

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

Appeal No. 22-02

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

Appellant: LOUIS VIGIL

And

DEPARTMENT OF GENERAL SERVICES, THEATERS AND ARENAS DIVISION,  
and the City and County of Denver, a municipal corporation.

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NATURE OF APPEAL

The Appellant Louis Vigil, (Appellant) is a Career Service Employee and has challenged his dismissal from his position as a Custodian with Department of General Services, Theaters and Arenas Division (Agency). The Agency dismissed the Appellant because of conduct that occurred on December 8<sup>th</sup>, 2001 and previous unrelated disciplinary action. The Agency contends Appellant violated Career Service Rule (CSR) §§ 16-50 8) and 18); 16-51 4) 11) and Executive Order No. 112, Violence in The Workplace.

Appellant contends the Agency violated CSR § 19. Appellant is requesting to be reinstated with back pay and all documentation surrounding the incident be removed from his employee file.

INTRODUCTION

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was present represented by Cheryl Hutchison. The Agency was represented by Assistant City Attorney Mindi L. Wright, Esq., with Rodney Smith, serving as advisory witness for the Agency.

The following witnesses were called and testified at the hearing:  
Appellant, Timisha Crosby, Ben Vigil, Emmett Delgado, Shelwyn Reed, and Rodney Smith.

Exhibits 1-7 and 9-13 were admitted into evidence by stipulation and were considered in this decision.

### ISSUES ON APPEAL

Whether the Agency proved by a preponderance of the evidence that the Appellant violated provisions of the Career Service Rules.

If so, whether Appellant's dismissal was reasonably related to the seriousness of the offense(s), considering all of the circumstances, as required by the Career Service Rules.

Whether the Agency violated Career Service Rules.

### JURISDICTION

The alleged conduct that gave rise to this disciplinary action by the Agency occurred on December 8<sup>th</sup>, 2001. A pre-disciplinary meeting was held on January 4<sup>th</sup>, 2002. Appellant was advised of the disciplinary action against him by letter dated January 17<sup>th</sup>, 2002. Appellant filed his appeal with the Career Service Hearing Officer on January 25<sup>th</sup>, 2002. Neither party has contested the jurisdiction of the Hearing Officer to hear and decide this appeal.

Based upon these facts, I find that this appeal has been timely filed. And, under CSR §§ 19-10 (b) and 19-27, I have authority to affirm, reverse or modify the actions of the Agency.<sup>1</sup>

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<sup>1</sup> CSR § 19-10(b) provides:

Actions subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

CSR § 19-27 provides:

The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

### RELEVANT FACTS

1. At the time of the incident which gave rise to this appeal, Appellant was employed as a Custodian by the Agency.
2. On December 8<sup>th</sup>, 2001, Appellant was in the break room at the Buell Theater with Timisha Crosby, Emmett Delgado, Dino Duran, and Ben Vigil.
3. In the break room, Appellant picked up Crosby between the waist and thighs and carried her over his shoulder. Crosby asked Appellant to put her down and struggled to break free from his grasp.
4. Appellant carried Crosby a short distance across the break room and out the door into the hallway.
5. Crosby simultaneously stiffened her torso and lifted her head attempting to break Appellant's grasp, but instead hit her head on a concrete pillar.
6. Appellant put Crosby down, then assisted her to the couch in the break room and tired to find a supervisor but could not.
7. Crosby's supervisor, Shelwyn Reed, arrived and authorized Appellant to take Crosby to Denver Health Medical, which he did.
8. Crosby was off work for several days because of the injury.
9. A notice of contemplation of disciplinary action was sent to Appellant on December 17<sup>th</sup>, 2001, and a pre-disciplinary hearing was held on January 4, 2002, at which Appellant was represented by Cheryl Hutchison.
10. On January 17<sup>th</sup>, 2002, a letter of dismissal was sent to Appellant effective that day.
11. On January 25<sup>th</sup>, 2002, Appellant filed an appeal of his dismissal.

### DISCUSSION AND CONCLUSIONS OF LAW

Mr. Vigil has Career Status as a Career Service Employee and may not be disciplined or dismissed without just cause.<sup>2</sup> Appellant is accused of violating the following Career Service Rules, Executive Orders, or Departmental Rules and Regulations:

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<sup>2</sup> CSR § 5-62 provides:

Employees in Career Status

An employee in career status

- 1) may be disciplined or dismissed only for cause, in accordance with Rule 16, DISCIPLINE.

§ 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. 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.
- 18) Conduct which violates an executive order which has been adopted by the Career Service Board. (Executive Order-112 – Violence in the Workplace)
- 20) Conduct not specifically identified herein may also be cause for dismissal.

§ 16-51 Causes for Progressive Discipline

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

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter “de novo”. The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de*

*novo* hearing and a resolution of the factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this one, has the burden of proving that position by a “preponderance of the evidence”. To prove something by a “preponderance of the evidence” means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).<sup>3</sup> The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civic Jury Instruction 3:5).<sup>4</sup> The ultimate credibility of the witnesses and the weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In its dismissal letter, the Agency claims Appellant violated the Career Service Rules outlined above. Therefore, the Agency has the burden of proving the allegations contained in the letter of dismissal by a preponderance of the evidence.

CSR 16-50 A) 8) is the first rule the Agency alleges Appellant violated. To be found in violation of this rule an employee must threaten, fight with, intimidate, or abuse for any reason an employee or officer of the City and County of Denver. Agency advisory witness Rodney Smith characterized the incident as “caused in essence by horseplay.” Smith believed there was no malicious intent, just horseplay that got out of hand.

Timisha Crosby, the employee injured in the incident, testified: “I know Louis would never hurt me.” She also felt the incident was just horseplay. She described the custodian crew as close knit and often saw others on the crew involved in horseplay. Crosby described Appellant as a friend, who she did not want to see fired over this incident, so she went so far as to make up a story about how she banged her head. Crosby’s conscience got the better of her, so she told the truth about the incident to her supervisor. Crosby described herself as “jumpy.” Because of this she was often the target of other employees who knew she would react when teased or scared by them. After the incident Crosby was never told to stay away from the Appellant.

Shelwyn “Bubba” Reed, Crosby’s immediate supervisor, authorized Appellant to take Crosby to the hospital to be checked by a doctor. I can’t imagine a supervisor allowing the person who allegedly violated CSR rules concerning violence to take the person injured to the hospital. Reed never called an ambulance or paramedics because he did not think that was necessary. Reed described Appellant’s offer to take Crosby to the

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<sup>3</sup> The notes on use of Instruction 3.1 state: Generally, in all civil cases, “the burden of proof shall be by a preponderance of the evidence,...” citing C.R.S. § 13-25-127.

<sup>4</sup> The content of this instruction was approved as an instruction in *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded, 1984).

hospital as an act of "his generosity." And, Reeds' accounts of horseplay among the staff made them sound commonplace.

Appellant testified Crosby was squirming after he picked her up and put her over his shoulder. He had to move forward to maintain balance and when they got close to the break room door he was concerned she might hit her head. He carried her through the doorway to keep this from happening, then was going to put her down in a safer place. When they cleared the doorway is when Crosby lifted up her body and accidentally banged her head on a concrete pillar. Appellant went to get help, along with another employee, Ernest Delgado. Appellant took Crosby to the hospital and was concerned for her. Appellant was told by Reed, the horseplay must stop.

Appellant was never put on investigatory leave or in any way treated like this incident was an act of violence. This incident was described by Shelwyn Reed, the initial investigating supervisor, and Rodney Smith, the Agency advisory witness, as horseplay. My belief is this was nothing more than an unfortunate accident, caused by horseplay. For these reasons, the Agency's allegation Appellant violated this rule is denied.

The Agency next alleges Appellant violated CSR 16-50 A) 18) regarding violation of an executive order. Specifically, Executive Order No. 112; Violence in the Workplace. This order contemplates intentional violence or threats of violence by the employee accused of violating the rule. A violation might also result from gross negligence or willful neglect by an employee. Because Appellant was not alleged to have violated that rule, it will not be discussed further.

No testimony from any witness indicated Appellant had any intent to harm Crosby. Moreover, subsection V. Management Responsibility requires:

"The investigation shall include, at a minimum, an interview of all persons involved, including any witnesses in order to obtain an accurate account of the incident."

Shelwyn Reed testified he only obtained written statements from the witnesses. He did not interview them as required by the Executive Order.

My belief that this incident was nothing more than an unfortunate accident, caused by horseplay, has already been explained. When combined with two facts: 1) No one believed Appellant intended to harm Crosby and 2) The Agency did not follow the Management Responsibility requirements of Executive Order No. 112, the Agency's allegation appellant violated this rule is denied.

The Agency allegation Appellant violated CSR 16-50 A) 20) is denied. This rule is a catchall rule, which does not apply in this appeal for reasons previously explained.

Next the Agency alleges Appellant violated CSR 16-51 A) 4) for failing to maintain satisfactory working relationships with coworkers, other City and County

employees or the public. This incident, involving horseplay in which an employee was not seriously injured, does not violate the rule. All testimony was Appellant and Crosby were friends and got along well. For a time Appellant gave Crosby rides to work and had done work on her car for her. The allegation Appellant violated this rule is denied.

Because of this unfortunate accident and the injury that resulted to Crosby, Appellant is in violation of CSR 16-51 A) 20) Conduct not specifically identified herein may also be cause for progressive discipline.

### JUSTNESS OF DISCIPLINE

The remaining issue is whether the discipline imposed is just given the circumstances. While the Hearing Officer may defer to the discipline imposed by the Agency, he is required to make an independent, *de novo*, finding and determination as to the reasonableness of the discipline consistent with CSR 16, DISCIPLINE.

The purpose of Rule 16 is stated in § 16-10:

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.

In § 16-20 1) the appointing authority or designee is authorized to impose discipline from as slight as a verbal reprimand to as severe as dismissal. In § 16-20 2) the instruction is:

Whenever 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.

Ernest Delgado was the only witness to describe this incident as beyond horseplay. When compared with the testimony of every other witness, Delgado's account simply doesn't fit. In particular, the participants, the investigating supervisor and the Agency Manager, who made the decision to terminate Appellant, all characterized this incident as horseplay. Horseplay, like in this incident, where any employee was injured, and missed several days of work required the Agency to impose discipline. Because it has been determined this incident was not "violence" as prohibited by the CRS's, and

because horseplay was common within the Agency, dismissal of Appellant is not just under the circumstances of this incident. Nonetheless, severe discipline is appropriate.

ORDER

The Agency discipline, terminating Appellant is reversed. Discipline is modified to suspension without pay or benefits from January 17<sup>th</sup>, 2002, until today. Appellant is to be returned to his former position forthwith.

Dated this 10<sup>th</sup> day of April, 2002.



Michael A. Lassota  
Hearing Officer  
Career Service Board  
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**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 10<sup>th</sup> day of April, 2002 addressed to:

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

Louis Vigil  
4966 St. Paul St.  
Denver, CO 80216

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 10<sup>th</sup> day of April, 2002, addressed to:

Mindi L. Wright  
Assistant City Attorney  
Employment Law Section

Tom Migaki  
Department of General Services

Fabby Hillard  
Theatres and Arenas

*Virginia Granada*