

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

Appeal Nos. 19-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

RUSSELL STONE, Appellant,

v.

Agency: Department of Law, City Attorney's Office, and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Russell Stone shall be referred to as "Appellant." The Department of Law, City Attorney's Office shall be referred to as "DOL." The City and County of Denver shall be referred to as the "City". They will be referred to collectively as the "Agency." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held April 28, 2003, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Daniel O'Brien, Esq. The Agency was represented by Kathy Greer, Esq., Special Assistant City Attorney, with Vincent DiCroce serving as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Agency:

Vincent DiCroce, James C. Thomas, Christopher Lujan

The following witnesses were called by and testified on behalf of the Appellant:

Appellant

The following exhibits were offered and admitted into evidence on behalf of the Agency:

Exhibits 1 - 8, 10 - 15

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

None

The following exhibits were admitted into evidence by stipulation:

None

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

NATURE OF APPEAL

Appellant is appealing a written reprimand for alleged violations of CSR §§16-51 A. 2), 6), 10), and 11). He is seeking reversal of the disciplinary action and removal of the written reprimand from his personnel files.

ISSUES ON APPEAL

Whether the Hearing Officer has subject matter jurisdiction over this appeal?

Whether Appellant violated CSR §§16-51 A. 2) 6) 10) and 11)?

If Appellant violated any provisions of CSR §§16-51, what is the appropriate sanction?

PRELIMINARY MATTERS

None.

FINDINGS OF FACT

1. Appellant is an Associate Assistant City Attorney ("ACA") assigned to the Prosecution and Code Enforcement Unit ("PACE"). He has been with the DOL since November 1998. Prior to that, he was the Chief Deputy District Attorney in the 13th Judicial District. He graduated from law school in December 1993. Prior to that, he had experience as a law enforcement officer, as a college professor, and as a management consultant. (Exhibit 7, pp. 51-52)
2. Vincent DiCroce was Appellant's direct supervisor during the relevant period. James C. Thomas is the manager of the PACE group and has been Appellant's supervisor during Appellant's entire tenure at DOL.
3. During the relevant period, teams of two attorneys were assigned to each of three General Sessions courtrooms covered by PACE. Appellant was assigned to Courtroom 115-P. Judge Patterson was the judge.
4. Christopher Lujan is an Associate Assistant City Attorney. He has worked for

DOL for two and a half years. He worked in PACE during the relevant period, where he was assigned to Courtroom 117-M.

5. As Appellant's supervisor, Mr. DiCroce frequently met with Appellant to discuss work issues, as he did with the other five attorneys under his supervision. During these meetings, Mr. DiCroce frequently spoke to Appellant about his lack of thoroughness and attention to detail. They would review his monthly activity reports ("MAR"), trial logs, case preparation, and appropriate sentencing recommendations during these meetings.

6. According to Mr. DiCroce's notes from a July 9, 2002, meeting with Appellant, they discussed his MAR, which was not complete as it lacked notations about several trials he had done during the past month. They also discussed a problem with the disposition of a case that had been referred to the district attorney ("DA") because it involved possible stalking charges. The defendant in this matter had nine or ten prior convictions for violating a restraining order ("VRO") with the same victim. The victim advocate ("VA") had referred the case to the DA; the referral form was in the file. Appellant pled the case to sixty days in jail. Neither the VA nor the complaining witness was notified of the plea. The DA accepted the case for filing and issued a warrant, which had to be pulled as the defendant had plead out on the county court case and had already been released from jail. According to Mr. DiCroce, Appellant had no memory of the case. Mr. DiCroce explained that Appellant needed to be more careful and mindful when cases were referred to the DA. He also discussed the need for Appellant to talk to the VA, if not also the complaining witness, when resolving these cases and that a sixty-day sentence probably wasn't the most appropriate pleas given the history. (*See*, Exhibit 10, p. 1)

7. State law requires that victims be advised of changes in the status of cases. While this doesn't apply directly to the cases handled by the DOL, it is still important to communicate with the victim, particularly in a domestic violence case. Mr. DiCroce testified that it could be fatal not to inform the victim when the offender is released from jail. A victim might be killed if she is unaware of the situation. Mr. DiCroce testified that it is also important to notify the victim if the matter is continued or pled out so that the victim does not take the day off (and lose a day's pay) when there is no hearing. There is no need to seek the VA's or complaining witnesses approval of the plea, but there is a need to keep them informed.

8. On August 8, 2002, Mr. DiCroce discussed problems with two matters with Appellant.

9. One matter involved a defendant with two VRO cases, one of which included an assault charge. The defendant had a recent prior conviction of 3rd degree assault with the same victim. He served 180 days on the prior case and then was picked up on the two new cases. Appellant dismissed one case upon a plea to the other and offered a 180-day cap on jail. Appellant then allowed the defendant to be released on a personal recognizance ("PR") bond pending sentencing. The VA and victim were very concerned that the defendant was going to be released. Appellant had little recollection of the case. Mr. DiCroce explained that his concern was not with the plea offer, but with the PR bond for a defendant who was facing six months in jail and who had just plead guilty to violating a protective order. In addition to the safety concerns for the victim, this defendant had no incentive to return to court and there would be no bondsman who would attempt to make sure he appeared. Appellant stated he

understood the concerns and that he should not agree to a PR bond in such cases. (*See*, Exhibit 10, p. 2)

10. The second matter concerned both Appellant's trial preparation and his courtroom conduct. The case involved a defendant who was charged with violating a restraining order on May 2, 2002. A supplemental report stated that, in addition to the May 2 occurrence, the defendant drove by the victim on May 1 and threatened her with acid and told her he was going to kill her. Appellant never amended the complaint to include the May 1 incident. The offense, which occurred on May 1, was more provable. Because the complaint was not amended, the judge could not find that the defendant violated the restraining order on May 1. The case was dismissed. Mr. DiCroce was concerned that Appellant did not properly amend the complaint and that this case was an example of Appellant's failure to review his docket. Mr. DiCroce noted that the evidentiary problems with the case should have been raised during the General Sessions Staffing.

11. The other problem noted by Mr. DiCroce was Appellant's courtroom conduct. On August 7, 2002, during his rebuttal argument for this case, Appellant became upset with the judge because the judge stated Appellant's argument was not consistent with the evidence presented. Appellant initially argued with the judge about the evidence and then stated something to the effect of "If I am going to have to argue with you and defense counsel, I might as well just sit down." Appellant then threw a pad of paper or a file on the table. Appellant's voice was loud and inappropriate. The judge was very upset with Appellant's conduct and told him that he would not be allowed to argue cases in his courtroom if he behaved in that fashion again. According to Mr. DiCroce's notes, he explained to Appellant that this conduct reflects negatively upon him and DOL. Mr. DiCroce told Appellant that he should evaluate and be mindful of his trial style. Appellant, Mr. DiCroce noted:

is often very forceful when conducting a trial. This style is effective in some cases but not all. [Appellant] would benefit from modifying his style to the type of case he is conducting.

(Exhibit 10, p. 4)

12. On August 22, Appellant was issued a written reprimand for his discourteous and unprofessional conduct before Judge Patterson on August 7. (Exhibit 6) Appellant did not appeal this written reprimand.

13. Mr. DiCroce noted other problems and discussions with Appellant over the next few months. (*See*, Exhibit 10, pp. 5-6)

14. Appellant received a "Meets Expectations" Performance Enhancement Program Report ("PEPR") rating on November 12, 2002. The narrative notes the Appellant:

does need to be more thorough in his work and pay more attention to detail. His trial preparation has been inadequate at times. On at least one occasion, [Appellant's] failure to properly prepare a case for trial did have a negative impact upon the resolution of a case. Additionally, [Appellant's] Monthly Activity Reports and Trial Logs are frequently completed in a cursory fashion. This has

been brought to his attention, but [Appellant] has been slow in correcting the deficiency. [Appellant] must also put more effort toward reviewing his caseload so that he can better identify priority cases and be better prepared for his cases on the day of trial.

(Exhibit 8, p. 2)

15. During his monthly conference, Appellant discussed his courtroom assignment with Mr. DiCroce. Appellant indicated that he would rather work in a different courtroom but remain in General Sessions. He felt his relationship with Judge Patterson was beginning to have a negative effect upon his ability to prosecute cases.

16. On December 18, 2002, a mistrial was declared by the judge for a case Appellant was trying. The judge banned Appellant from his courtroom without supervision from a supervisor. The defendant had been representing himself in a jury trial. The first time the case was tried, Judge Patterson declared a mistrial. The court felt that questions asked by Appellant elicited responses from the victim regarding prior bad acts. Because Appellant had not filed a 404(b) motion, the court felt it had no choice but to declare a mistrial and reset the matter. On the new trial date, a similar situation occurred.

17. Mr. DiCroce met with Judge Patterson about this incident and obtained a transcript/audio tape of the proceedings. Judge Patterson was very concerned about what he perceived to be unprofessional and incompetent conduct. He indicated that he felt Appellant lacked the skills and balance necessary to handle the cases.

18. When Mr. DiCroce met with Appellant to discuss this matter, Appellant indicated that he did nothing wrong since the defendant opened the door to the prior bad act evidence. Mr. DiCroce explained that, even if he felt the defendant opened the door, Appellant should have asked to approach the bench and discuss it with the judge before asking the questions he did.

19. Judge Patterson's courtroom was closed for the last two weeks of the year. Appellant was assigned to cover cases for other ACA's until the matter with Judge Patterson was resolved.

20. Appellant met with Mr. DiCroce for his monthly conference on December 30, 2002. They discussed Appellant's rotation into "traffic" and out of General Sessions. Mr. DiCroce explained that he did not want to move Appellant into traffic simply because the judge did not want him in his courtroom. However, Mr. DiCroce felt Appellant could no longer effectively prosecute cases before Judge Patterson. Mr. DiCroce stated he was still going to follow up on the mistrial matter.

21. On December 20, 2002, Appellant was assigned to cover Courtroom 115-M for Mr. Lujan, who was busy with another matter and whose partner was not available. Appellant was told he was to handle the sentencing for Rolanda Durham, who had been found guilty on two counts of domestic violence in November.

22. When Mr. Lujan met with Appellant about the case, he indicated that Ms.

Durham had been found guilty on his case. He stated there were other cases assigned to another ACA in another courtroom involving Ms. Durham, but that he knew nothing more about them. Mr. Lujan testified that he saw Ms. Durham's attorney in the hallway and that she indicated that she was going to ask that all the cases be handled at once. He did not learn until after December 20 that the same victim was involved in the other cases.

23. Mr. Lujan told Appellant that there would be a preliminary sentencing investigation ("PSI") for the case he tried. He said Appellant should "go along with" the PSI. Mr. Lujan testified that he did not give Appellant any instructions about a plea agreement to cover Ms. Durham's other cases.

24. Appellant testified that Mr. Lujan gave him instructions for all three cases.

25. Mr. Lujan testified that he does not give instructions to someone of higher "rank." While Appellant and Mr. Lujan are both Associate Assistant City Attorneys, Mr. Lujan has less experience as an ACA, or attorney, than Appellant.

26. Ms. Durham was sentenced to six months on the first case. She pled guilty to one count of interference with a police officer in one case; the counts of violating a restraining order and the threats to property/persons were dropped, even though the defendant had violated the restraining order immediately after it was issued. She received an additional six months in jail on this case. The third case, which included counts of destruction of private property and disturbing the peace, was also dismissed. Ms. Durham was not required to pay restitution.

27. Appellant stated that he did not find any notes from Mr. Lujan or any other ACA saying restitution was due and no victim impact statement was included. He also testified that he believed that Judge Crew would not enforce a restitution order once a defendant is in custody because the defendant would not have an opportunity to provide restitution while in custody and then the court loses jurisdiction after the prison sentence is completed. Therefore, he believed that it was useless to request restitution.

28. Mr. DiCroce testified that restitution should have been considered. Ms. Durham had been charged with destruction of private property, *i.e.*, six broken car windows. The victim had been cooperative and notes in the file indicated that he was going to bring in an estimate for the repair.

29. Appellant did not notify either the VA or the victim directly that the second two cases had been resolved on December 20.

30. The victim, a Mr. Adkins, appeared for trial on the second two cases on December 30, 2002. The victim, who works as a skycap at Denver International Airport, took the day off to attend the trial. He was very upset when he got to court and discovered that the matters had been pled out and that he had not been told. Among other concerns, he lost a day's pay because he had come to court.

31. Mr. Adkins called Mr. Lujan from court and left a message that he did not know what had happened, that he was told all the cases were dismissed and that he was angry about

the dismissals and no restitution. Mr. Lujan called him back and told him he would find out what happened. He gave him other phone numbers of persons to talk to about the matter. Mr. Adkins eventually called J. Wallace Wortham, Jr., City Attorney. Mr. Wortham contacted James C. Thomas, Prosecution Practice Group Manager for investigation into Mr. Adkins' complaints.

33. Mr. Thomas spoke with Mr. Lujan and Appellant about the matter. Mr. Thomas found that, in light of Appellant's previous performance problems and his refusal to accept responsibility and his placing the blame on others, a written reprimand was appropriate. Mr. Thomas decided that a verbal warning was not appropriate because many of the issues had been discussed previously with Appellant. He also considered suspension too harsh a discipline.

34. The written reprimand was issued on January 10, 2003, and served on January 14. (Exhibit 5) Appellant filed his first step grievance on January 21. (Exhibit 2) Mr. Thomas denied it on January 28. (Exhibit 3) The second step grievance was delivered to Mr. Wortham on January 31. (Exhibit 4) Mr. Wortham did not respond within ten days. Appellant filed this appeal in a timely manner on February 17.

35. Mr. DiCroce testified that he expects all of the members of his team to be prepared, follow guidelines and know what they are doing. He testified Appellant should have sought restitution and should not have dismissed the count involving the violation of the restraining order. He should have also known to notify Mr. Adkins, who had been a cooperative witness, that there would be no trial so he would not take the day off and lose a day's pay.

36. Appellant's Performance Evaluation Program (PEP) plan worksheet provides the following among Appellant's priority 1 job responsibilities:

Job Responsibility: Courtroom Trial Attorney

Expected Accomplishments:

3. Plea bargain cases set for trial, disposition, or arraignment consistent with ethical obligations and office standards.

Job Responsibility: Public & Telephone Contact:

Expected Accomplishments:

Courteous and helpful response to calls and in person contacts.

(See, Exhibit 8, pp. 7-8 and 11)

DISCUSSION AND CONCLUSIONS OF LAW

Analysis

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner*

v. Rossmiller, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

While this matter came before the Hearing Officer as a grievance, this matter is an appeal of a disciplinary action (written reprimand). The Agency has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances.

Appellant has been cited with several violations of the CSR arising from his handling of the three cases involving Ms. Durham and his failure to contact Mr. Adkins, the victim in those matters. He is specifically charged with failing to meet established standards of performance [§16-51 A. 2)], carelessness in performance of duties and responsibilities [§16-51 A. 6)], failure to comply with the instructions of an authorized supervisor [(§16-51 a. 10)], and the catchall provision [§16-51 A. 11)].

In order to establish the violation of CSR §16-51 A. 20, failure to meet established standards, the agency may use PEP standards as evidence of what is expected for employees. In this case, DOL provided Appellant's PEP plan worksheet, which establishes that Appellant was to plea bargain cases consistent with ethical obligations and office standards. Mr. DiCroce's testimony establishes Appellant's acceptance of the plea for the two cases not previously tried does not meet the office's standards. In particular, Appellant should not have dropped the charges of destruction of property (which then denied Mr. Adkins restitution) and violation of the restraining order from one case and threats to person/property charge for the second case. Appellant should have reviewed the files, noticed that the victim was not only cooperative, but that he wanted restitution, and that the criminal defendant violated the restraining order immediately after it was issued. As an experienced attorney in the PACE Unit, Appellant should have known that the plea he agreed to was inappropriate under the circumstances. His decision to take the plea is a violation of the standards established for his role as a trial attorney, a priority 1 job responsibility.

Appellant's failure to contact either Mr. Adkins or the VA after he took the plea for Ms. Durham violates another priority 1 job responsibility, courteous and helpful responses to calls and personal contacts. In this case, Appellant failed to make any contact with Mr. Adkins, after the proceeding, courteous or otherwise. This resulted in a valid complaint from Mr. Adkins about how he was treated with regard to the matter. A simple phone call would have resulted in Mr. Adkins not having to take a day off from work and might have soothed his anger about the failure to receive restitution for the six damaged car windows.

Because Appellant's conduct violates priority 1 job responsibilities from his PEP, the violation of CSR §16-51 2) is established.

The next violation, CSR §16-51 A. 6), involves carelessness in performance of duties and responsibilities. This provision is distinguished from another CSR provision, §16-50 A. 1), in that violations under this provision do not require that the misconduct alleged rises to the level of either gross negligence or willful misconduct. It just requires that an employee do something he would not have done had he been paying the minimal attention necessary to the performance of his work.

The Hearing Officer finds that DOL established that Appellant was careless in performing his job responsibilities on December 20, 2002. If Appellant had reviewed Ms. Durham's files, he

would have discovered that he had a cooperative witness who wanted restitution and the other information would have led Appellant to either reject the plea offer or fashion another plea that better suited the situation and met the PACE Unit's guidelines. Instead, he apparently took the plea offered by the criminal defendant without much thought. He did not consider that this was a criminal defendant who was already convicted of threats to person/property. He dropped the other charges that arose from the defendant's continued domestic violence and violation of a restraining order without thinking whether such an agreement was appropriate. Accepting the plea offer without examining the ramifications constitutes carelessness. This violation has been established.

Appellant is charged with violating the instructions of an authorized supervisor. There was no evidence that Appellant was given specific instructions on how to handle the Durham cases by his supervisor, Mr. DiCroce, or any other supervisor. There is a question whether he was given "instructions" from Mr. Lujan about the second two cases. However, Mr. Lujan is not a supervisor. He is a co-worker of equal rank to Appellant, both being Associate Assistant City Attorneys. Therefore, even if Mr. Lujan told Appellant how to handle the two untried cases, the allegation that Appellant failed to follow instructions of an authorized supervisor has not been established by a preponderance of the evidence. The violation of CSR §16-51 A. 10) is dismissed.

The violation of CSR §16-51 A. 11), the catchall provision, is likewise dismissed. Appellant's misconduct falls within two specific provisions of CSR §16-51 A.

The last question for the Hearing Officer is the appropriate level of discipline. The Hearing Officer has considered the evidence presented and the demeanor of the witnesses for both sides, as well as Appellant's prior disciplinary history in order to reach her decision.

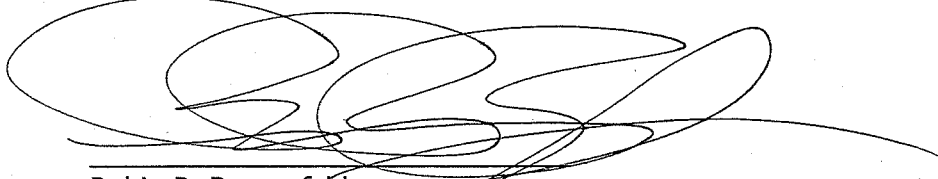
CSR§ 16-51 A. violations are the violations that call for progressive discipline. Appellant was issued a written reprimand in August 2002 for his courtroom conduct; he did not grieve or appeal this reprimand. Because he already has a written reprimand, another written reprimand is appropriate.

Even if Appellant did not have the prior written reprimand, the Hearing Officer would have concluded that the Agency was acting properly in issuing the written reprimand. Appellant is an experienced attorney having practiced law for ten years and been in the PACE Unit for more than four. He has had many non-disciplinary warnings about his carelessness in performing his job and the need to pay attention to detail. Mr. DiCroce spoke with him many times between June and December 2002 about the need to talk to the VA and victims when resolving cases involving violations of restraining orders and other domestic violence cases. Appellant did not heed these non-disciplinary warnings. Issuing a written reprimand to get Appellant's attention is not only within the discipline permitted the Agency in this matter, it is the appropriate level to be administered.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: The violations of CSR §§16-51 A. 2) and 6) are AFFIRMED. The violations of CSR §§16-51 A. 10) and 11) are DISMISSED. The written reprimand is AFFIRMED.

Dated this 5th day of June 2003.



Robin R. Rossenfeld
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 AND ORDER by depositing the same in the U.S. mail, this 6 day of June 2003, addressed to:

Russell Stone
3400 S. Lowell Blvd., # 9-105
Denver, CO 80236

Daniel O'Brien, Esq.
5555 DTC Parkway, Suite C3210
Greenwood Village, CO 80111-3020

Cathy Greer, Esq.
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Denver, CO 80202

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 6 day of June 2003, addressed to:

Office of the City Attorney
Employment Law Section

J. Wallace Wortham, Jr.
City Attorney

