

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

Appeal No. 45-00

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

LUCILLA TENORIO, Appellant,

Agency: DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT,
AND THE CITY AND COUNTY OF DENVER, a municipal
corporation.

INTRODUCTION

For purposes of these Findings and Order, Lucilla Tenorio shall be referred to as "Appellant." The Department of Safety, Denver Sheriff Department shall be referred to as the "Department." The City and County of Denver shall be referred to as the "City". The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held on February 8 and 9, 2001, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Pamela Johnson, Esq. Craig Hess, Esq., Assistant City Attorney, represented the Department and City, with Major Carlos Jackson appearing 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 Department:

Appellant, Carlos Jackson, John Simonet, Fidel Montoya

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, 2, 3, 4, 5, 6, 7

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

A, B, C, D, F, E

The following exhibits were admitted into evidence by stipulation:

Exhibits 1, 2, 3, 4, 5, 6, 7, A, B, C, D, F

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

None

NATURE OF APPEAL

Appellant is appealing her ten-day suspension for alleged violations of CSR §§16-50 A. 8), 18) and 20) and 16-51 A. 4), 5) and 11) and is requesting return of the lost pay and benefits.

ISSUES ON APPEAL

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

Whether Appellant violated CSR §§16-50 A. 8), 18) and 20) and 16-51 A. 4), 5) and 11)?

Whether the Agency's action in suspending Appellant for five days for the alleged violations of CSR §§16-50 A. 8), 18) and 20) and 16-51 A. 4), 5) and 11) was arbitrary and capricious or otherwise contrary to rule or law?

Whether the Agency's action in suspending Appellant for five days for the alleged violations of CSR §§16-50 A. 8), 18) and 20) and 16-51 A. 4), 5) and 11) was retaliatory for her attempts to enforce an earlier settlement agreement between Appellant and the Agency and for her complaints about alleged hiring irregularities by the Agency?

If Appellant violated any provisions of CSR §§16-50 and 16-51, what is the appropriate sanction?

PRELIMINARY JURISDICTIONAL MATTERS

The Agency filed a Motion to Dismiss on June 6, 2000 for lack of jurisdiction. Appellant filed her Response on June 22, 2000, in which she requested leave to amend her appeal, and the Agency filed a Reply on July 7, 2000. On September 18, 2000, the Hearing Officer found that Appellant stated grounds for an appeal and that the case would go forward to a hearing on the merits.

More specifically, the Hearing Officer found that, once discipline is imposed, an employee has the due process right to a full evidentiary hearing on the merits should the employee want it. The suspended employee does not have to cite any Rule violations to be entitled to a post-disciplinary hearing before the Hearing Officer. CSR §16-40 C) gives the right to a post-disciplinary hearing to every employee who has been suspended, involuntarily demoted, or dismissed from her position. This hearing ensures that due process was followed by the Agency and that its actions were not arbitrary, capricious or otherwise contrary to law. It is the function of the Hearing Officer to serve as the independent check on the Agency's actions when suspending or otherwise disciplining its employees. To interpret the Rules otherwise would negate the need for any appeal to this Hearing Officer after any disciplinary action. The Hearing Officer denied the Motion to Dismiss.

As to whether Appellant could amend her Notice of Appeal to include a violation of CSR §16-50(B)(8), the Hearing Officer found that 1) there was no need for the Appellant to cite any Rule violations because she has been suspended and was entitled to a hearing on the merits because due process demands it and 2) CSR §16-50 set forth the reasons for discipline and did not create affirmative rights for an employee. The Motion to Amend was also denied.

This matter was then set for a hearing on the merits.

FINDINGS OF FACT

1. Appellant is an Agency Personnel Analyst with the Denver Sheriff's Department. She has worked for several agencies in the City and County of Denver for over 15 years. She worked for the Sheriff's Department in the early 1990's. She brought a sexual harassment suit against the Department in 1993, which was eventually settled. Appellant transferred to another City agency while that suit was pending. She returned to the Sheriff's Department in February 1997.

2. The Department was not required to take Appellant back after the lawsuit was settled. She asked Major Carlos Jackson if she could return to the Department. Since she had been a good employee during her previous tenure, Major Jackson and John Simonet, Director of Corrections and Undersheriff, thought it was a good idea and agreed to her return. Major Jackson described her as a talented and capable person and stated that, while he held in higher esteem than the rest of his staff, he felt she could get things done and that is why he wanted her

to work for him. Mr. Simonet echoed this sentiment and reason for agreeing to Appellant's return to the Department.

3. About nine months to a year after her return to the Department, Appellant spoke to Mr. Simonet about certain obligations the Department had assumed as part of settlement of the sexual harassment suit. (Exhibit 7) These obligations included the formation of a committee to review existing departmental policies concerning on-the-job harassment, review of the training policies related to on-the-job harassment, and make recommendations concerning the identification and relief of work-related stress. When nothing was done about forming the committee, Appellant went again to Mr. Simonet in November 1998 to address the issue. Appellant met with Mr. Simonet, other Departmental managers, and Xavier DuRân, Assistant City Attorney. At that time an Employees Policy Review Committee was established. Appellant was made a member of the committee. Other employees were also asked to volunteer.

4. The Department's witnesses (Mr. Simonet and Major Jackson) admit that the Department was not as timely as it should have been in establishing the Employee Policy Review Committee or fulfilling other obligations under the settlement agreement. When Appellant brought the delay to their attention, the deficiencies were addressed.

5. The Employee Policy Review Committee was given a broader mandate than required by the settlement agreement. It was given the power to review any Departmental policy they wanted to. It conducted surveys about sexual harassment in the workplace, as required by the settlement agreement. The Committee is still in existence. It has made several recommendations about policies, some of which have been implemented.

6. When Appellant first returned to the Department, she went to work in the Recruitment Office, where she was supposed to enter test scores into system. Appellant was not a background investigator. While she was there, Appellant noticed what she believed to be hiring irregularities by the Department, including the alleged recruitment of an under-aged deputy sheriff with a record of domestic violence. She also claimed that Major Jackson, who was in charge of recruitment, was altering test scores of deputy sheriff candidates. When she brought these alleged irregularities to the attention of Major Jackson, Appellant alleged that he took away her job duties and relegated her to answering phones and shredding recruitment files. Her keys to the file room were taken away. Appellant never filed a formal complaint about the alleged irregularities. Instead, she just wrote a memo to Major Jackson expressing her concerns.

7. Other than Appellant's mere allegations about alleged recruiting irregularities sometime in 1998, there was no evidence submitted to support her contentions. The testimony of Major Jackson and Mr. Simonet demonstrated that Appellant's contentions of misconduct were wrong. The allegedly under-aged

candidate met the CSA requirements, as evidenced by the CSA certifying the candidate at the time of his hiring. His alleged history of domestic violence was not borne out by a conviction. Major Jackson did not have the ability to alter test scores since he did not even have access to them. All he was doing was marking documents with a "P" or "F" to indicate whether candidate was cleared for the next hurdle in the hiring process. The notations were required for those entering data into the computer program that processed the candidates' applications. The notations were not meant to indicate whether the candidate passed or flunked a polygraph test, or any other test, as Appellant claimed. Major Jackson and Mr. Simonet confirmed that the notations were never passed along to Mr. Simonet for his use in making the decision whether to hire the particular candidate.

8. Major Jackson never assigned Appellant to shred files only or forbade her to use the computer. He denied he told her to sit in a corner and do nothing. He admitted that he had Appellant turn in her keys to the file room. However, Appellant was not singled out to do this. Major Jackson explained that he had all his employees turn in their keys because there had been problems allowing all of them free access into the room. After that, only the sergeant had the keys.

9. Major Jackson testified that he tried to work with Appellant to get her independent work since she was having difficulties working with others.

10. Sometime after August 1998, Appellant was transferred, at her request, to the Finance and Administration Division, which she knew to be located in close proximity to the vehicle impound area where Ralph Leonard, the man who sexually harassed her, was working. Appellant testified that she felt uncomfortable about working in an office near Sgt. Leonard. Appellant never complained to management about her discomfort or asked to transfer out of Finance because of Sgt. Leonard's proximity.

11. In October 1999, Appellant transferred to the Office of Safety Information, where Captain Hess supervised her. She was assigned to that office at the time of her discipline March 2000. Appellant testified that Captain Hess acted in a retaliatory manner towards her because he was a former supervisor of Sgt. Leonard's. However, Appellant agreed to the transfer to the Office of Safety Information and did not complain to management that Captain Hess was acting in a retaliatory manner towards her at any time prior to the disciplinary meeting in this matter.

12. Sometime during the two years preceding the incident at issue, Appellant was involved in at least two incidents during which time she used inappropriate language towards co-workers. The first one involved Sgt. Duran, who was one of her supervisors. Sgt. Duran was trying to hold Appellant accountable for her time (when she was coming to work, leave slips, authorization to leave work, etc.). Appellant went to Major Jackson to complain about Sgt. Duran. According to Major Jackson, Appellant used "unkind" words to describe Sgt. Duran. Major

Jackson was unable to remember whether any of the words used by Appellant were profanities, but he did remember he was clearly upset by the confrontation.

13. The second incident involved Major Jackson directly. Appellant was attending therapy appointments, which were 45 minutes long. She also needed travel time of an hour each way to attend the therapy sessions. The appointments were scheduled for 1:00 p.m. She would leave work at 10:00 a.m. and not return to the office afterwards. In other words, Appellant was taking five hours, instead of three, to attend her therapy sessions. Major Jackson asked her about the time discrepancies. Appellant became upset. She pounded her purse or bag on the table and then hit the wall with the purse. Major Jackson was not sure if she used profanity during that incident.

14. Major Jackson testified that he had seven complaints filed with him about Appellant while she was working with him in Internal Affairs. The complaining witnesses claimed that Appellant had been abusive, demeaning, demanding and overbearing with them

15. Sometime in 1999, Appellant began to work with Mr. Simonet to get her a promotion. Appellant was eligible for promotion on four different CSA lists. Mr. Simonet told Appellant to develop a position within the Department that would meet the job descriptions at least one of the classifications for which Appellant was eligible. They met at seven to ten times over the course of the year to discuss the promotion. Appellant developed a job description, but she was turned down for promotion by Mr. Servold, a CSA auditor, because the position did not meet the City-wide impact required for the Employee/Public Relations Coordinator classification. Then they worked to develop a position for her as Program Evaluator, but there was no need for such a title within the Department. Finally, they decided she should develop a Statistical Research Analyst position because Captain Hess said he could use someone in that classification.

16. Appellant tried to schedule a meeting with Mr. Simonet, Captain Hess and Mr. Servold to discuss her promotion several times in November 1999. According to Appellant, at least five meetings were scheduled, but either Mr. Simonet had to cancel or they had not been recorded in his calendar. Appellant claimed she had to threaten to call her attorney in order to get the January 25, 2000, meeting scheduled.

17. Appellant spoke angrily with Mr. Simonet's staff (Ethel Deleon and Stephanie Molina) on at least one occasion after a meeting was cancelled.

18. Mr. Simonet was set to retire from the Department at the end of January 2000. The January 25 meeting was three working days before he was to retire. Captain Hess was supposed to attend; Mr. Servold was unable to attend.

19. An Employee Policy Review Committee meeting had been scheduled

for 11:00 a.m. until 1:00 p.m. on January 25. Mr. Simonet had another meeting at 3:00. Therefore, Mr. Simonet agreed to meet with Appellant at 2:00 p.m., directly after the Committee meeting.

20. Mr. Simonet was sitting at the table in the conference room. Appellant got up to get a cup of coffee. Mr. Simonet asked Appellant to shut the door. Mr. Simonet began to talk to Appellant, explaining that, as he had only a few days left before he retired and that Appellant would have to work with Captain Hess and Mr. Simonet's replacement to get the promotion. Appellant became upset that Mr. Simonet was saying he was not going to be able to help her any longer. She stood up, waved the cup of hot coffee in Mr. Simonet's face, and began to yell at him. She said, "Mother fucker, you are blowing smoke up my ass" and asked him that, if he had no intention of helping her, why did he make her go through the gyrations with the CSA. According to Mr. Simonet, she also said, "You fucker, I'm disgusted. I'm going to get you" and "You no good fucker. I'm going to get you and (Major) Jackson." When Appellant started to leave, she said, "I'll see you in court. Have a nice retirement." Simonet replied, "No, you won't."

21. The conference table at which Mr. Simonet was sitting when this incident occurred is approximately four to five feet wide and eight to ten feet long. Mr. Simonet was sitting at the south side of the table. The door is along the north side of the room. Appellant sat down either on the north or the east side of the table.

22. Mr. Simonet is about a foot taller than Appellant when they are standing next to each other.

23. Mr. Simonet remained sitting throughout the incident even when Appellant stood in front of him and shook the coffee cup in his face.

24. Mr. Simonet testified that he found Appellant's language and her statement "I'll get you" to be threatening. He stated that her standing up with the coffee cup was also threatening and that he was afraid she would throw either the coffee or the cup itself at him. He testified that he was very disturbed by the incident.

25. No one other than Appellant and Mr. Simonet was present during the incident.

26. Mr. Simonet mentioned the incident to Major Jackson and Chief Camito right after Appellant left the conference room area.

27. The next day, Mr. Simonet mentioned the incident to Xavier DuRân, Assistant City Attorney. Mr. DuRân told Mr. Simonet to write up the incident and send it to Fidel Montoya, Director of Public Safety. Mr. Simonet sent a memo to Mr. Montoya on January 31, 2000, his last day at the Department. (Exhibit 1)

28. Major Jackson was not involved in the predisciplinary process, although it would normally have been part of his job responsibilities to do so. Appellant had filed a grievance against him and he decided it was better for him not to participate.

29. Appellant was sent a predisciplinary letter by Mr. Montoya on or about February 29, 2000. (Exhibit 5) In the predisciplinary letter, Appellant was informed that discipline was being contemplated for her alleged misconduct which might violate one or more off the following CSR: §§16-50 A. 8), 18) (referencing Executive Order No. 112), and 20) and 16-51 A. 4), 5) (referencing Denver Sheriff Department Order No. 2441.1), and 11).

30. A predisciplinary hearing was conducted by Mr. Montoya on March 8, 2000. Captain Hess, Pamela Johnson (Appellant's attorney) and Appellant were present. Mr. Montoya read the predisciplinary letter (Exhibit 5) into the record. Ms. Johnson read Appellant's written response (Exhibit B) into the record.

31. After reviewing the information provided and consulting with Mr. DuRân, Mr. Montoya decided to suspend Appellant for five days, beginning on March 27 and running through March 31, 2000, for violations of CSR §§ 16-50 A. 8) 18) (referencing Executive Order No. 112), and 20) and 16-51 A. 4), 5) (referencing Denver Sheriff Department Order No. 2441.1) and 11). The Notice of Discipline, dated March 20, 2000, was hand delivered to Appellant on March 21, 2000.

29. Appellant filed this appeal on March 31, 2000.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Regulations

CSR Rule 16 governs discipline. CSR § 16-10 sets out the purpose of the Rule:

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. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

CSR § 16-20, Progressive Discipline, provides in relevant part:

- 1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter of the City and County of Denver, or the Revised Municipal Code of the City and County of Denver include:
 - a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency file on the employee;
 - b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
 - c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority;
 - d) Involuntary demotion, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority; and
 - e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.
- 2) 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.
- 3) In those cases when the discipline deemed appropriate is suspension without pay of an overtime-exempt employee, the suspension shall be for at least a whole workweek or multiples of whole workweeks.

CSR § 16-50, Discipline and Termination, provides, in relevant part:

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. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 8) **Threatening, fighting with intimidating, or**

abusing employees or officers of the City and County of Denver for any reason, including but not limited to: intimidation or retaliation against an individual who has been identified as a witness, as a party, or as a representative of any party to any hearing or investigation relating to any disciplinary procedure, or a violation of a city, state, or federal rule, regulation or law. (Emphasis added.)

- 18) Conduct which violates an executive order which has been adopted by the Career Service Board.

Executive Order No. 112 – Violence in the Workplace. (See below)

- 20) Conduct not specifically identified herein may also be cause for dismissal.

CSR § 16-51, Causes for Progressive Discipline, provides, in relevant part:

- A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

- 4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

- 5) Failure to observe department regulations.

Sheriff Department Order No. 2441.1 - Violence in the Workplace (See below)

- 11) Conduct not specifically identified herein may be cause for progressive discipline.

City and County of Denver Executive Order No. 112, Violence in the

Workplace, issued on February 7, 1995, adopted by the Career Service Board on January 25, 1999, states in pertinent part:

II. General Policy

Violence or the threat of violence by or against any employee of the City and County of Denver is unacceptable and contrary to city policy, and will subject the perpetrator to serious disciplinary action and possible criminal charges. The city will work with law enforcement to aid in the prosecution of anyone inside or outside of the organization who commits violent acts against employees.

To ensure and affirm a safe, violence-free workplace, the following will not be tolerated:

- A. **Intimidating, threatening or hostile behaviors**, physical assault, vandalism, arson, sabotage, unauthorized use of weapons, bringing unauthorized weapons onto city property or **other acts of this type clearly inappropriate to the workplace.** (Emphasis added.)
- B. Jokes or comments regarding violent acts, which are reasonably perceived to be a threat of imminent harm.
- C. Encouraging others to engage in the negative behaviors outlined in this policy.

VII. Disciplinary Action

Any violation of this policy by employees, including a first offense, will result in disciplinary action, up to and including dismissal....

Denver Sheriff Department Order No. 2441.1, Violence in the Workplace, provides:

1. Purpose: The purpose of this order is to define the Department's policy regarding violence in the workplace. This is to ensure that the workplace is free from employee violence and harassment and reasonably safe for all employees.
2. Policy: It is the policy of the Denver Sheriff Department that violence or the threat of violence perpetrated by employees against other employees of the Department will not be tolerated. Any employee who observes or suspects the possibility of violence or suspicious behaviors should report this to a supervisor as soon as possible, for intervention.
4. Definitions and Examples

- A. **Intimidating, threatening or hostile behaviors, assault, vandalism, arson, sabotage, or unauthorized use of a weapon. (Emphasis added.)**
- B. Joking or commenting about violent acts that may be perceived as a threat to others.

Analysis

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined by the Courts 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).

Because this is an appeal of a disciplinary action (five-day suspension), the Agency has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances.

The crux of this case is Appellant's alleged conduct towards John Simonet on January 25, 2000, such behavior being grounds for a five-day suspension pursuant to CSR §16-50 A. 8) (threatening, fighting with, intimidating or abusing employees or officers of the City and County of Denver) and CSR § 16-50 A, 18) (violating Executive Order No. 112; Violence in the Workplace). Violation of either of these provisions supports discipline up to and including termination. The alleged misconduct is also a violation of the Departmental Order against violence in the workplace, Order No. 2441.1, which constitutes a violation of CSR §16-51 A. 5), and a violation of CSR §16-51 A. 4), which requires employees to maintain satisfactory working relationships with each other. Violations of CSR §16-51 are cause for progressive discipline. Under appropriate circumstances, violations of this section supports immediate dismissal.

There are two versions of the events of January 25, 2000, one told by the Appellant and one told by Mr. Simonet, the victim of Appellant's outburst. No one else was present at the time. Therefore, this case comes down to an issue of credibility between the two principles. The Hearing Officer has considered the demeanor of these two people while they were testifying and also considered that Mr. Simonet, who is no longer employed by the Department and had every reason to let the matter go and get on with his life, particularly as his wife had just undergone heart surgery on the day Mr. Simonet came to testify, in reaching her determination about their respective credibility.

The Appellant tried to argue that she could not have been perceived by Mr. Simonet as intimidating, threatening or hostile because he is taller than she. The Hearing Officer finds this to be a disingenuous argument. It is unreasonable to assume that offenders must be physically bigger than their victims. Even if this were not true, the size differential is irrelevant because, as both of them testified,

Mr. Simonet was seated and Appellant was standing when she shook the coffee mug in his face.

The Hearing Officer was most impressed by the miscalculated demonstration performed by Appellant's attorney, who filled a black coffee mug with water and asked Mr. Simonet to stand in front of the Hearing Officer and shake the mug in the Hearing Officer's face the same way Appellant did to him. The Hearing Officer stopped that demonstration because she immediately perceived the threatening nature of such an action to both the Hearing Officer's person and the papers on the desk in front of her.

The credible testimony established that Appellant acted in a threatening, intimidating or abusive manner towards her boss, who was still a City employee on the day of the incident. Whether she also used profanities, which she denies, the plain meaning of her admitted language ("You're blowing it up my ass," "I'll see you in court," and "Have a nice retirement"), even with the profanities removed, was hostile, offensive and threatening. Her shaking the coffee mug in Mr. Simonet's face was threatening and intimidating. The Department has established, by the preponderance of the evidence, that Appellant violated CSR §§16-50 A. 8) and 18) and 16-51 A. 4) and 5).

The violations under the "catch-all provisions, CSR §§16-50 A. 20) and 16-51 A. 11), are dismissed. Appellant's misconduct is covered by specific provisions of CSR §16-50 A and 16-51 A. These catchall provisions, which exist for the rare instances when an employee engages in an activity that that CSA Board did not think of when listing specific misconduct that might constitute reasonable grounds for dismissal or progressive discipline but which might justify such action by an agency. That is not the issue here. The grounds for Appellant's discipline rest in specifically defined misconduct contained in the provisions of CSR §§16-50 and 16-51.

The other issue before the Hearing Officer is the appropriate discipline for Appellant's violations of the CSR. The Hearing Officer has the power to affirm or modify the discipline imposed by Mr. Montoya, the appointing authority in this matter.

In making this determination, the Hearing Officer has looked at Appellant's employment history and her lack of a history of serious disciplinary problems since her return to the Department in 1997. There was testimony presented by the Department's witnesses that Appellant had been abusive or rude to others over the past few years, but both Mr. Simonet and Major Jackson testified that they thought she was a good employee even if she had occasional problems working with others. In any case, Appellant was not disciplined for her previous outbursts. Her PEPRs for the two previous years were each "Exceeds Expectations." She even received an "exceeds" evaluation in the area of interpersonal relationships in 1998 (Exhibit F, p. 110) and a score of 5 out of 5 for personnel skills in 1999 (Exhibit F, p.

103).

On the other hand, Appellant fails to accept her own responsibility in this matter. She tries to raise several smoke screens to show that she is the one who is perennially wronged by the Department. She states that the Department had not acted promptly in enforcing the terms of the settlement agreement from her sexual harassment suit. There is no evidence that Appellant grieved this failure or attempted to enforce it except by going to Mr. Simonet and reminding him of his obligations, which Mr., Simonet then satisfied. Appellant also complains that she had to work near Sgt. Leonard, her sexual harasser. However, Appellant asked to be transfer to an office she knew was near Sgt. Leonard's work location. Further, she never informed management that she was uncomfortable with her choice of office locations. She then tries to argue that Major Jackson was retaliating against her for her alleged discovery of alleged recruitment violations. There is no credible evidence to support those contentions. Major Jackson explained that he did not single Appellant out for turning in her key to the file room – that all his employees had to turn in their keys. He also explained that the "P" and "F" markings were for data entry and were not provided to Mr. Simonet, the hiring authority. The alleged hiring of an under-aged deputy sheriff with a history of domestic violence was also not borne out as the CSA, which operates independently of the Department, certified that particular individual for employment at a deputy sheriff. Appellant did not report these allegations to anyone in a timely manner and cannot receive the benefit of her belated attempts at "whistle blowing." Finally, Major Jackson's role in Appellant's discipline was non-existent. Major Jackson informed Mr. Montoya that he would not handle any part of the disciplinary process because Appellant had grieved him on other matters and he wanted to avoid any appearance of improper influence or bias.

Appellant's claim that this was also the result of retaliation by Captain Hess, Sgt. Leonard's prior supervisor, is not borne out. Captain Hess was not the appointing authority. Mr. Montoya was. There was no evidence presented that Captain Hess unduly influenced Mr. Montoya in deciding to suspend Appellant for five days.

She tries a nebulous claim of Mr. Simonet's bias, as demonstrated by the fact that the Employee Policy Review Committee was not set up promptly and by the fact that Mr. Simonet did not get her the promotion. The Hearing Officer cannot reasonably interpret these "facts" to establish any bias by Mr. Simonet against Appellant. In fact, Mr. Simonet thought Appellant was a good worker and encouraged her to create a job that would provide her with a promotion. The fact that he had not disciplined her before for her outbursts with his staff demonstrates his high tolerance for her misconduct, not a bias against her.

Finally, Appellant' conduct was outrageous. Mr. Simonet had agreed to Appellant's return to the Department in 1997, although he was under no obligation to do so, because he thought she was a capable worker and would benefit the

Department. Mr. Simonet worked with and encouraged Appellant with regards to the promotion. It was the CSA auditor, not Mr. Simonet, who was the obstacle. Then, three days before Mr. Simonet retired, he told Appellant the obvious – she was going to have to work with his successor to get the promotion since he was leaving. Instead of accepting Mr. Simonet's statement at face value, Appellant reacted violently and inappropriately. She shook a mug of hot coffee in his face, which was a threatening and intimidating violation of Mr. Simonet's personal space. It does not matter to the Hearing Officer whether Appellant used profanities or not. Mr. Simonet was her boss and she had no right to make the statements she did, with or without the profanity.

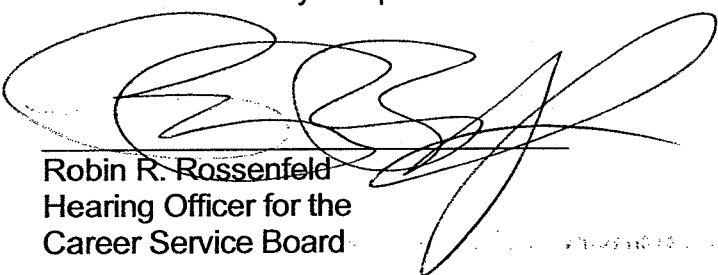
CSR §16-51, as well as §16-50, permits either progressive discipline or immediate dismissal "(u)nder appropriate circumstances." Just cause for discipline includes both the "failure to maintain a satisfactory working relationship with co-workers" [CSR § 16-51 A) 4)] and "failure to observe departmental regulations" [CSR § 16-51 A) 5)]. Executive Order No. 112 provides that any violation of the policy prohibiting violence in the workplace by employees, including a first offense, will result in disciplinary action, up to and including dismissal.

These provisions reflect the seriousness with which workplace violence must be treated. Dismissal was a possible discipline. However, Mr. Montoya considered Appellant's work tenure and history and her ability to continue to contribute to the Department when he decided to impose the lesser discipline, a five-day suspension. Given the outrageous nature of Appellant's conduct and her continuing refusal to accept her responsibility for the situation, a five-day suspension is a minimal consequence. The credible evidence in the record more than supports the five-day suspension. The Hearing Officer affirms Mr. Montoya's decision.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: the Department's determination that Appellant violated CSR §§16-50 A. 8 and 18 and 16-51 A 4) and 56) is SUSTAINED; the Department's determination that Appellant violated CSR §§16-50 A. 20) and 16-51 A. 11) is DISMISSED. The ten-day suspension is SUSTAINED and the request to recover ten days back pay and benefits is DENIED.

Dated this 27th day of April 2001.


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 same in the U.S. mail, postage prepaid, this 27 day of April, 2001, addressed to:

Pamela A. Johnson
633 17th Street, Suite 2200
Denver, CO 80202

Lucilla Tenorio
3035 Lowell Blvd.
Denver, CO 80211

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** depositing same in interoffice mail, this 27 day of April, 2001, addressed to:

R. Craig Hess
Assistant City Attorney

Ari Zavaras
Department of Safety
Manager of Safety

F.J. Oliva
Denver Sheriff's Department

V. Granada
