

**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**MISTY JONES,**

Appellant,

vs.

**DEPARTMENT OF AVIATION,**

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

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**I. INTRODUCTION**

The Appellant, Misty Jones, appeals her dismissal from employment with the Department of Aviation (Agency) on September 28, 2009. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 13, 2010. The Agency was represented by Assistant City Attorney Joseph Rivera. The Appellant was represented by Mark Bove, Esq. The following witnesses were called to testify for the Agency: the Appellant; James Palmer; Leonard Spomer; Ray Taylor; Pat Kelly; and Dan Brown. The Appellant called no additional witness during her case-in-chief. Agency Exhibits 1-3, 6-10, 13-15, and Appellant Exhibits A and C were admitted into evidence. For reasons which follow, the dismissal is AFFIRMED.

**II. ISSUES**

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules (CSR): 16-60 D., E., S., or Y;
- B. whether the Appellant violated Denver City Charter § 1.2.1;
- C. whether the Appellant violated Executive Order 25, section 3.4;
- C. if the Appellant violated any of the aforementioned, whether the Agency's decision to dismiss her from employment conformed to the directives regarding discipline under CSR 16-20.

### **III. FINDINGS**

Ms. Jones was employed for 10 years as a maintenance technician by the Agency at Denver International Airport (DIA). Her duties required her to respond to calls to repair the 113 passenger bridges used to move passengers on and off their flights at the airport's three concourses. When not engaged in repairs, Jones was required to inspect and conduct preventative maintenance on concourse A and C passenger bridges, so there was no idle time during her shift other than her one half hour lunch and two 15 minute breaks, all of which were subject to emergent responses. Jones worked four ten hour days, 6:00 a.m. to 4:30 p.m., Sunday-Wednesday. On Sundays she was the only bridge repair technician at DIA.

DIA maintains a \$2.5 million emergency mobile command vehicle (command vehicle). The command vehicle provides video, audio and communications support for emergencies on the airfield side of DIA. It houses eight computers, microwave uplinks, recording, and other sensitive equipment which is always powered on in order to avoid any delay in serving its various command post and communications functions during an emergency. During emergencies, the command vehicle is used by the National Transportation Safety Bureau, Federal Aviation Authority, Federal Bureau of Investigations, and other agencies to communicate the need for and to dispatch appropriate equipment or personnel needs across various agencies. Among the always-on equipment inside the command vehicle is a motion-activated video camera which is linked to a recording device. The digital recorder superimposes the camera location, date and running time stamp on the recording. Recording the activities of the command vehicle occupants during emergencies can assist them in the current emergency as well as in planning for future emergencies.

When not in use, the command vehicle is stored at DIA in Firehouse #1. Although DIA Firehouse #1 belongs to the Denver Fire Department, the command vehicle belongs to DIA, not the Denver Fire Department, and because of previous issues relating to the command vehicle, Denver firefighters are instructed to keep away from it. Other than during exhibitions and demonstrations, only six certified DIA personnel are allowed access inside the vehicle. Jones did not have such certification.

During the night of Sunday July 5-6, 2009, a jet ran off a runway into a ditch at DIA. Due to some problems with the recovery of the aircraft, the airline requested DIA to provide its recording of the recovery which was captured by the external cameras of the command vehicle recording system. James Palmer, a certified operator of the command vehicle, was given the task of reviewing the command vehicle recordings to determine if there was a pertinent recording. When Palmer viewed the command post recordings for July 5, 2009, he discovered the command vehicle's internal camera recorded Jones entering the command vehicle with a Denver firefighter, undressing, and engaging in sex with him between 3:15 p.m. and 3:26 p.m., during Jones' shift. [Exhibit 6]. Palmer reported his findings up his chain of command. As a result, Palmer's supervisor, Leonard Spomer, was required to view all recordings taken by the command vehicle recording system since it was placed into service - a period of 2 ½

years - in order to determine if there were other such incidents. Spomer, who had known Jones at work for eight years, discovered two other instances when Jones engaged in sex with the same firefighter in the command vehicle: Tuesday March 17, 2009, and Sunday April 19, 2009.<sup>1</sup> Each instance took place during Jones' work hours. For each of those dates, Jones submitted her work hours to payroll as a complete 10-hour work day.

A pre-disciplinary meeting was held on September 21, 2009. Jones' attorney-at-law accompanied her and presented a written statement in which Jones "concede[d] that she made a terrible mistake, exercised very poor judgment, and engaged in unprofessional behavior." During the meeting, Jones acknowledged entering the command vehicle with the firefighter on several occasions at the end of her shift. On September 28, 2009, the Agency issued a notice informing Jones she was dismissed immediately from employment. This appeal followed timely on October 8, 2009.

#### **IV. ANALYSIS**

##### **A. Jurisdiction and Review**

Personal jurisdiction. As a full-time employee of the Denver Department of Aviation, Jones was member of the Career Service personnel system, and may, therefore, appeal her discipline under the Career Service Rules. Denver City Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR § 19-10 A.1.a. Subject matter jurisdiction is proper under CSR §19-10 A.1.b., as the direct appeal of a dismissal.

Review. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

##### **B. Burden and Standard of Proof**

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove the level of discipline complied with the purposes of discipline. CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

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<sup>1</sup> The agency claims recordings from the command vehicle identify Jones engaged in sex with the firefighter on four dates: March 17, April 12, April 19 and July 5, 2009. This claim is based entirely upon Spomer's identifying Jones in the Exhibit 6 recordings for each of the four dates. The recordings clearly identify Jones in the command vehicle on April 19 and July 5. Spomer identified Jones by her ball cap, sunglasses, and coveralls in the March 17 recordings. Spomer's identification of Jones in the April 12 recording is not credible, since, other than the firefighter, the identity of a second person is not discernable in any of the six clips for that date. Thus the Agency proved Jones presence in the command vehicle on three, not four dates.

## **C. Career Service Rule Violations**

### **1. CSR 16-60 D. Unauthorized operation or use of any vehicles, machines, or equipment of the City...**

The command vehicle is a City vehicle. The agency's un rebutted evidence established that only certified DIA employees are allowed to use it, and that Jones was not so certified. Jones denied at hearing that she remembered ever entering the command vehicle, although her earlier admission, at the pre-disciplinary meeting, and especially the digital recordings, [Exhibit 6], establish this element by a preponderance of the evidence.<sup>2</sup> Jones denied her actions constitute the use of a City vehicle. [Appellant closing argument]. By any common understanding of the word "use," it is evident Jones exercised possession of, frequented, placed herself in, or otherwise availed herself of the command vehicle, [see WEBSTER'S UNABRIDGED DICTIONARY DELUXE EDITION (1979)]; and her use was unauthorized. She replied that any employee may enter the command vehicle, but this claim was rebutted by those employees who control the operation of the vehicle, [Palmer testimony, Spomer testimony], and by the fire chief's order for his own subordinates to stay away from it. Those elements, Jones' use of a City vehicle, and such use being unauthorized, establish a violation of CSR 16-60 D.

In addition, the Agency's evidence establishes Jones used her City work vehicle to drive to Firehouse #1 in order to meet the firefighter for their liaison, an evident misuse of a City vehicle. Jones claimed she was just passing by Firehouse #1 on her way to pick up parts for her duties. Her supervisor allowed it was theoretically possible for Jones to pass firehouse #1 on her way to retrieve supplies, or on the way to an office. [Palmer cross-exam]. However, the video evidence of Jones inside the command vehicle on April 19 and July 5,<sup>3</sup> and Palmer's identification of Jones inside the command vehicle on March 17, April 19, and July 5, make it clear Jones was not on a work errand at those times. Jones' use of a City work vehicle to travel to Firehouse #1 for her personal interests was an unauthorized use of a City vehicle, and therefore established a second violation of CSR 16-60 D.

### **2. CSR 16-60 E. Any act of dishonesty...**

An employee is dishonest within the meaning of this rule by making any knowing misrepresentation within the employment context. In re Mounjim, CSB 87-07, 6 (1/8/09). The Agency claimed Jones was dishonest by claiming and accepting pay from the City while she was engaged in her trysts. [See Agency closing statement; Exhibit A; Exhibit 13]. Jones replied she is entitled to take one half hour and two 15 minute breaks at her discretion, so that, even if she met the firefighter at Firehouse #1, she was "off the clock" at those times. Jones' supervisor acknowledged bridge technicians have no set time for lunch, only that they "generally take lunch between 11:00 a.m. and 1:00 p.m. and generally stay close to the main terminal. [Taylor testimony]. While

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<sup>2</sup> See footnote #1

<sup>3</sup> See footnote #1.

Jones' supervisor held some expectation that technicians would remain nearby their work area and remain available for dispatch, there was no requirement for them to remain within a particular area or distance, and the Agency did not prove by preponderant evidence that Jones would have been unable to respond timely to a dispatch. Since the only basis of the Agency's claim under this rule was that Jones claimed pay dishonestly for the time she met the firefighter in the command vehicle, but the Agency was unable to prove Jones was "on the clock" at those times, this violation is not proven.

#### **7. CSR 16-60 S. Unauthorized absence from work...**

This rule requires an agency to prove (1) an employee was absent from work and (2) the absence was unauthorized. With respect to the first element, even allowing that Jones' conduct in the workplace on March 17, April 12, April 19 and July 5, 2009 was unacceptable, it does not follow that the improper conduct metamorphosed into an absence from work. Regarding the second element, as stated immediately above, Jones was entitled to take a half hour lunch break and two 15 minute breaks at her discretion. Where the Agency did not rebut Jones' testimony that she was on an authorized break for all times claimed by the Agency as violations, the agency failed to prove Jones' time off was unauthorized. See In re Compos et al, 56-08, 14-15 (12/15/08).

#### **8. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.**

The Agency made three distinct claims under this rule: that Jones' conduct was in violation of CSR 15-5 regarding employee conduct; City Charter § 1.2.1, General municipal policy; and Executive Order 25 §3.4, prohibiting the personal use of City vehicles.

a. CSR 15-5 Employee conduct. Every employee in the Career Service shall conscientiously fulfill the duties and responsibilities of his or her position. The conduct of every employee during work hours or at any time while representing the agency, department, or City shall reflect credit on Career Service and the City and County of Denver (City).

As noted in prior decisions, generalized standards and aspirational goals fail to provide notice to apprise employees what measures determine success or failure. See, e.g. In re Catalina, CSA 35-08, 10 (8/22/08) (performance standard of maintaining respect for others and helping to maintain a positive work relationship failed to provide notice that confidentiality breaches are covered by that standard); and In re Mounjim, CSA 87-07 (7/10/08) ("communication of work duties and of the standards by which those duties are judged, are fundamental tenets of the Career Service Rules"). The Agency failed to provide evidence that Jones did not conscientiously fulfill her duties and responsibilities. It also failed to provide evidence that her conduct discredited the

Career Service or the City. This violation, therefore, is not proven.

b. Charter §1.2.1 General Municipal policy. ...It is the intent of the city and County of Denver that its officers, officials, and employees adhere to high levels of ethical conduct so that the public will have confidence that persons in positions of public responsibility are acting for the benefit of the public.

For the same reasons as stated immediately above, this policy is unenforceable as a CSR violation.

c. Executive Order 25 Vehicle Use Policies, §3.4 – No Personal Use. City vehicles are to be used only for City business. City employees shall not use a City vehicle for personal use other than for driving from home to work and from work to home when authorized... or when the vehicle is an authorized full-use public safety vehicle as defined below

Authorized full-use public safety vehicles: the Mayor or Manger of Safety may authorize full use of certain public safety vehicles where the employee's assignment requires immediate response to emergency situations on a 24 hour on call basis, requiring the use of specialized safety or emergency equipment which must be carried in or on the vehicle. Full-use authorization shall be in writing and shall be valid only during on-call status.

For reasons stated above at CSR 16-60 D., Jones' personal use of the command vehicle as well as her unauthorized use of her work vehicle were unauthorized. She did not claim she met the full-use exception. Thus, two violations of Executive Order 25 are established, which in turn, establish a violation of CSR 16-60 Y.

**9. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.**

To sustain this violation, the agency must show actual harm done to the Agency or City as a result of employee's conduct. In re Simpleman, CSA 31-06, 10 (10/20/06). No evidence of actual harm was shown, therefore no violation is proven under this rule.

## **V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

A. Severity of proven offenses.

Jones' misuse of her work vehicle, alone, may not have been a sufficient reason to dismiss her from employment. However, her personal use of the command vehicle was deemed egregious by the Agency. The following Agency concerns were un rebutted. First, the equipment inside the \$2.5 million command vehicle is sensitive. An inadvertent bump into one of the many computers, uplinks, or other sensitive equipment could turn off or change settings, delaying or making it difficult to reset the equipment to a ready position to respond to life-threatening emergencies. Second, the discovery of Jones' use of the command vehicle could turn one of DIA's show pieces into an object of derision, and could diminish DIA's reputation as a world leader in airport operations. Finally, the use of a \$2.5 million dollar piece of City equipment for personal pleasure demonstrates extremely poor decision-making by a City employee. Jones' choice to engage in her rendez-vous on Sundays, when there was less supervisory oversight, demonstrates that she planned her encounters to avoid detection.

B. Past Record

Jones' had no prior violations during her entire tenure. Her work reviews were always "successful" or better. She always performed the repairs requested of her. [Taylor cross-exam]. One egregious violation, however, may justify dismissal. CSR 16-20; 16-50.A.3.

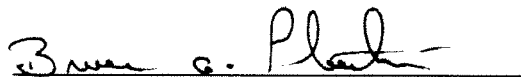
D. Penalty most likely to achieve compliance.

The Agency determined the severity of the offenses justified dismissal. Jones' belated memory loss at hearing, and her denial of wrongdoing make it unknown if she could or would be willing to correct the offending behaviors. Based upon the findings above, the Agency's election to dismiss Jones was neither clearly excessive nor based upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing* In re Delmonico, CSA 53-06, 8 (10/26/06).

**VI. ORDER**

For reasons stated above, the Agency's termination of Jones' employment is **AFFIRMED.**

DONE May 11, 2010.

  
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Bruce A. Plotkin  
Career Service Board Hearing Officer

## NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party 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 certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

### BY MAIL OR PERSONAL DELIVERY:

Career Service Board  
c/o Employee Relations  
201 W. Colfax Avenue, Dept. 412  
Denver CO 80202

### BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.