

**DECISION AFFIRMING 10-DAY SUSPENSION**

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**GREGORY GUSTIN**, Appellant,

v.

**DEPARTMENT OF AVIATION, PARKING AND TRANSPORTATION**,  
and the City and County of Denver, a municipal corporation, Agency.

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**I. INTRODUCTION**

The Appellant appeals a 10-day suspension assessed by his employer, the Department of Aviation, Parking and Transportation Division (Agency), for alleged violations of specified Career Service Rules. A hearing was conducted by Bruce A. Plotkin, Hearing Officer, on July 12, 2017. Appellant represented himself, and Assistant City Attorney Shelby Felton represented the Agency. Agency exhibits 1 – 6 were admitted. The following witnesses testified for the Agency: Terry Smith and Dorothy Harris. The Appellant testified on his own behalf and presented no other witness.

**II. ISSUES**

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-29 A; I; or L;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend him for 10 days conformed to the purposes of discipline under CSR 16-41;

**III. FINDINGS**

The relevant facts are not disputed. The Appellant, Gregory Gustin, has been employed at Denver International Airport since 2011. He is a Landside Service Agent II in the Revenue Management Division. That division controls parking and transportation at the airport. His duties include providing customer service and ensuring compliance with transportation rules. His position is also responsible for enforcing rules that prohibit limousine, shuttle, and other drivers from soliciting passengers. Drivers are considered customers of the Agency. Landside Service Agents interact frequently with taxi and limousine drivers from diverse cultural and religious backgrounds and for that reason are required to be sensitive to those backgrounds and treat all drivers respectfully.

On November 7, 2016, Gustin was on duty in the Commercial Transportation Holding Lot. Limousine drivers enter the office there in order to apply for and pick up passes which allow them a limited time to wait for and pick up a specific passenger according to the itinerary they must provide. Limousine driver Omar Jama entered the office to obtain such a pass. On seeing

Jama, Gustin said to a co-worker, loud enough for Jama to hear him, "here comes another one."

The incident occurred the day before the recent Presidential election, during which the campaign for then-candidate Trump contained divisive rhetoric concerning Muslims. Jama was offended, and immediately said "you are just like Trump," adding "stereotyping like Trump." Jama reported the incident the same day to Landside Services Administrator Terry Smith. Smith obtained statements from Gustin and from his co-worker. [Exhibits 5-2 and 9]. Both confirmed Jama's recollection.

A contemplation of discipline meeting was held on December 29, 2016, which Gustin attended with a representative. On January 3, 2017, the Agency served its notice of suspension on Gustin, signed by the decision-maker, Dorothy Harris, Senior Vice President of Parking and Transportation. [Exhibit 2]. This appeal followed timely on January 9, 2017.

## IV. ANALYSIS

### A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10, 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 Gustin violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend him for 10 days complied with the purpose of discipline under CSR 16-41. The standard by which the Agency must prove each claim is by a preponderance of the evidence.

### C. Career Service Rule Violations

#### 1. CSR 16-29 A. Neglect of duty, or carelessness in performance of duties and responsibilities.

Both parts of this rule require notice of a duty and either the failure to perform it (neglect) [In re Abbey, CSA 99-09, 6 (8/9/10)], or a substandard performance of that duty (carelessness). [In re Simpleman, CSA 31-06, 4-5 (10/20/06)]. The Agency alleged Gustin's gratuitous comment was a careless performance of his duty to remain professional, and to treat customers respectfully. [Exhibit 2-3; Harris testimony]. Gustin did not dispute those duties or that he lacked notice of them. Instead, he responded (1) others make similar comments all the time; (2) he observed Jama soliciting numerous times; (3) he issued Jama's pass as requested; (4) no supervisor ever told him he did anything wrong until November 22, 2016; (5) his statement was not offensive; and (6) he was having a private conversation with a co-worker which Jama overheard.

(1) Others do it. Gustin presented no evidence, other than his statement, that others make similar comments. Moreover, it should be evident that wrongdoing by others does not excuse his own wrongdoing. The Agency established Gustin's duty to treat customers, including Jama, with respect. His comment "here comes another one," regardless of intent, was inherently demeaning, in violation of that duty.

(2) Prior solicitations. Gustin acknowledged he saw no evidence of Jama soliciting fares on November 7, 2016. The extent of Gustin's authority to deter wrongful solicitation of fares by

drivers is to call police who are empowered to write citations. Gustin's comment did nothing to address wrongful solicitation. That Gustin did not call police to enforce a violation is further evidence the comment was gratuitous and demeaning, rather than a warning or legitimate enforcement function. Jama came simply to request a legitimate pass, Gustin had a duty to issue it and his comment was wholly unrelated to that duty. Finally, even if Jama had been soliciting fares, that improper action would not have justified Gustin's duty to remain professional.

(3) Issued pass. Gustin's subsequent issuance of a pass for Jama was irrelevant to his inappropriate comment. Customers should not have to endure insulting, inappropriate comments before obtaining legitimately-requested passes.

(4) Not timely notified. Appellant was issued discipline a year earlier for similarly insulting and insensitive comments, [Exhibit 4], and thus was on notice the Agency considered such comments entirely inappropriate. [Exhibit 4-2]. Also, Gustin was asked the same day to provide a statement about the incident, providing further notice to Gustin that the Agency was taking an active interest in the incident. Gustin's 2015 work review also reminded him to treat drivers respectfully. [Exhibit 6-3]. Finally, the period between the incident, November 7, until the issuance of the Agency's contemplation of discipline letter two weeks later, on November 22, was an appropriate, and even brief time, for an Agency to investigate, consult, and issue a notice in contemplation of discipline.

(5) Not offensive. Harris' findings in the notice of discipline and in her testimony, that Gustin's comment was inappropriate and insensitive, and Smith's similar conclusion at hearing [Smith testimony], were more persuasive than Gustin's denial. The comment, on its face, is inherently disparaging and insensitive in view of Jama's legitimate purpose for entering the office, and in view of Gustin's apparent annoyance with Jama for his prior alleged solicitation violations.

(6). Private conversation. Gustin obviously saw Jama enter the office since Jama's entrance prompted Gustin's comment. Thus, the comment, which Gustin made loud enough for Jama to hear, was not private.

The Agency established Gustin's duty to treat Jama with professionalism and respect. His comment was, on its face, unprofessional and disrespectful of that duty. None of Gustin's explanations justified the comment. Consequently, the Agency proved Gustin's comment was careless of his duty to treat a customer professionally and respectfully, and therefore proved Gustin violated CSR 16-29 A.

## **2. CSR 16-29 I. Failure to maintain satisfactory working relationships with co-workers and other individuals the employee interacts with as part of his or her job.**

Gustin acknowledged he had prior interactions with Jama during the course of his duties. He also acknowledged Jama sought a pass from him on November 7, 2016. Issuing passes is part of Gustin's duties. Jama was, therefore, a member of the class of "other individuals," encompassed by this rule, to whom Gustin was obligated to maintain a satisfactory working relationship.

Jama was offended by Gustin's comment. He immediately protested "you are just like Trump," and "[you are] stereotyping like Trump." While Jama's reaction was one factor to consider in assessing whether a violation occurred [In re Harrison, CSA 55-07, 89-07 and 90-07, 53 (6/17/10)], the standard for analyzing a violation under this rule is objective and is not defined by

the affected individual's subjective feelings and perception of mistreatment. In re Leslie, CSA 10-11, 15 (12/5/11).

In the case of an allegedly offensive statement, the analysis must begin with the plain and ordinary meaning of the statement, and next, whether a reasonable person would find that plain meaning offensive. It is difficult to imagine anything other than a negative connotation to the words "here comes another one," regardless of the speaker's intent. Its commonly understood use is belittling.<sup>1</sup>

The context was also important. Gustin considered Jama to be a frequent illicit solicitor of fares. Thus his comment, intended to be overheard, was more likely than not, a disdainful expression of disapproval of Jama's prior actions. Gustin had been disciplined one year earlier for making unsolicited and inappropriate comments. The common meaning of the clause "here comes another one," combined with the particular circumstances of this case indicate, by a preponderance of the evidence, that Gustin's remark to Jama was belittling and detrimental to their working relationship.

Gustin argued he continues to enjoy a professional, if not friendly, relationship with Jama, and continues to issue passes to him, so that harm to the working relationship was not established. However, "permanency of damage to the work relationship is not prerequisite for finding a violation of this rule." In re Novitch, CSB 49-15A, n. 11 (9/15/16). For these reasons, Gustin's remark to a customer "here comes another one" violated CSR 16-29 I.

**3. CSR 16-29 I. Discrimination or harassment as defined in this Rule 16. This includes making derogatory statements based on race, color, creed, religion, national origin, sex, gender identity, sexual orientation, marital status, military status, age, disability, political affiliation, or any status protected by federal, state, or local laws. This prohibited conduct need not rise to the level of a violation of any relevant state or federal law before an employee may be disciplined**

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Proving a violation of this rule requires more than establishing a demeaning remark, action or gesture. A derogatory statement, whether by word, deed, or other means, must be objectively discriminatory or harassing based on a protected status. The Agency found Gustin's comment about Jama to be harassing<sup>2</sup> based on Jama's race, color, creed, religion, or national origin.

Based on the findings and conclusions above, Gustin's comment was offensive. The following circumstances are relevant to determine whether the offensive comment was objectively harassing based on a protected status: 1. Jama found Gustin's comment to be offensive based on an unstated protected status; 2. Jama asked Gustin to repeat the

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<sup>1</sup> See, e.g.

Here comes another one

Here it comes again

Here comes another one

When will it ever end?

I know whatever it is

I've not seen one before

But here comes another one

And here comes a bunch of 'em

Here comes another one

Thank God I'm not having lunch with them

<http://www.metrolyrics.com/here-comes-another-one-lyrics-monty-python.html> [last viewed 8/1/17].

<sup>2</sup> While the Agency's notice of discipline claimed Gustin's comment was discriminatory or harassing under this rule, the Agency clarified during hearing that it was pursuing only a claim of harassment based on a protected status, and not discrimination. [Ms. Felton response to Hearing Officer question].

comment, and Gustin immediately specified "there are already two solicitors on the east side," strongly indicating his meaning that "another one" referred to "another solicitor;" 3. Gustin also told Jama he'd seen him soliciting taxi passengers on numerous occasions, and other agents saw the same behavior [Exhibit 2-5; Gustin testimony]; 4. the Agency allowed it was possible Gustin intended his statement "here comes another one" referred to drivers who solicit riders, rather than someone of a particular race, religion, color, or national origin [Exhibit 2-3]; 5. Gustin acknowledged the statement and subsequently gave consistent accounts of the incident; and 6. taken alone, the statement "here comes another one" does not suggest any protected status.

Despite Jama's feelings about Gustin's comment, the objective evidence, above, strongly suggests Gustin's comment was not based on a protected status. Thus, even while the comment was offensive in violation of other rules, the Agency failed to prove it was harassing based on a protected status. Consequently, the Agency failed to prove this rule violation.

## **V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-41.

### **A. Seriousness of the proven offenses**

Even though harassment based on a protected status was not proven, Gustin's comment violated the Agency's fundamental customer service expectations. These expectations had been amply communicated to Gustin.

### **B. Prior Record**

Gustin was suspended in 2015 for three days and was required to attend diversity training for insensitive remarks toward two Muslim taxi drivers who were praying on one of the passenger pickup islands. They were not in violation of any law or airport regulation. Nonetheless, Gustin approached to ask if they were praying for nine-year-old wives. [Ex. 4]. In view of Gustin's insensitive comment in the present case, Gustin's previous training did not accomplish its purpose. Consequently, the Agency was justified in assessing a more substantial penalty this time.

### **C. Likelihood of Reform**

Previous discipline and previous training did not dissuade Gustin from making inappropriate and insensitive comments. In addition, he denied all wrongdoing in the present case. Therefore, it is unknown if a more substantial suspension and additional sensitivity training will result in the reform sought by the Agency.

## VI. ORDER

The Agency's 10-day suspension, assessed from January 3, 2017 through January 16, 2017, is AFFIRMED.

DONE August 8, 2017.



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Bruce A. Plotkin  
Career Service 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.