

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

DONALD J. WEISS, Appellant,

vs.

DEPARTMENT OF AVIATION, and the City and County of Denver,
a municipal corporation, Agency.

The hearing in this appeal was held on Dec. 10, 2010 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Andrea J. Kershner. Trent Tarkenton, Information Technology Project Manager, served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered herein.

I. INTRODUCTION

Appellant Donald J. Weiss, an Associate Information Technology Technician for the Denver Department of Aviation (Agency), challenges his Sept. 10, 2010 dismissal based on two incidents occurring in early August and his failure to take responsibility for the incidents. The parties stipulated to the admissibility of Agency's Exhibits 1 - 21. Agency's Exhibits 22 and 23 and Appellant's Exhibits B, C, and E were admitted during the hearing. Appellant withdrew his Exhibits A and D. On Dec. 29, 2010, the parties submitted written closing arguments.

II. ISSUES

The issues presented in this disciplinary appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and

2) Did the Agency establish that dismissal was within the range of penalties that could be imposed by a reasonable administrator for the violations proven in the disciplinary letter?

III. FINDINGS OF FACT

The Agency hired Appellant as an Associate Information Technology (IT) Technician in the Technologies Division in November 2002. Appellant is assigned to the Service Desk, where he provides IT support to customers at the Denver International Airport (DIA). [Exh. 8-7, 2008 PEPR.] On Aug. 18, 2010, the Agency placed Appellant on investigatory leave based on misconduct alleged to have occurred on Aug. 2 and 3, 2010. After investigating the incidents and holding a pre-disciplinary meeting, the Deputy Manager of Aviation for Technologies found that dismissal was appropriate. This appeal followed.

1. Disrupting work of Planning and Development Project Manager

In August 2010, the seventh floor office space then occupied by the Planning and Development Department (P & D) at DIA was being renovated for use by another agency. On Aug. 2nd, Appellant's supervisor Trent Tarkenton assigned Appellant to mark certain furniture for removal from P & D in preparation for that renovation. Appellant entered the cubicle of Architectural Design Project Manager Thomas Vickery, and spent between three and ten minutes placing labels on his chairs, tables and other furniture for removal. [Appellant, 12/10/10, 1:41 pm; Vickery, 10:25 am.] At the time, Mr. Vickery was on the phone attempting to negotiate a contract with a construction project manager. He did not hear Appellant say anything in introduction or explanation. Appellant testified that he asked permission to enter and label the furniture, and Mr. Vickery responded by waving at him over his shoulder, as he was facing away from the cubicle entrance. Mr. Vickery found Appellant's movements around him distracting. When Appellant reached over him to put a sticker on his cabinet, Mr. Vickery became annoyed, and told his caller he was being disrupted and would call him back. Mr. Vickery then left his cubicle. "I was in his way when he was trying to get out of the cube." Appellant then apologized, stating, "I'm really sorry if it's something I did. I'm done here." [Appellant, 1:59 pm.] Mr. Vickery immediately complained to his supervisor that he believed an employee at Technology Services had been rude and unprofessional. [Mr. Vickery, 10:20 am.]

In his written statement to the Deputy Manager shortly after the incident, Appellant related that he knocked on the cubicle and asked the employee if he could label his furniture for the upcoming move. The man said "uh-huh" and motioned with his hand for him to enter.

I placed as many labels as I could and when it came time to place the last label on the overhead storage shelf which was in the back right hand corner of the cube, I could not reach it and I asked him if he could help me by moving to the side slightly. At the statement, the man became noticeably irritated and picked up his phone and indicated to a person on the other end that he could not possibly do business in this environment and then he hung up the phone and made his way to exit the cube. I was unaware that the man was even on a phone call up to the point that he became irritated. I thought he was eating his lunch as I noticed a sandwich in his hand.

I immediately apologized to the man and indicated that I was finished and that I would be leaving. I said nothing else.

[Exh. 4-1, Appellant's statement.]

At hearing, Appellant testified that he knocked on Mr. Vickery's wall and asked if he could place labels on furniture for the next day's move. Appellant spent two to three minutes in the cubicle tagging furniture, then reached over Mr. Vickery to place a label on his cabinet at the back of the space. Mr. Vickery said, "I can't do business this way any more." Appellant replied, "'Hey, I'm really sorry, I'm done here, if it's something I did.' . . . I was aware he was upset. I was in his way when he was trying to get out of the cube." [Appellant, 12/10/10, 1:41, 1:58, 2:06 pm.]

2. Conversation with Mr. Tarkenton

At about 7 am on Aug. 3, 2010, the above incident was reported to Appellant's supervisor Trent Tarkenton by Liz Trevino, a DIA employee who was managing the office move. Deputy Manager of Aviation for Technologies Robert Kastelitz also received a phone call from Dave Rhodes, the Deputy Manager for Planning and Development, who told him employees at P & D were upset because Appellant caused a disturbance the prior day. [Kastelitz, 11:39 am]. Mr. Kastelitz called Mr. Tarkenton to relay the complaints, and tell him he was concerned about preserving the relationship between the two agencies. [Kastelitz, 12:28 pm]. He asked Mr. Tarkenton to determine what occurred and rectify the problem by having Appellant apologize to the affected employees. [Tarkenton, 8:53 am; Kastelitz, 11:40 am]. Mr. Tarkenton then left a message for Appellant that "we have some damage control to do." [Tarkenton, 8:53 am].

When Appellant returned Mr. Tarkenton's phone call upon his arrival at work, the latter explained that "a conversation is in order" because some employees at P & D were offended by his actions the previous day. [Appellant, 1:34 pm; Tarkenton, 3:20 pm]. Appellant replied that he didn't believe he did anything that would warrant an apology, and asked for details of what he supposedly did. "I was worried about apologizing as an admission." [Appellant, 1:32 pm.] Mr. Tarkenton told him he believed their daily work relationship with P & D required an expression of regret if its employees are offended so they may move forward with this relationship in a productive manner. The Technologies unit was reorganized into its current structure five months before this incident. Its relationship with P & D was considered crucial to its success, as P & D is in charge of millions of dollars worth of major programs, including light rail, a bridge, and the new airport hotel. [Tarkenton, 9:25 am.] Mr. Tarkenton explained that he was not asking Appellant to admit guilt, but simply apologize that a critical business partner was offended by his actions. He told Appellant he did not know what had happened or who was at fault, but that Appellant needed to come with him to P & D to express his regret in an effort to re-establish a positive relationship between the agencies. [Tarkenton, 8:55 am]. Appellant loudly and angrily refused, stating he did not believe he did anything wrong, interrupting Mr. Tarkenton several times. [Tarkenton, 8:55 am].

As a result of co-workers' complaints about his negative tone and past discipline for rude behavior, Mr. Tarkenton had conducted biweekly coaching meetings with Appellant since Feb. 2010 to improve his interpersonal skills. During one of those meetings, Mr. Tarkenton explained the difference between admitting guilt and expressing regret, and the importance of the latter when co-workers feel offended. [Tarkenton, 10:05 am]. Appellant testified that he understood an apology can be offered to customers if you offend them, even if you do not believe you are guilty of any wrongdoing. [Appellant, 1:33 pm.]

The degree of anger expressed by Appellant during their Aug. 3rd conversation led Mr. Tarkenton to conclude that Appellant was attempting to intimidate him into withdrawing the criticism. He scheduled a meeting with Appellant for the next morning in order to give him a chance to cool down before they discussed the matter further. After their conversation, Mr. Tarkenton contacted Mr. Kastelitz and Human Resources. He informed them about his conversation with Appellant, and that they were scheduled to meet the next day to discuss the complaint from P & D. [Tarkenton, 9:05 am.] He then went to the P & D offices and apologized to the employees who complained in an attempt to regain a positive working relationship between the two units. [Tarkenton, 9:05 am].

The next day before the meeting was set to begin, Appellant sent an email to Mr. Tarkenton and asked if the meeting could result in discipline. [Tarkenton, 9:06 am; Exh. B.] Before Mr. Tarkenton responded, Appellant came to his office and asked the same question. [Tarkenton, 9:57 am]. Mr. Tarkenton replied that discipline was possible. Appellant then declined to attend the meeting without his union representative and Human Resources, and Mr. Tarkenton agreed to cancel the meeting in the absence of Appellant's representative. After Appellant left, Mr. Tarkenton referred the matter to Human Resources for further action. [Appellant, 1:47 pm; Exh. C.] Thereafter, neither Appellant nor Mr. Tarkenton pursued another meeting to discuss the matter. [Tarkenton, 10:08 am].

At Mr. Tarkenton's request, Senior Human Resources Generalist Colin Cheadle investigated the above two incidents, and interviewed Appellant as well as nine employees. Mr. Tarkenton told the investigator that he was alarmed by Appellant's angry reaction during their phone conversation on Aug. 3rd. [Tarkenton, 9:09 am.] Appellant testified that he did not tell Mr. Cheadle about the phone conversation because Mr. Cheadle asked him about a call made on Aug. 2nd, which was not the date of the call. He denied being confrontational with Mr. Tarkenton. [Appellant, 2:09 pm]. Mr. Cheadle testified that Appellant was asked if he had a confrontation with Mr. Tarkenton after completing the work in P & D, but that he did not mention a specific date. [Cheadle, 3:12 pm; Exh. 22-3]. Appellant told him he was unaware that his work had distracted Mr. Vickery. Mr. Cheadle gave Appellant the opportunity to review his statement and made changes with a red pen, but Appellant made no changes. [Cheadle, 3:14 pm; Exh. 22.]

Mr. Tarkenton's account of the phone conversation caused Mr. Cheadle to review Appellant's disciplinary history and determine that it showed a pattern of aggressive and hostile conduct. [Cheadle, 10:43 am; Exh. 5-4, 5-5]. He concluded that

Appellant irritated Mr. Vickery, causing him to terminate his business telephone call. Mr. Cheadle also concluded it was very likely that the phone conversation with his supervisor occurred as described by Mr. Tarkenton based on the details in Mr. Tarkenton's account and Appellant's disciplinary history. He noted that the conversation caused Mr. Tarkenton great concern about his work relationship with Appellant, Appellant's disregard for his authority, and Mr. Tarkenton's own safety. [Cheadle, 10:55 am.] Based on his investigatory findings and Appellant's disciplinary history, Mr. Cheadle recommended initiation of the disciplinary process. [Cheadle, 10:56 am]. The Agency decided to place Appellant on investigative leave during the process out of concern for workplace safety. Appellant "was intense and clearly angry" when he was served with the notice of investigatory leave and the pre-disciplinary letter. [Cheadle, 10:59, 11:04 am].

At the pre-disciplinary meeting on August 27, 2010, Appellant presented and read a written statement. [Cheadle, 11:00 am; Exh. 4]. Therein, Appellant recounted that "after I had heard [Mr. Vickery] speak to a person on the phone and indicate that he could not do any business under these conditions I was quite surprised and I realized that he was obviously very agitated about something. I even indicated that I was sorry for his perception and that I was leaving his cube as I was finished with the labels." [Exh. 4-3]. Mr. Cheadle testified that was the first time he heard Appellant admit he was aware his actions had irritated Mr. Vickery on Aug. 2nd. [Cheadle, 11:00 am]. The statement continued, "I admit that I was emotional when I heard from Trent Tarkenton that there had been some allegations of wrongdoing by me but I absolutely deny having behaved in a hostile, threatening, violent, or unprofessional manner at any time." [Exh. 4-4].

Mr. Kastelitz concluded that Appellant's actions violated several CSR disciplinary rules and Executive Order 112. Based on recommendations from Mr. Tarkenton and Mr. Cheadle and Appellant's extensive disciplinary history for the same type of conduct, Mr. Kastelitz terminated Appellant on Sept. 10, 2010. [Exhs. 2, 7, 9, 11, 12, 14, 16.]

Appellant's prior evaluations indicate that he was on notice since 2006 of the need to improve his interpersonal skills. On Nov. 28, 2006, Appellant received three "Needs Improvement" category ratings in the areas of "Service," "Respect for Self and Others," and "Related Unit Goal" on his Performance Enhancement Program Report (PEPR), and was placed on an Action Plan. [Exhs. 1-6; 13]. On his Oct. 31, 2007 PEPR, Appellant received ratings of "Needs Improvement" in the areas of "Service," "Related Goal Unit," three "Needs Improvement" ratings in the "Teamwork" category, one "Needs Improvement" rating in the "Accountability and Ethics" category, and one "Needs Improvement" rating in the "Duty, Goal, and Priority" category. [Exhs. 1-6; 10]. On his Dec. 8, 2008 PEPR, Appellant received two "Needs Improvement" ratings in the category of "Works Cooperatively with Others," one "Needs Improvement" in the category of "Interpersonal Relations and Teamwork," and two "Needs Improvement" ratings in the category of "Provides Technical Support." [Exhs. 1-6; 8].

Appellant also has an extensive disciplinary history based on conflicts with fellow employees. On Nov. 15, 2004, Appellant received a two-day suspension without pay

for a physical altercation with a co-worker. [Exhs. 1-7; 16]. On Dec. 12, 2006, Appellant received a verbal reprimand for a loud and angry discussion in the workplace, and disrespectful behavior towards his supervisor. [Exhs. 1-6; 12-1]. On Sept. 12, 2007, Appellant received a written reprimand for unprofessional, rude, and disrespectful behaviors as well as failure to perform a function of his job, violating CSR §§ 16-60 K and O. [Exhs. 1-6; 11-1]. On Dec. 4, 2008, he received a Letter of Advisement for a verbal altercation with a co-worker, which stated that "in the future, any outburst of this kind that you participate in will lead to further disciplinary action up to and including dismissal." [Exhs. 1-6; 9-1]. On Oct. 29, 2009, Appellant received a five-day suspension for threatening and intimidating conduct towards co-workers and management as part of a pattern of aggressive and hostile behaviors, including violations of CSR §§ 16-60 J, M, and O, and violations of Executive Order 112. [Exhs. 1-6; 7-3]. An investigation conducted as a part of that disciplinary action concluded that Appellant is "unable to acknowledge his behavior, in any of the reported circumstances," he has a "marked lack of insight," and an "inability to take responsibility for his behavior without rationalizing it." [Exh. 7-5]. The investigation further found that the results of an evaluation conducted on Appellant indicated that "there was a consistent discrepancy between how [Appellant] viewed events, and how they were viewed by others." [Exh. 7-6].

III. ANALYSIS

A. Disciplinary Violations

The Agency bears the burden to establish that Appellant violated the Career Service Rules as cited in the letter of dismissal by a preponderance of the evidence, and show that the penalty was within the range of discipline that can be imposed for the proven violations. In re Gustern, CSA 128-02, 20 (12/23/02); Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

1. Neglect of duty under § 16-60 A.

An employee violates this rule when he neglects to perform a job duty he knows he is supposed to perform. In re Compos, CSB 56-08A, 2 (6/18/09).

The Agency found that Appellant neglected his duty based on his failure to perform the duties listed in his PEPR and his failure to follow Mr. Tarkenton's order to accompany him to P & D to apologize for the prior day's incident. [Kastelitz, 11: 51 am.] The PEPR requires him to deal with anger, frustration, and disappointment in a mature manner, take responsibility for his decisions and behaviors, demonstrate good interpersonal relations with staff, employees, the public and other departmental personnel, and take a positive approach to addressing and solving problems by his tone of voice and words. Mr. Tarkenton concluded that Appellant neglected these duties during their Aug. 3rd phone conversation. [Tarkenton, 9:11 am].

I conclude that the Agency established that Appellant neglected his duty to maintain professional standards of conduct in his conversation with Mr. Tarkenton. Appellant was on notice of the need to comply with these standards of behavior based

on his PEPRs and biweekly coaching sessions with Mr. Tarkenton, and was given ample notice of the type of behavior that violates those standards based on numerous disciplinary actions over the preceding six years. [Exhs. 7, 9, 11, 12, 14, 16.]

Mr. Tarkenton and Appellant recalled their telephone conversation very differently. Mr. Tarkenton testified that Appellant was defensive and loud, and became very angry with Mr. Tarkenton, repeatedly refusing to apologize. Mr. Tarkenton characterized Appellant's reaction as "rage" as demonstrated by Appellant's emotional tone, rapid tempo, loud volume, and repeated interruptions. Appellant testified that he was emotional, but not violent or abusive.

I find Mr. Tarkenton's testimony more credible than Appellant's on this issue. Mr. Tarkenton made a substantial investment of time and energy in attempting to improve Appellant's workplace interpersonal skills over the past six months, and his version of the incident was consistent over time. In contrast, Appellant at first denied doing anything that warranted an apology, but later admitted in his statement and at hearing that he was aware of the incident referred to in the complaint, and aware he had upset Mr. Vickery. His later statement - "I had no idea what [Mr. Tarkenton] could have been referring to with the exception of the incident involving the man in the office area that I had apparently offended in some way just by being present, but to whom I had offered an apology the previous day" - clearly indicates Appellant was aware of the incident at issue. [Exh. 4-2.] It is apparent that Appellant initially denied knowledge or wrongdoing to avoid an admission that could lead to discipline, a clear motive to color his version of events. [Appellant, 1:31 pm; Exh. 4-2.]

Appellant argues in essence that he is being disciplined for invoking his right not to serve as a witness against himself. The constitutional prohibition that is apparently being invoked governs only admissions that may lead to a deprivation of life or liberty. U.S. Constitution, Amend 5; U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a *fundamental trial right* of criminal defendants.") In contrast, there is no legal barrier restricting parties in civil actions from being called to the stand, placed under oath, and required to testify about their claims or defenses. Similarly, communication between an employee and supervisor is undeniably important to accomplishing the employer's work. Appellant cites no authority for his argument that he is not required to assist his supervisor in maintaining a work relationship that was negatively affected by his actions, however inadvertently. I find that the Agency did not violate Appellant's constitutional or other rights by ordering Appellant to go with the supervisor and express his regret for irritating a customer.

Appellant also contends that he was denied the right to present his side of the story because his supervisor never re-set the meeting cancelled on Aug. 4th at Appellant's request. However, the Career Service Rules provide that Appellant's opportunity to correct any errors and to be heard in explanation or mitigation is provided in the pre-disciplinary meeting. CSR § 16-40 B. Appellant has cited no authority for his argument that it is the Agency's burden to give an employee an earlier opportunity to do the same. Moreover, Mr. Tarkenton's Aug. 3rd phone call and the

internal investigation gave Appellant two opportunities to be heard before the disciplinary process began.

Appellant's statements to his supervisor were motivated by his desire to avoid an admission and subsequent discipline, and ignored his duties to deal with anger in a mature manner, take responsibility for his behaviors, and solve problems positively. In addition, Appellant refused to comply with his supervisor's order to come with him to P & D to express his regret for the incident, a violation of his duty to follow directions given to him by his supervisor, in contravention of this rule.

2. Carelessness in performance of duties under § 16-60 B.

An employee is careless when he fails to exercise reasonable care in performing an assigned duty, resulting in potential or actual significant harm. See In re Mounjim, CSA 87-07, 5 (7/10/08). A person exercises reasonable care when he acts with that degree of care a reasonable person would use under similar circumstances. In re Feltes, CSA 50-06, 6 (11/24/06).

The Agency concluded that Appellant was careless in the performance of his PEPR duties based on his interaction with Mr. Vickery. [Tarkenton, 9:15 am; Kastelitz, 11:52 am]. The Agency cited the standards requiring him to serve as an effective representative of the organization by being courteous to others, considering their viewpoints, treating others with respect, dealing with emotions in a mature manner, taking responsibility for his own behavior, and solving problems in a positive manner through his tone of voice and choice of words. [Exh. 8.]

Mr. Tarkenton considered these PEPR standards to be important work duties because of Appellant's important customer service role, and the major impact his interaction with P & D had on the new professional relationship between Technologies and P & D, a vital work partner in large upcoming construction projects. [Tarkenton, 9:11 am]. Appellant was given the task of labeling furniture in P & D, and should have used reasonable care as defined in his PEPR in performing this duty. In reaching around and in front of Mr. Vickery, Appellant failed to demonstrate courtesy, tact and sensitivity to Mr. Vickery while the latter was conducting business in his own office space. I find that Appellant knew Mr. Vickery was on a business call because he observed blueprints and papers in the cubicle, and was in a position for several minutes to observe Mr. Vickery holding the phone and hear Mr. Vickery's part of the conversation. [Exh. 4-1.] Appellant's intrusive actions had the predictable result of causing insult and distraction to Mr. Vickery, and interfered with the contract negotiations. As a result, Appellant served as a poor representative of his division and caused actual harm by adversely affecting Technologies' relationship with a key customer. [Tarkenton, 9:13 am]. Mr. Tarkenton further corroborated Mr. Vickery's testimony by observing that Appellant treated him the same way. [Tarkenton, 9:14 am.] It is worth noting that Mr. Tarkenton as Appellant's supervisor should have expected an additional measure of respect and courtesy from his subordinate. Appellant's failure to act in consideration for the personal space and needs of others was careless under this rule.

3. Failure to comply with the orders of a supervisor under § 16-60 J.

This rule is violated where a supervisor communicated a reasonable order to a subordinate, and the subordinate violated that order under circumstances demonstrating willfulness. In re Sawyer and Sproul, CSA 33-08, 9 (1/27/09).

The Agency found that Appellant violated this rule by refusing Mr. Tarkenton's order to go with him to P & D to apologize for his actions. [Tarkenton, 9:16 am; Kastelitz, 11:53 am]. Mr. Tarkenton's instruction to Appellant to apologize to Mr. Vickery was reasonable, particularly where he emphasized that he need not admit guilt, but simply express regret for the offense he caused. [Tarkenton, 9:17 am]. Appellant conceded in his statement and at hearing that he had already apologized to Mr. Vickery after Mr. Vickery terminated his phone call and walked out of his cubicle. [Appellant, 1:58 pm; Exh. 4-1, 4-2.] Thus, Appellant's later denial of any knowledge of giving offense and his refusal to apologize are not believable, and do not justify Appellant's willful failure to obey his supervisor's reasonable order. Thus, the Agency proved that Appellant violated this rule.

4. Failure to meet standards of performance under § 16-60 K.

An agency may prove an employee's failure to meet standards of performance by evidence of a prior established standard, clear communication of that standard, and the employee's failure to meet that standard. In re Mounjim, CSA 87-07, 8 (7/10/08), rev'd on other grounds.

The Agency found that Appellant failed to meet specific standards in his PEPR, including: 1) serving as an effective representative of the organization by providing courteous treatment and ensuring that everyone's thoughts and opinions are considered in reaching a solution; 2) treating all people with dignity, respect, tact and sensitivity to others' perspective, personality, work style, and ethnic/cultural values; 3) dealing with anger, frustration, and disappointment in a mature manner; 4) listening to others and seeking solutions acceptable to all, valuing others' expertise, adapting approaches to different people and situations, seeking to understand others; 5) taking personal responsibility for decisions and behaviors; 6) demonstrating good interpersonal relations with staff, employees, public, and other departmental personnel; and 7) demonstrating a positive approach to addressing and solving problems through tone of voice and choice of words. The Agency contends Appellant failed to meet these standards when he was disrespectful and intimidating to Mr. Tarkenton during their telephone conversation, and failed to follow his instruction to apologize to Mr. Vickery. [Tarkenton, 9:22 am; Kastelitz, 11:54 am; Exh. 1-3].

Appellant acknowledged that he became upset, confused and emotional over the accusation, but denied he was hostile, violent, threatening, or unprofessional. [Appellant, 1:48 pm; Exh. 4-2, 4-4]. Mr. Tarkenton credibly testified that Appellant's display of rage during their call was intended to intimidate him, and alarmed him enough to cause him to seek investigatory leave for Appellant based on concerns for his own safety. Mr. Cheadle corroborated that testimony by his account of Appellant's

similarly angry reactions to receiving the notice of investigatory leave and pre-disciplinary letter. [Cheadle, 11:05.]

Appellant's PEPR clearly set the standards of conduct expected of him, and Mr. Tarkenton held regular meetings with him to reinforce those standards and coach him on proper interpersonal behavior. Appellant failed to meet those standards by his unprofessional outburst toward his supervisor, failed to treat both Mr. Tarkenton and Mr. Vickery with courtesy, respect, and sensitivity, and failed to resolve the issue raised by Mr. Tarkenton in a positive manner. I find that the Agency established that Appellant violated this rule by his angry and defiant exchange with his supervisor, as well as his earlier failure to treat a customer with courtesy, respect and sensitivity.

5. Failure to observe regulations, policies, or rules under § 16-60 L.

An agency establishes a failure to observe a policy by proving notice to the employee of a clear, reasonable, and uniformly enforced policy, and the employee's failure to follow that policy. In re Mounjim, CSA 87-07 A., 6 (CSB 1/8/09).

The Agency determined that Appellant failed to observe its policies prohibiting violence in the workplace during Appellant's phone conversation with Mr. Tarkenton in that his reactions were intimidating, threatening, and hostile, in violation of Agency Policy 2016 II.A. [Kastelitz, 11:54 am; Exh. 1-4.] Appellant's display of anger was found to be intentionally intimidating to Mr. Tarkenton, who described Appellant's behavior as an attempt to bully him into withdrawing the criticism. [Tarkenton, 9:23 am]. Mr. Tarkenton related two similar incidents in Feb. 2010 when Appellant became angry when reminded not to use unauthorized overtime, and another outburst when Mr. Tarkenton refused to reinstate his driving pass. [Tarkenton, 9:33 am.] Mr. Tarkenton testified that Appellant's manner on the telephone was much the same, despite his regular coaching and mentoring to eliminate the behavior. "It was rage. It sounded like he was really furious." [Tarkenton, 9:00 am.] Appellant's tone of voice was loud and emotional, his tempo rapid, and he cut him off several times. Appellant conceded he was emotional, but he specifically denied only that he said, "hell, no" when refusing Mr. Tarkenton's order to meet with P & D.¹ I find Mr. Tarkenton's testimony more believable based on his balanced demeanor on the stand and the consistency of his version of events. Mr. Tarkenton's testimony is also consistent with Appellant's past discipline for similar behavior, which shows a pattern of anger when he becomes frustrated. Mr. Tarkenton's alarmed reaction to Appellant's anger was reasonable given the intensity of the anger as measured against the innocuousness of the supervisor's request, in light of his past efforts to assist Appellant to change his behavior. The Agency established that Appellant violated Policy 2016 during his telephone conversation with Mr. Tarkenton by his intimidating and hostile statements, and therefore proved a violation of this rule.

¹ I do not consider Mr. Tarkenton's testimony that Appellant stated, "Hell, no!" in response to his order because it was not included in the pre-disciplinary or disciplinary letters. [Exhs. 2, 5.]

6. Threatening, intimidating, or abusing employees under § 16-60 M.

The Agency determined that Appellant abused Mr. Tarkenton in violation of § 16-60 M with his intimidating and hostile conduct during their telephone conversation. [Kastelitz, 11: 55 am]. Appellant conceded becoming emotional, but denied threatening, intimidating, or abusing Mr. Tarkenton.

For the same reasons as stated above in the analysis of § 16-60 L, I find that Appellant violated this rule by his intimidating and hostile conduct toward Mr. Tarkenton during their telephone call.

7. Failure to maintain satisfactory working relationships under § 16-60 O.

This rule is violated where an employee exhibits conduct that would cause a reasonable person standing in the employee's place to know it would be harmful to another person or have a significant impact on his working relationship with that person. In re Schultz, CSA 70-08, 4 (3/2/09).

The Agency determined that Appellant failed to maintain a satisfactory work relationship with Mr. Tarkenton by his intimidating and hostile conduct during their telephone conversation, and with Mr. Vickery by his insensitive actions while in his cubicle. [Kastelitz, 11:55 am].

As found above, Appellant was indeed intimidating and hostile toward his supervisor on the telephone, causing Mr. Tarkenton to pursue discipline and investigatory leave for Appellant. He ultimately recommended termination for the two events, in light of the apparent lack of success of his substantial efforts to improve Appellant's interpersonal skills. This is strong evidence of the damage done to their relationship by Appellant's behavior. Mr. Tarkenton testified that he concluded Appellant failed to maintain a good working relationship with him or with P & D. [Tarkenton, 9:25 am.] Mr. Kastelitz testified that he does not believe he can work with Appellant again, and has concluded that Appellant is not a good fit for the position he had, a job in which customer service plays an essential part. [Kastelitz, 11:58 am.]

The evidence proved that Appellant failed to maintain a satisfactory work relationship with his supervisor by his intimidating and hostile reaction to his relatively mild charge of discourtesy toward a customer. A reasonable person standing in Appellant's position should have known that such a display toward his supervisor would have a significant impact on their working relationship. This is especially so where Mr. Tarkenton had spent a significant amount of time coaching Appellant on professionalism and interpersonal work relationships.

The Agency also alleged that Appellant violated this rule when he tagged Mr. Vickery's furniture around him while he was on the phone without addressing him. Although a reasonable person should know that tagging furniture around and over a person for several minutes in their own work space would be irritating, that would not by itself have a significant impact on their working relationship. Mr. Kastelitz testified that he would not have brought disciplinary action against Appellant for the incident, and

thought the matter ended after he made a written statement. [Vickery, 10:24 am.] Therefore, I find that the Agency failed to establish a violation of this rule based on Appellant's conduct toward Mr. Vickery at P & D.

8. Conduct violating the Rules or Executive Orders under § 16-60 Y.

The Agency found that Appellant violated this rule by means of his failure to comply with Executive Order 112 and CSR § 15-110, both of which prohibit threatening or hostile behavior in the workplace. It based its finding on a determination that Appellant was intimidating and hostile during his phone call with Mr. Tarkenton when the latter directed him to apologize to Mr. Vickery. [Tarkenton, 9:38 am; Kastelitz, 12:00 pm].

For the same reasons as set forth above under § 16-60 L, I find the Agency proved Appellant violated the rule because of his intimidating and hostile behavior with his supervisor.

B. Appropriateness of Penalty

In evaluating the appropriate degree of discipline, the Agency must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. In re Norman-Curry, CSA 28-07 and 50-08, 23 (2/27/09). An agency's determination of penalty must not be disturbed unless it is clearly excessive or based substantially on unsupported considerations. In re Owens, CSA 69-08, 8 (2/6/09).

The Agency established that Appellant violated § 16-60 A, B, J, K, L, M, O and Y by the conduct described in the disciplinary letter. In determining the appropriate penalty, Mr. Tarkenton and Mr. Kastelitz discussed each rule violation. [Tarkenton, 9:11 am; Kastelitz, 11:49 am]. After the 2009 suspension, Appellant had been transferred to Mr. Tarkenton's supervision in order to give him "a second chance". Mr. Kastelitz here considered another suspension or relocation, but decided against either based on the fact that it had been less than a year since Appellant was given that second chance, and it did not result in improving Appellant's behavior. [Kastelitz, 11:32 am, 12:02 pm.] Mr. Kastelitz testified that he too had numerous discussions with Appellant on appropriate professional behavior in the workplace, noting Appellant's tendency to use an angry voice and arm gestures that Mr. Kastelitz told him could be perceived as threatening. [Kastelitz, 11:33 am]. Mr. Tarkenton had also notified Mr. Kastelitz in July that Appellant was escalating to anger quickly over minor frustrations. [Kastelitz, 11:38 am]. Mr. Kastelitz also considered that Appellant did not accept responsibility for his behavior in this or past incidents, and reluctantly concluded that Appellant was not a good fit in this customer service position. [Kastelitz, 11:57 pm.]

Mr. Kastelitz believed that the incident with Mr. Vickery was a minor matter which could have been easily handled without discipline in the absence of Appellant's extreme reaction to his supervisor's call. [Kastelitz, 11:49 am.] The dismissal decision was based on that reaction and Appellant's failure to follow a direct order, in light of his long disciplinary history for the same type of behavior and failure to respond to regular

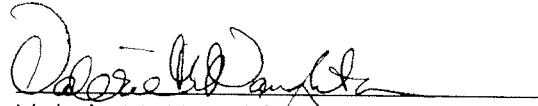
coaching meant to improve his behavior. [Kastelitz, 11:50 am]. Mr. Cheadle and Mr. Tarkenton agreed with that assessment. [Tarkenton, 9:40 am; Cheadle, 11:08 am].

Although Appellant admits he has some behavior issues, he denies these indicate a pattern of conduct that would justify dismissal. [Appellant, 2:29 pm]. Appellant testified that he has tried to make changes to his approach after each of the incidents in his disciplinary history. [Appellant, 2:27 pm]. At hearing, Appellant continued to assert that he had done nothing wrong. Under these circumstances, the Agency reasonably concluded that anything less than termination would not effect an improvement in Appellant's conduct. I find that the Agency's analysis is rationally related to the principles of progressive discipline based on its consideration of the severity of the offense and the fact that it does not appear Appellant recognizes any need to alter his reactions to frustration. I conclude that dismissal was within the range of discipline that could be imposed by a reasonable administrator, in keeping with the goals of discipline under the Career Service Rules.

IV. DECISION AND ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency's dismissal dated Sept. 10, 2010 is AFFIRMED.

Done this 14th day of February, 2011.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.

I certify that on February 14, 2011, a copy of this Decision and Order was delivered to the following in the manner indicated:

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