

DECISION

IN THE MATTER OF THE APPEAL OF:

CANDACE LYKKEN, Appellant,

vs.

DEPARTMENT OF AVIATION,

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

I. INTRODUCTION

The Appellant, Candace Lykken, appeals her one week (five work-day) suspension assessed by her employer, the Department of Aviation (Agency). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on June 3, 2010. The Agency was represented by Robert A. Wolf, Assistant City Attorney. The Appellant represented herself. Agency Exhibits 1-12(1), 12-3, and 14-17 were admitted, as were Appellant's Exhibits A-I. The following witnesses testified for the Agency: Billie Jo Roach; Geraldine Thomas; Yvette Briscoe; and Dan Melfi. The Appellant testified on her own behalf. For reasons which follow, the five-day suspension is AFFIRMED.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Agency proved, by a preponderance of the evidence, the Appellant violated any of the following Career Service Rules: 16-60 K; L; M; O; or Y;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to assess a five-day suspension conformed to the purposes of discipline under CSR 16-10.

III. FINDINGS

Ms. Lykken is employed as a customer service representative for the travelling public at Denver International Airport. The Agency assessed discipline against her for two separate incidents, one for her behavior toward a co-worker on January 11, 2010 over providing a DMV release and the other for a customer service incident on February 22, 2010.

A. The DMV release incident.

In addition to her public service duties, Lykken served as a member of the Auxiliary Snow Removal Team, consisting of volunteer airport employees who wish to assist during snow removal emergencies at DIA. Executive Order #3 (E.O. #3) requires all City of Denver employees who drive city-owned vehicles to make their DMV records available to their agencies. E.O. #3 also requires each agency to track and audit all such DMV records at least annually.

In order to comply with E.O. #3, the Agency requires each snow removal volunteer to submit a DMV release upon completion of snow removal training each fall. Lykken submitted such a release after her snow removal training in the fall of 2008.

During the Agency's audit of its E.O. #3 compliance for 2009, the Agency discovered the employee responsible for having Auxiliary Snow Removal volunteers fill out their DMV releases failed to do so at the September 2009 training. Consequently, the agency issued an email notice to its snow removal volunteers, including Lykken, to submit a release. [Exhibit 12; Exhibit 13]. The pertinent portion of the notice read "I should have had you complete the attached Colorado Motor Vehicle Department Release of Records form at snow training in September, but failed to do so. Please print and complete the attached form and **return it to me** as soon as possible. You cannot perform snow removal operations until the form is complete...so make sure you complete it **NOW.**" [Exhibit 12-1, emphases and ellipsis in the original].

In response to the notice, Lykken went to the DIA human resources office on January 11, 2010, where she was directed to Dina Thomas, a Human Resources Technician. Although Lykken had signed a similar waiver without complaint a year earlier, she told Thomas she was uncomfortable signing the form, and wanted assurances of confidentiality of her DMV record. Thomas explained the release would remain confidential with HR and would never be released to anyone else. Lykken was unconvinced and became agitated. Her voice became elevated and she began gesturing broadly while she spoke.

Thomas remained calm and explained again that HR maintains confidentiality and does not discuss such things outside of official need to know. Lykken interrupted, became more aggressive, and shouted "how do I know that?" Thomas still remained calm and explained E.O. #3 requires the agency to maintain such records, and repeated those records remain confidential. Thomas also suggested to Lykken that, if she was concerned about her confidentiality, she should not sign the form, but she would no longer be able to serve on the snow removal team.

Lykken, who was standing above the seated Thomas, became more aggressive. She shouted her DMV record was her own business and no one else's. She shook the DMV release form toward Thomas' face, became increasingly animated and shouted louder and louder that she does not drink and drive, that she is in recovery for the rest of her life, that the release does not

prevent her DMV information from being spread around, and that she probably said too much. Thomas became concerned for her safety, and began to consider an escape route.

In an effort to end the situation quickly, Thomas elevated her voice slightly and told Lykken firmly she needed to come back the next day and speak with someone else who could explain the DMV waiver requirements to her. Lykken left Thomas' office, but continued to yell to no one in particular all the way down the hallway.

Lykken's yelling at Thomas attracted the attention of Senior Human Resources Professional Diana Smith who heard the yelling from her office. She walked down the hallway toward the commotion and observed Lykken standing over Thomas, yelling and waving a paper at her, while Thomas appeared calm.

Thomas was shaken by Lykken's actions. Smith asked Thomas to document the incident which Thomas did the following day. [Exhibit 14]. Thomas asked Smith not to have to deal with Lykken any more as this was the second incident where Lykken intimidated her. Smith assured Thomas she would assign someone else to deal with Lykken if she came in again.

The day after the incident, Lykken sent an e-card to Thomas in which she stated "Dina, Hi!! I am so sorry about the misunderstanding in your office yesterday. Please [accept] my heartfelt apology, it won't happen again." [Exhibit 15]. Lykken followed up with a phone call to Thomas the same day to ask if Thomas received the e-card. Lykken apologized again, but Thomas remained shaken.

[Thomas testimony; Thomas cross-exam; Exhibit 1-3, 1-4; Exhibit 14].

B. The customer service incident.

On February 22, 2010, Lykken was returning from her lunch break to duty at the customer service booth on concourse A. Lykken's supervisor, Yvette Briscoe, was attending the booth during Lykken's lunch. As Lykken approached the booth, a passenger and her two children also approached the booth, still attended by Briscoe. The passenger asked if Briscoe might have a cell phone which would accept her SIM card in order to contact someone urgently. Interrupting, Lykken addressed the passenger directly in a loud voice telling her to try contacting her cell phone company. Briscoe was taken aback by the sudden interruption, but did not react overtly. Instead, she simply told the passenger it may be a good idea. Briscoe looked up the telephone number for the passenger's cell phone carrier. When she began to provide the information, Lykken interrupted, telling Briscoe she (Lykken) was assisting this passenger and could do so herself. Briscoe stated she was simply giving the passenger the information she needed. Lykken raised her voice further, saying "I don't need your help, I can do this alone. I will help this passenger!"

Briscoe quietly instructed Lykken to calm down. Lykken threw up her hands and yelled "I can't do this now, I'm too upset" Briscoe again instructed Lykken to calm down, that she (Lykken) was behaving unprofessionally and that she would talk with her later about it. Briscoe then turned back to the passenger, gave her the phone number, and began to direct her to a phone she could use. Lykken yelled "No! I will do it!" Briscoe apologized to the passenger, told her Lykken would assist her, then left.

Later the same day, Briscoe required Lykken to meet with her and Nikki Watts, Aviation Customer Service Supervisor, about the incident. Lykken explained she was uncomfortable having a supervisor in the booth observing her and said she believed supervisors were setting her up to fail. Lykken also stated she was sensitive to the subject of cell phones because her cell phone was recently stolen. Briscoe told Lykken she was expected to work with co-workers, supervisors, and outside agencies on a regular basis, and that she needed to maintain professional working relationships at all times. Briscoe ended the meeting by telling Lykken her behavior was unprofessional and would not be tolerated again. Briscoe documented the incident the same day.

[Briscoe testimony; Exhibits 1-4; 1.A].

The Agency issued a letter in contemplation of discipline to Lykken on March 3, 2010 concerning the two incidents. A pre-disciplinary meeting was held on March 15, 2010. Lykken attended without a representative and gave a statement. On March 22, 2010, the Agency issued a notice, signed by Assistant Deputy Manager of Aviation Dan Melfi, informing Lykken she was suspended for five working days, from March 30 through April 5, 2010. This appeal followed timely on March 30, 2010.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction. As an employee of the Career Service system, Lykken may appeal discipline under the Career Service Rules. 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 suspension. 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 its decision to suspend Lykken for five days 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.

C. Alleged Career Service Rule Violations

1. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). The Agency's disciplinary letter referenced Lykken's 2009 work review standard which states "[d]emonstrates effective oral and written communication by providing factual information to customers in clear and concise statements, uses ideas and words that are appropriate to listener and situation." [Exhibit 1-1]. The only evidence concerning the passenger's reaction to Lykken was Briscoe's testimony that the customer "had to be embarrassed. While Lykken did not rebut this testimony, Briscoe did not describe the passenger's demeanor or reaction otherwise, and the content of Lykken's words was actually helpful according to Briscoe, i.e., Lykken's suggestion to call the passenger's cell phone provider was helpful information. Thus the content of Lykken's words was appropriate, and not a violation of this rule. However, even when the content of a communication is appropriate, the broadly stated language of the work standard also encompasses the manner of communication. Lykken was appalled that Briscoe was present for what, in her mind, was an attempt to "set her up." Briscoe's description of Lykken's actions as inappropriate, loud and unprofessional, are consistent with Lykken's state of mind, and consistent with her prior inappropriate responses to perceived affronts. [Melfi testimony].

Lykken disputed who began serving the passenger first, however that dispute is irrelevant. Lykken did not dispute Briscoe's characterization of Lykken's tone, demeanor, or that Lykken's reactions were attracting unwanted attention to the customer service booth. Where Lykken's manner of communication was loud, inappropriate and unprofessional, and where such manner was consistent with her pattern of acting inappropriately, this violation is established by a preponderance of the evidence.

2. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. The Agency cited the following agency regulations.

Department of Aviation Standard Policies and Procedures

No. 2016: Violence in the Workplace...

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

A. Intimidating, threatening or hostile behaviors...or other acts of this type clearly inappropriate for the workplace.

It was a reasonable response, under the circumstances described above, for Thomas to be intimidated or frightened by Lykken. Lykken was standing above Thomas, waiving her arms. She thrust a paper toward Thomas' face repeatedly. Lykken's voice became increasingly shrill, aggressive and angry, and, even though Thomas did nothing to provoke Lykken and tried several times

to moderate Lykken's anger, Lykken became increasingly menacing. Thomas was therefore reasonably intimidated and threatened by Lykken in violation of the Agency's policy 2016 against violence in the workplace.

Lykken countered she was not intimidating or threatening for the following reasons. (1) Her loud voice is merely an expression of exuberance, as she is passionate about her job. (2) Thomas raised her voice first, so that she (Lykken) was merely matching Thomas' tone. (3) Lykken was not unduly loud or threatening since security was not called. (4) Lykken often talks with her hands, so her gestures were not threatening.

1. Exuberance. First, as stated previously, Lykken's assessment of her actions do not weigh as heavily as a recipient's reasonable reactions to those actions, and Thomas was reasonably afraid of Lykken's arm waiving, loud voice, and having a paper thrust in her face. Moreover, Lykken's assessment of her actions as merely passion for her job does not comport with the observations by Thomas, her supervisors, and others that she was yelling, even screaming, and out of control in both incidents. 2. Thomas raised voice first. Others heard Lykken's agitation and loud voice, but no one else except Lykken claimed Thomas was loud. 3. Security not called. That the Agency did not call security does not prove whether Lykken was threatening or intimidating. Rather, it appears, as stated by Melfi, that the Agency has afforded Lykken every restraint in dealing with her excesses. 4. Normal gestures. Finally, as was the case for the volume of her conversation, Lykken's hand waiving must be judged by the effect it has on others whose reactions are reasonable. There is no reason to dispute Thomas' fearful reaction to Lykken's arm-waiving was reasonable, given that her description of Lykken's actions are consistent with Lykken's past history, that Thomas' account of the incident on January 22 was supported by other witnesses, and that Lykken admitted she sometimes loses control. [Lykken testimony]. Lykken's responses, above, do not diminish the reasonableness of Thomas' reactions or the seriousness of Lykken's actions.

3. CSR 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the city or any other member of the public for any reason.

The same facts which established a violation of CSR 16-60 L, immediately above, also prove a violation of this rule. Thomas was reasonably threatened and intimidated by the combination of Lykken's position, tone and gestures. In addition, Lykken's public and angry expression toward her supervisor, over who should handle a customer, was a violation of this rule. Lykken's response, that she was first to deal with the passenger, is irrelevant to her actions toward the passenger and toward her supervisor, who showed remarkable restraint at the time.

4. CSR 16-60 O. Failure to Maintain satisfactory working relationships with co-workers, other City employees, or the public.

Where Thomas was sufficiently shaken by Lykken's unreasonably abusive treatment of her on January 11, 2010, that she asked her supervisor never to have to deal with Lykken again, a violation of CSR 16-60 O is established.

5. 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 alleged Lykken's actions on January 11 and February 22, 2010 violated the following prohibitions against violence in the workplace.

Executive Order No. 112 Violence in the City Workplace

E.O. #112 prohibits all forms of violence in the workplace. This Order encompasses not only actual and attempted physical violence, but also includes shouting at another. [Exhibit 4-2]. Lykken stated she was not demeaning toward Thomas, but it is the recipient's reasonable reaction, and not actor's intent that is the principal focus of workplace violence. Where it was established that Thomas was reasonably intimidated by Lykken's actions, and that Lykken was shouting at Thomas, Lykken violated Executive Order 112.

CSR 15-110 Preventing Violence in the Workplace

The Agency alleged Lykken was in breach of the following portions of this rule. "The following, though not inclusive, will not be tolerated: A. Intimidating, threatening or hostile behaviors..." The same facts and findings which established Lykken's violation of E.O. #112 and Agency policy #2016, also establish a violation of 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.

Violence in the workplace, in all its forms, is among the most serious offenses under the Career Service Rules. That the Mayor, the Agency, and the Career Service Rules have addressed this behavior separately, demonstrates the emphasis interested authorities have placed on the prevention of, and punishment for, such behaviors.

B. Past Record

Lykken's disciplinary history demonstrates a pattern of failing to exercise emotional restraint, and a failure to understand what she believes are innocent actions are alarming to others. In 2007 Lykken received a verbal reprimand for calling repeatedly the Denver Police Department and Airport Operations emergency numbers looking for a particular police officer with whom she sought to have coffee, against his stated wishes, and after her supervisors warned her not to contact the officer. [Exhibit 1-4]. The police department and airport operations asked Lykken's supervisors for assistance to keep her from tying up emergency communications. [Exhibit 6-1].

In another written reprimand in 2007, Lykken forwarded a chain email to other employees in direct violation of Agency policies, and after receiving a warning one year earlier also for forwarding chain emails. [Exhibit 7-2]. In the earlier incident, Lykken forwarded a chain mail that made one of the unintended recipients, a Denver County Court Judge, none too happy that she was being directed not to buy cans of Pepsi because Pepsi intentionally left out the words "under God" from the pledge of allegiance on its cans. [Exhibit 8].

In 2005 the Agency issued a written reprimand to Lykken after her supervisor overheard her yelling into the telephone sufficiently loudly for the entire office to hear her berating a caller, who spoke English poorly, to pronounce her name correctly, even after the caller tried to comply three times. Lykken then entered her supervisor's office "in a highly agitated state as you tried to explain in a raised tone your actions with this caller. You started to cry and [were] visibly shaking. You hammered your right finger to your left palm while you were screaming that you had a right to defend your name..." After Lykken's second level supervisor met with her about the incident, Lykken began "wailing profusely" to the extent that the entire office was disrupted.

C. Penalty most likely to achieve compliance.

Based upon the discussion, above, the Agency's election to suspend Lykken for five days 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).

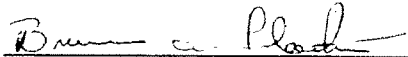
I agree with Assistant City Attorney Wolf's assessment that, when Lykken expressed regret for her actions, she tempered each apology with the assignment of blame elsewhere: her supervisors were out to get her; Thomas raised her voice first, so that she (Lykken) was merely responding in kind; or that she had difficulties in her personal life that week. Lykken's failure to accept responsibility for her own, unprovoked actions, in conjunction with her disciplinary history, justify the Agency's concern that past discipline has been insufficient to effect change in Lykken's misperceptions about others and her unacceptable reactions to those misperceptions. Contrary to Lykken's perception, the Agency has shown extraordinary leniency in keeping her employed following actions that justify dismissal.

Hoping Lykken will accept a last opportunity to control her inappropriate behaviors, Melfi overruled the advice of others in assessing a five-day suspension, but made it clear it is unacceptable for Lykken repeatedly to lose control, then apologize, expecting that the apology puts everything right. As Melfi aptly stated, "she gets so upset and she has to control it on the front end, not the back end." Melfi made it clear the Agency's patience with Ms. Lykken has expired with this case, and she should expect another incident involving inappropriate conduct would result in termination. [Melfi testimony].

VI. ORDER

The Agency's decision to suspend Lykken for five days, beginning March 30, 2010, is **AFFIRMED**.

DONE July 7, 2010.


Bruce A. Plotkin
Career Service Board Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board to review this Decision, in accordance with the requirements of CSR 19-60 through 19-80, within fifteen calendar days after the date this order is delivered as stated in the attached certificate of delivery. **Please note the 15-day deadline begins from the date sent, not the date received.** The Career Service Rules are available as a hyperlink at <http://www.denvergov.org/jobs/PublicNoticesandAnnouncements/CareerServiceAuthorityRuleRevisions/tabid/433593/Default.aspx>

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
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.