

DECISION AND ORDER

KIMBERLY FRESQUEZ, Appellant,

v.

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

The hearing in this appeal was held on Jan. 10 and 11, 2017 before Hearing Officer Valerie McNaughton. Appellant was represented by Sean Olson, Esq. Assistant City Attorneys Charles Mitchell and Shelby Felton appeared for the Agency, and Christopher Lujan served as the Agency's advisory witness. Christopher Lujan, David Workman, Brookelynn Cass, Casey Kmak, and Stephanie O'Malley testified for the Agency. Appellant testified on her own behalf, and presented the testimony of Matthew Murray and Kiara Jenkins.

I. STATEMENT OF THE APPEAL

Appellant Kimberly Fresquez challenges her dismissal from the position of Program Manager on Sept. 12, 2016 by the Denver Department of Safety (Agency). The parties stipulated to the admission of Agency Exhs. 1 – 4 and 6, and Appellant Exhs. A – D. Exhibits 5, 8 and C were admitted at hearing, and Appellant withdrew Exh. E .

II. FINDINGS OF FACT

Appellant has been an employee of the City for over twenty years, working prior to this position at Denver General Hospital, the Department of Public Works and the Denver Police Department. At the latter agency, Appellant was most recently the Operations Coordinator for Deputy Chief of Police Matthew Murray. In September of 2015, the Manager of Safety hired her to serve as Program Manager for the Public Safety Cadet Program for youth interested in employment in the police, sheriff, fire or emergency service agencies. That position is responsible for planning and management of about 50 cadets in the program, including cadet leaders, senior cadet leaders, and the cadet commander. [Exh. 5-49.] Cadets who meet the academic, work and fitness requirements of the program are reimbursed for college books and tuition, and paid for a certain number of hours during the school year and summer, depending on their cadet rank. [Exh. 5-39.] Appellant's duties included program and personnel management, committee assignments, and enforcement of cadet standards. The focus in her first year was "building a collaborative and productive relationship with the Cadet Leadership Team." [Exh. B-5.]

Appellant testified that she learned about the cadet program while serving as administrator for the Deputy Chief of Police, where she coordinated the activities of a succession of cadets interested in joining the Police Department. When the position of cadet program manager was funded in mid-2015, Appellant told Manager of Safety Stephanie O'Malley that that was her dream job. O'Malley had gotten to know Appellant's work with the police department's cadets, and was impressed with her. O'Malley's deputy, Christopher Lujan, ran the recruitment process. When his committee recommended another candidate, O'Malley rejected that recommendation in favor of Appellant. Lujan informed O'Malley that Appellant had scored last on the candidate list. Nonetheless, O'Malley decided to select Appellant based on her strong interest in the program.

Sept. 14, 2015 was Appellant's first day on the job. Lujan delivered a five-page letter outlining the cadet program and his expectations regarding her performance. Those included ensuring accurate time-keeping and approving cadet time cards, one of the duties in her performance evaluation. [Exhs. B-1; 4-4.] Lujan indicated that he would be "actively monitoring how you lead this program in terms of how you communicate with the cadets and the judgment you exhibit in administering the daily operations of this program ... You are *strongly encouraged* to continue empowering the cadet leaders to make decisions on their own after collaboration and deliberation." [Exh. B-5, italics in original.] Appellant's formal performance criteria listed maintaining respectful and positive working relationships as her top priority. [Exh. 4-1.] In her 2015 evaluation delivered in Feb. 2016, Appellant was required to complete six training sessions to increase her skills in several areas, including communication and leadership. Appellant was rated as satisfactory overall, but below expectations in the area of supervisory functions because of her failure to reconcile time cards in the Kronos system. [Lujan, 9:25 am; Exh. 4-4.]

In early June, 2016, cadet Kristen Pough informed a staff member that she wished to resign from the program because of bullying by Appellant. The staff member referred Ms. Pough to Manager of Safety Stephanie O'Malley to report her complaint. Deputy Director Christopher Lujan was thereafter assigned to interview four cadets named by Ms. Pough as persons who had knowledge of Appellant's conduct. When those interviews corroborated some of Ms. Pough's complaints, Appellant was placed on investigative leave and a more thorough investigation was conducted by an outside contractor. The investigation found a number of incidents of unprofessional conduct, including favoritism, offensive language, inappropriate touching, and failure to pay overtime. Based on these findings, the Agency began the disciplinary process. The pre-disciplinary letter alleges nine Career Service disciplinary rules violations, as well as breaches of city policies on overtime and workplace violence under CSR § 9-90 and Executive Order 112.

At the pre-disciplinary meeting, Appellant accepted responsibility for using curse words, asking to see a cadet's thigh tattoo, and failing to pay overtime, citing her reliance on past practices in defense of the latter. [Exh. 6-11, 6-12.] Appellant stated that she did not recall making demeaning comments to cadets, and denied other conduct reported in the investigation. [Exh. 6-4.] She denied making preferential assignments, and said her treatment of certain cadets was based on their performance or procedures. Appellant stated cadet personalities were discussed at leadership meetings only to strategize on how to resolve challenges. [Exh. 6-7.] She denied hugging or slapping any cadet, and said her physical contact was limited to giving high-fives and pats on the back after a kickball game. [Exh. 6.]

David Workman has been in the cadet program for the past two and a half years. He was a Cadet Leader during the investigation, and became Cadet Commander in October, 2016, after Appellant was placed on investigatory leave. Workman observed that Appellant's communication was not always clear, and "began to impede the success of individual cadets." [Workman, 11:18 am.] He got along well with Appellant because he made every effort to stay "on her good side". . . . "I've seen how she treats those on her bad side." [Workman, 11:31 am.] Appellant often gossiped and vented to him about the other cadets, sometimes describing female cadets as "bitch", "whorish", "brat", and "crybaby". She mocked Senior Cadet Leader Casey Kmak by calling him "fire boy" because he was the son of the Denver Fire Department Chief. Appellant told Workman that she wanted to demote Kmak, who she described as "mentally weak" and incompetent. At the time, Kmak was Workman's direct supervisor within the Cadet Program. [Workman, 11:33 am.] Appellant frequently used profanity in discussing other cadets with Workman. Even after Workman told Appellant many times that he found her language inappropriate, she did not stop. [Workman, 12:11 pm.] Appellant made him uncomfortable when she touched him on the neck, shoulders and arms, and once hit him on the back of his head during a meeting, making him feel weak and helpless in front of his peers. [Workman, 11:28 am.]

Workman reported that he had worked at the Recruit Academy over the maximum 39 hours per week during the summer of 2016, and was not paid overtime. [Exh. 5-40.] In mid-June, Appellant texted him, "Why so many hours? I can only pay you for 39." Appellant replied that he did not want to leave his duties unfinished at the Academy, and did not "mind too much volunteering" the extra hours. [Exh. 5-108.] Workman continued to report over 40 hours in June and July, and testified he could not complete his work as an instructor inside that number of hours. [Appellant, 11:57 am; Exh. 5-110 – 111.] Appellant admitted she did not approve overtime for the work over 39 hours. [Appellant, 5:00 pm.]

Cadet Brookelynn Cass testified about three incidents. At a fitness event soon after Appellant's first day, she sat next to Cass in the bleachers. Appellant looked at the part of Cass's tattoo visible just above her knee and below her long athletic shorts, and asked, "How are you going to explain that to your children?" [Exh. 8.] Cass laughed it off, but considered the remark "kind of rude". After Appellant left, Cass said to those sitting near her, "I'd tell them not to be judgmental." She did not complain to higher management because she feared that Appellant would retaliate against her. [Cass, 1:31 pm.] The following July, Appellant approached Cass while she was standing in a line at a kickball game, lifted one leg of her shorts, exposing the tattoo, remarked "yikes!", and walked away. Cass was shocked and embarrassed. Fellow cadet Kiara Jenkins witnessed the incident. [Jenkins, 3:58 pm.] A month earlier, Cass was showing her high school picture to two other cadets, who laughed. Appellant asked to see it, and remarked, "[y]ou look like a bitch." Cass felt the comment from the program supervisor was inappropriate.

Senior Cadet Leader Casey Kmak testified that he was at a kickball game attended by all cadets at the end of academy, and saw Appellant playfully slap Dominic Odom on the butt as he walked by. On other occasions, he witnessed Appellant rubbing cadets' shoulders, backs, and arms. Among cadet leaders, Appellant made negative and offensive comments about the performance of other cadets and leaders, such as "I can't believe he fucking did this", and once added, "I'm going to get fucking drunk tonight." [Exh. 5-153.] She told Kmak that a cadet failed to pass a required examination, and was "not ready for this academy". [Kmak 2:10 pm.] Appellant once described a cadet in

Kmak's group as having "a bitchy attitude", without presenting any context or direction to correct any misconduct. Kmak has never heard Appellant criticize cadets known to be her favorites, including Workman, Valerde and Odom, for the same type of conduct used to discipline other cadets. The cadets knew which cadets Appellant favored and did not favor because cadets would pass on negative things Appellant had said about them to others in the group. [Kmak, [2:14 pm.] Appellant remarked to others that Kmak "shouldn't go running to his dad", who is a fire chief. "At the beginning I took advantage of her open door a good amount to talk about issues in the program. I felt uncomfortable after a while, and meetings became less frequent." [Kmak, 2:26 pm.] Kmak confirmed that Appellant expected senior leadership working on the academy to report early and attend meetings after the program's maximum hours, but did not pay them overtime for that work. [Kmak, 2:07 pm.]

After the pre-disciplinary meeting, the Agency found that Appellant had engaged in unprofessional conduct and had failed to pay overtime. The former included describing one cadet as looking "like a bitch" in her high school photo, using profanity to criticize cadet performance, inappropriate touching, and slapping a cadet in the head. It also included remarking "yikes!" after lifting the shorts of a cadet to expose her thigh tattoo, and engaging in favoritism among the cadets. [Exh. 1.]

Appellant testified that her first few months on the job were a challenge, both because of the manner in which some cadets responded to her, and because Lujan was "placing obstacles to make me fail" since he did not want her in that position. [Appellant, 4:18 pm.] After obtaining advice from O'Malley and Police Chief White, Appellant handled the cadet issues firmly, earning her credit in her February performance review for addressing unprofessional conduct by cadets. [Exh. 4-4.]

As to the allegations of her own unprofessional conduct, Appellant testified that she said freaking, not fucking, when describing an incident. Because she sometimes wears a retainer, Appellant offered that cadets may have misheard her when she said, "[a]re you freaking kidding me?" [Appellant, 4:20 pm.] Appellant admitted she used the word bitch, but only to describe a situation, not as a personal insult. Appellant stated she would touch cadets on the shoulder to signal she was behind them, and would pat them on the back or deliver high-fives after a game, "like a mother". She hugged the girls more often than the boys when sharing good news or congratulating them. Appellant did not recall hitting Workman in the head, and denied smacking anyone on the butt. Appellant denied calling any cadet "whorish", but conceded that she would discuss cadets in frank terms among the leadership group, including their personality traits. She described that environment as safe and joking.

III. ANALYSIS

It is the Agency's burden to prove the cited violations of the Career Service Rules by a preponderance of the evidence, and to show that its penalty is proper under CSR Rule 16.

A. VIOLATION OF DISCIPLINARY RULES

1. Neglect and carelessness, CSR § 16-29 A.

This rule, a combination of previous CSR §§ 16-60 A and B, prohibits a failure to perform a known duty as well as poor performance of a duty. See In re Gutierrez, CSB 65-11, n1 (4/4/13); In re Galindo, CSA 39-08 (9/5/08) (decided under prior rules). The Agency found Appellant neglected her duty to keep track of cadet hours, and engaged with cadets in a careless manner. [O'Malley, 3:00 pm.]

Cadets and leaders recalled many instances in which Appellant displayed unprofessional conduct inconsistent with her supervisory role in the cadet program. Despite Workman's many requests, she did not curb her habit of using profanity to express her frustration in the work setting. I do not find convincing her suggestion that the three cadet witnesses all misunderstood her to be saying "fucking" because she was wearing a retainer. If that were true, a listener would have noted her misstating more than one word. It also requires an assumption that she wore her retainer every time a cadet heard her use the word in question. I credit the cadets' ability to recognize a common swear word.

Appellant's favorable treatment of three or four cadets over the others was known among the group, and favorites felt the need to agree with her in order to "stay on her good side", as more than one described it. Appellant shared her desire to demote a cadet leader with his subordinate, and belittled other cadets without offering constructive action to correct any perceived weaknesses. Appellant disregarded personal space limits by her overfamiliar physical contact with cadets, in one instance hitting the head of a cadet leader in response to a wisecrack, in another slapping a leader on the behind after a game. In the aggregate, this conduct created a negative work atmosphere for the cadets under her supervision, and neglected her duty to promote positive relationships within the group.

The Agency also found that Appellant carelessly performed her time-keeping duties in that she knew cadets were working excessive hours, but permitted that practice to continue without paying overtime or reorganizing work to fit within the authorized schedule. Appellant admits that she knew of the work hours policy, knew cadets were exceeding it, but took no action because she believed Lujan's practice was to treat extra hours as volunteer. The evidence showed that Lujan detailed her duties on her first day in a five-page letter, which prominently featured the requirement "to ensure accurate time-keeping in Knonos", and mentioned no exception for overtime. [Exh. B-1.] The cadet handbook specifies maximum work hours, and is silent on how excess hours are treated. [Exh. 5-40.] Her below expectations rating in monitoring work time in February, 2016 gave Appellant ample notice that this was an important part of her job. [Exh. 4-4.] Appellant presented no evidence in rebuttal, and requested no training or further information to confirm her impression that the time could be categorized as volunteering. The Agency thus proved Appellant neglected her duty to accurately track cadet hours, and was careless in the performance of this duty, in violation of § 16-29 A.

2. Dishonesty, CSR § 16-29 D.

This rule requires proof of a knowing misrepresentation of facts in the employment context. In re Mounjim, CSB 87-07, 5-6 (1/8/09). In finding a violation of this rule, the Agency concluded that Appellant certified 39 work hours, knowing she understated the cadet's actual work time. Workman's testimony and texts showed he informed Appellant he had worked 45.25 hours one week, and Appellant responded that she could not pay for them. [Workman, 11:57 am; Exh. 5-108.] Appellant admits she did not authorize overtime to pay for the actual number of hours worked. Workman and Kmak both confirmed they were not in fact paid for their overtime hours. The evidence shows that Appellant knowingly falsified work hours, in violation of this rule.

3. Failure to comply with orders or perform assigned work, CSR § 16-29 F

This rule contains two violations: failure to comply with a reasonable work order, and failure to perform assigned work an employee is capable of performing. Under the second portion of the rule, the Agency states it provided Appellant with clear performance expectations in Exh. B, the letter delivered on her first day. As to this rule, O'Malley based her finding on Appellant's general failure to keep the deputy director aware of the functioning of the program. [O'Malley, 3:02 pm.]

The letter does require Appellant to obtain Lujan's approval before making programmatic or personnel decisions. [Exh. C-5.] However, Lujan testified that this requirement was removed in January, upon his return from FMLA leave. [Lujan, 10:35 am.] There is no evidence that the conduct cited in the discipline letter constituted a failure to keep the deputy director advised about the cadet program. The evidence does not show Appellant violated this rule.

4. Failure to meet performance standards, CSR § 16-29 G.

The Agency established a violation of this rule by showing it established a performance standard, clearly communicated it to Appellant, and Appellant failed to meet it. See In re Macieyovski, CSA 28-14, 7 (10/13/14). Here, Appellant is charged with failing to treat others respectfully, and failing to promote positive working relationships within the cadet program. Specifically, the Manager of Safety found that Appellant's use of profanity, inappropriate physical contacts with cadets, and noticeable favoritism among the cadets was contrary to these standards. [O'Malley, 3:03 pm.]

Appellant was given immediate notice of the work standards she would need to meet as cadet program manager. [Exh. B.] Her supervisor's letter squarely placed the focus on leadership style, including the manner of her decision-making and ability to build a collaborative, empowering and productive relationship with the team. [Exh. B-5.] While general, these goals are clearly violated by observable favoritism at odds with the intended meritocracy of a cadet team. Crude insults are counterproductive when the goal is to motivate cadets to solve problems and make decisions. Inappropriate physical contact such as hits and slaps have no readily apparent place when training toward a safety career. All of these practices had an actual negative impact on cadets, as demonstrated by their testimony. Appellant was also required by her performance enhancement plan to perform all administrative supervisory functions,

including accurate Kronos timesheets. Appellant failed to meet this standard by virtue of her false recording of overtime hours in the summer of 2016.

The evidence established that Appellant's conduct, both admitted and as reported by cadets, fell outside the communicated performance standards for the position of manager of the cadet program, and thus violated CSR § 16-29 G.

5. Failure to maintain satisfactory work relationships, CSR § 16-29 I.

This rule bars conduct an employee knows or should know will significantly harm a working relationship. In re Burghardt, CSB 81-07, 2 (8/28/08). As found above, Appellant engaged in crude insults, favoritism, gossip and inappropriate physical contact that negatively affected the cadets who testified. Workman felt demeaned and embarrassed after Appellant hit him on the head at a meeting with his leadership peers. Cass was offended when Appellant said she "looked like a bitch" in her high school picture, and shocked when Appellant raised her shorts in front of others and pretended to be scandalized by her tattoo. Kmak testified that Appellant cursed when angry, and spread negative gossip about many cadets, with no apparent constructive intent. [Kmak, 2:12 pm.] He became less comfortable with Appellant, and met with her about work issues less frequently. Everyone knew which cadets shared a favored relationship with Appellant, and relationships were complicated by that knowledge. Lujan testified that cadet morale was "destroyed" during Appellant's tenure, and some informed him they were relieved when told Appellant had been removed from the program. [Lujan, 10:49 am.]

While discussing performance issues with members of the leadership team may sometimes be appropriate, the gossip indulged in by Appellant was personal and gratuitously insulting without being constructive. Inappropriate touching and favoritism harmed the cadets' ability to build a positive relationship with their supervisor. By any objective measure, Appellant's improper behavior damaged working relationships within the cadet team, in violation of this rule.

6. Discrimination or harassment, CSR § 16-29 L.

This rule prohibits unfair or unequal treatment of a person based on a protected status, regardless of intent or whether the same conduct would violate state or federal law. In re Burghardt, CSB 81-07, 3 (8/28/08). The Agency based the rule violation on its finding that Appellant lifted the shorts of a female cadet to expose her thigh tattoo, and inappropriately touched other cadets.

Cadet Cass credibly testified that Appellant twice made rude comments about her tattoo in front of others, and the second time lifted the edge of her shorts to expose it. Cadet Jenkins confirmed Appellant's action, despite her opinion that Appellant was personally supportive of her. [Jenkins, 3:58 pm.] Cass noted that many of the male cadets had visible tattoos, and Appellant made no critical remarks about them. I find that the Agency proved Appellant's treatment of Cass was based on her gender, and was an apparent criticism of a female with a tattoo. The other evidence showed no such distinction in treatment between males and females by Appellant.

7. Divulging confidential information, CSR § 16-29 Q.

The Agency asserts that Appellant violated this rule by discussing cadets' performance with members of cadet leadership. The cadet manual specifies that personnel files are confidential. [Exh. 5-62]. Workman and Kmak both testified they considered Appellant's comments unhelpful to improve performance, but neither claimed the information was confidential. Appellant told Kmak that one cadet failed her physical examination "and was not ready for this academy". [Kmak, 2:13 pm.] There is no evidence that an examination score is confidential; in fact, knowledge of cadet status in various areas may well be necessary information for cadet leadership. Gossiping about cadet information that is "not their business" does not establish disclosure of confidential material under this rule. [O'Malley, 3:10 pm]; see In re Purdy, CSB 67-11 (4/4/13). The Agency failed to prove this violation.

8. Conduct violating rule or other applicable authority, CSR § 16-29 R.

The Agency alleges that Appellant violated CSR § 9-90 and Executive Order 112, the former by failing to designate Workman and Kmak's excess hours as overtime, and the latter by improper touching and striking cadets. Appellant admits that she did not designate the excess hours as overtime in Kronos, and therefore the first allegation is established. Appellant denies she hit Workman in the head, but her denial is contradicted by Workman's credible testimony, and his vivid memory of how her actions affected him. He admitted it was not a hard hit or intended to hurt him, but it left him feeling embarrassed and weak in front of his leadership peers. [Workman, 11:28 am, 12:06 pm.] Kmak witnessed Appellant swatting cadet leader Odom on the behind, an inappropriate act by a supervisor. Both incidents constituted violations of Executive Order 112, § 2.0., and therefore proved violation of § 16-29 R.

9. Prejudicial conduct, CSR § 16-29 T

"Conduct which is or could foreseeably: 1. Be prejudicial to the good order and effectiveness of the department or agency, 2. Bring disrepute on [or compromise] the integrity of the City; or 3. Be unbecoming of a City employee" is prohibited by CSR § 16-29 T, effective Feb. 12, 2016.

The Agency relied on the evidence of Appellant's verbal and physical abuse of cadets, and its effect on the morale and effectiveness of the program. The testimony of Workman was particularly instructive: even though he was one of Appellant's favorite cadets, he experienced discomfort and uncertainty in his future based on his fear that he would "get on her bad side" if he disagreed with her, as he had seen happen to others. Indeed, Workman accepted that he must volunteer his hours over the maximum in order to avoid a confrontation with Appellant. [Exh. C-1.] In a setting intended to spur collaboration and growth in college students interested in public safety, Appellant's conduct resulted in conformity rather than increased leadership skills. The evidence demonstrated that Appellant's pattern of conduct toward the cadets prejudiced the effectiveness of the cadet program, in violation of this rule.

IV. PENALTY DETERMINATION

Based on her factual and rule findings, Manager of Safety Stephanie O'Malley made the decision to terminate Appellant. O'Malley selected Appellant for this position because she believed Appellant would succeed as a result of her strong interest in helping cadets shown in her previous position. [O'Malley, 3:15 pm.] O'Malley's review of the investigative reports and interviews led her to the conclusion that Appellant was continuing to display the same negative trait as documented in her last supervisory job: treating those she did not like with disrespect. [Exh. 2-2; Murray 3:45 pm.] The cadets' strongly negative reactions to her verbal and physical conduct led O'Malley to conclude that she "had no choice but to terminate her." She considered Appellant's statements at the pre-disciplinary meeting, and her long history with the city with only minimal discipline. After being placed on leave, Appellant apologized to O'Malley, and asked if this position was a good fit for her. O'Malley concluded that it was not.

I find that the Manager made reasonable factual findings, correctly found rule violations in all but two instances, and carefully considered all factors relevant to a disciplinary determination under the Career Service Rules. Appellant's prior supervisor Matthew Murray testified in support of Appellant's organizational skills, but acknowledged that she had been counseled to avoid favoritism. Appellant did not display at hearing an appreciation of the serious effect of her conduct on the cadets or the program as a whole. Given Appellant's notice of the need to build relationships, empower leaders, and demonstrate even-handedness among the cadets, O'Malley's penalty decision was reasonable in light of the needs of the Agency and the cadet program. Appellant's conduct and history showed that no less a penalty than termination would succeed in motivating Appellant to conform her behavior to the applicable rules and the needs of the Agency.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency's action is affirmed.

Dated this 24th day of February, 2017. |



Valerie McNaughton
Career Service Hearing Officer