplinary action against Appellant, even though she was off duty, for the following reasons.

Appellant attempts to characterize her actions as not being within the course and scope of employment, and therefore beyond the Agency's control. After reviewing this case and the CSR disciplinary rules, the hearing officer finds that only some of them presume the employee is within the course and scope of her duty. *See, e.g.,* CSR 16-51 A. 6) (*above*).² CSR 16-50 A. 8) and CSR 16-51 A. 4) (*above*) do not make this presumption. The purpose of these regulations is to foster and maintain order and productivity through the requirement of civility and mutual respect among employees, and to project a positive public image. The City and County of Denver has a reasonable, legitimate interest in discouraging certain kinds of behavior, particularly when that behavior is on City property, on or near the workplace, and takes place during regular business hours. Whether or not a given employee is on or off the clock, such activity as is alleged here is equally disruptive to the work environment itself, and further, tends to undermine the public image of the City.

Appellant construes the rule too narrowly to achieve its purpose. First, the regulation itself includes no such limitation to being "on the clock" and within the course and scope of duty. Second, this is not an incident so remote from the workplace as to bear no relationship whatsoever to that workplace. Appellant's interpretation of this regulation would hypothetically permit two employees having a dispute to clock out and then proceed outside in front of the building to engage in a verbal altercation, in full view of the public, with impunity. This cannot be what the Career Service Board intended when it promulgated this regulation.

In addition, Appellant offered no specific authority eliminating or otherwise limiting a City Agency's powers to issue disciplinary actions solely to on-the-job incidents. In fact, the hearing officer is aware of case law tending to suggest that the Colorado Supreme Court and Court of Appeals are of the opposite opinion. *See, e.g., McCann v. Lettig*, 928 P.2d 816 (Colo. App. 1996) (*involving a regulation prohibiting employee's from engaging in off-duty work without permission*); *Englewood v. Englewood Career Service Bd.*, 793 P.2d 585 (Colo. App. 1989) (*Englewood City employee disciplined for an incident that occurred at his home while he was off-duty under jurisdictional Ordinance similar to that of the Career Service*); *City and County of Denver v. Casados*, 862 P.2d 908 (Colo. 1993) (*discusses the balancing of interests between a government employee's constitutionally protected freedoms while off duty on the one hand, and a legitimate governmental interest to limit certain off-duty behaviors on the other*).³

² For this reason, disciplinary rules cited by the Agency that are duty-related are not relevant to this case and have been disregarded.

³ These cases do not directly address the issue of whether City agencies have the authority to regulate off-duty behavior. However, the facts of each case clearly presume that they do.

The Agency clearly has a legitimate interest in regulating the behavior of its employees while on City grounds, whether they are clocked in or not, particularly where the incident was during work hours and involved other City employees who *were* on the clock. The hearing officer finds that while Appellant had punched off the clock, she nonetheless committed the alleged offense: a) on Agency property; b) against other City employees who were on duty at the time of the alleged incident; c) in full view of the public; and d) during regular business hours. The hearing officer concludes that under these circumstances the incident was so "proximate" to the work setting that its occurrence would have virtually the same disruptive impact on the workplace as it would have if Appellant had been on the clock. The Agency was therefore within its rights to enforce this rule against Appellant even though she was off the clock.

3. Analysis of the evidence.

Based on the totality of the evidence in this case, the hearing officer concludes that the Agency has shown just cause for disciplining Appellant for the following reasons.

Appellant has denied raising her voice at the officers until late in the incident. She denies using any profanity, making any unacceptable gestures, and in general, doing any of the inappropriate things the Agency has alleged.

The hearing officer finds the officers' consistent statements to the contrary more persuasive than Appellant's denials. First, Appellant and her witness testified from their recollection of the incident approximately four months after it had happened. On the other hand, the incident reports prepared by the officers (Exhibits 4 through 6) were all written within an hour and a half of the incident in question, when the events were still fresh in the recollection of the reporters. There is no indication of any motive for these individuals to lie or bend the truth in these reports has been shown.

Second, those statements, and the testimony of those Agency witnesses, are fairly consistent and tend to corroborate one another. All three of the officers reported Appellant raising her voice throughout the incident, not just toward the end as she asserts. Agent Salinas' written statement (Exhibit 4) indicates that Appellant spoke with an elevated tone in her comments right from the start. This assertion is further underscored by the fact that Officers Vasquez and Arabalo both testified their attention was drawn to this incident from a distance *because* they heard someone speaking with a raised voice. They both looked in the direction of the incident and observed Appellant to be the person who was raising her voice and gesturing at the parking agent. The hearing officer finds this set of facts to be extremely persuasive corroborating evidence that Appellant was yelling at Agent Salinas from the start.

Agent Salinas further asserts that Appellant made an obscene gesture to her while she was still in front of the vehicle. Officer Vasquez' written statement similarly states that as he approached the scene, he observed Appellant raising her fist in what appeared to him to be a suspiciously aggressive gesture. Once again, these observations are mutually corroborative evidence to the contrary of Appellant's denials.

Agent Salinas' written statement indicates that Appellant used profanity. Officer Vasquez did not hear any conversation between Agent Salinas and Appellant. Yet he independently asserted in his written statement that Appellant also used profanity when talking to him moments later. Once again, this mutually corroborative evidence refutes Appellant's assertions that she used no profanity during this incident.

Finally, both of the police officers testified that they considered arresting Appellant, despite the policy of maximum discretion, because of her hostile, aggressive tone and escalated behavior. Sgt. Arabalo testified that this incident was uniquely disruptive in his experience with ticket disputes at DDHS.

The hearing officer finds the Agency accounts internally consistent and more persuasive than Appellant's evidence. Based on this evidence, the hearing officer concludes it is more likely than not that, contrary to her denials and attempts to minimize her escalated behavior, Appellant raised her voice, used profanity, and gestured inappropriately during the incident in question.

The hearing officer finds the Agency's allegations as described above have been proven by a preponderance of the evidence. The hearing officer concludes that the Agency has shown violations of CSR 16-50 A. 8), "threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason..." and CSR 16-51 A. 4), "failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public." Therefore, the Agency has shown just cause for disciplining Appellant.

4. Severity of the discipline.

In determining the appropriateness of a given disciplinary action, the test is whether the degree of discipline is "reasonably related" to the seriousness of the offense. *See*, CSR 16-10. To be reasonably related, the chosen discipline must be "within the range of reasonable alternatives available to a reasonable, prudent agency administrator." *See, e.g., Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo. App. 1986).

The hearing officer has found that the evidence supports the factual allegations against Appellant. While the Career Service has progressive discipline system, CSR 16-20 subsection 2) states that "any measure or level of discipline may be used in a given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken..." Based on the Agency's factual showing, the hearing officer concludes that a written reprimand was within the range of reasonable alternatives available to the Agency. Appellant's assertion that the discipline was too severe must therefore fail.

CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of evidence that Appellant engaged in violations of the following:
 - a) CSR 16-50 A. 8), Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason...

- b) CSR 16-51 A. 4), Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.
2. The Agency was within its rights to discipline Appellant for violations of CSR 16-50 A. 8) and CSR 16-51 A. 4), despite that she was not on duty, where the infraction occurred on City property, in full view of the public, during regular business hours, and with other City employees who were on duty at the time of the incident.
3. The Agency has failed to show by a preponderance of the evidence that Appellant engaged in violations of the following:
 - a) CSR 16-50 A. 14), Failure to use safety devices or failure to observe safety regulations resulting in injury to self or others; jeopardy to the health or safety of others; or damage or destruction of City property (there is no evidence that safety devices or regulations, or City property, were involved in this case).
 - b) CSR 16-50 A. 17), Conduct which violates the Charter of the City and County of Denver or the Revised Municipal Code of the City and County of Denver (the Agency has cited no specific relevant portions of these authoritative sources);
 - c) CSR 16-50 A. 20), Conduct not specifically identified herein;
 - d) CSR 16-51 A. 5), Failure to observe departmental regulations (none of which have been cited by the Agency);
 - e) CSR 16-51 A. 6), Carelessness in the performance of duties and responsibilities (Appellant was not on duty when this incident occurred);
 - f) CSR 16-51 A. 8), Neglect in the care or use of City and County property (no such property was involved in this case).
4. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
5. In light of the totality of evidence in this case, the written reprimand of Appellant is reasonably related to the seriousness of the offense.


DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to issue a written reprimand is **AFFIRMED**.

The hearing officer **ORDERS** that the written reprimand presently in Appellant's personnel files be **AMENDED** to remove any and all references to the alleged violations set forth in paragraph 3 of the **CONCLUSIONS OF LAW** section (*above*).

This case is hereby **DISMISSED WITH PREJUDICE**.

Dated this 19th day of May, 2003.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 20 day of May, 2003, addressed to:

Cheryl Hutchison
AFSCME
3401 Quebec St. Suite 7500
Denver, CO 80207

Verlinda M. Quinones
620 S. Osceola St.
Denver, CO 80219

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the interoffice mail, this 20 day of May, 2003, addressed to:

Niels Loechell
Assistant City Attorney
Denver Department of Human Services

Diana Smith
Denver Department of Human Services

V. Garza