

DECISION AND ORDER

DOUGLAS LEGG, Appellant,

v.

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

I. INTRODUCTION

Appellant Douglas Legg (Appellant) appeals the Denver Department of Public Works' (Agency) July 1, 2019 dismissal of him, for alleged violations of Career Service Rules (CSR) 16-28. On February 6, 7, and 11, 2020, Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the discipline. Shelby A. Felton and Ashley M. Kelliher, Senior and Assistant City Attorneys, represented the Agency and Patricia Bangert, Esq. represented Appellant. The Agency's exhibits 1 through 7, 9, 10, 11, 13 through 45, and 47 through 51; and Appellant's exhibits A through Q, S through W, and Y were admitted into evidence.

LaToya Linzey, Business Partner, and Steve Duarte, Director of the Office of Human Resources (OHR); Colin Krupczak, supervisor at the Office of Safety and Industrial Hygiene (OSIH); Kristen Fah, City Senior Internal Auditor; Agency Executive Director Eulois Cleckly, Manager Jeff Gonzales, Supervisors Kardell Collins, Dean Rzeszut, Robert Paige, Nick Armbrust, and Robert Valdez; and Heather Burke-Bellile and Nancy Kuhn of the Public Information Office (PIO), testified for the Agency. The Appellant, Hardline Equipment (Hardline) General Manager Troy Schuller, Agency Supervisors Gary Bales and Davi Sigala, and Kelly E. Duffy, former director of the Agency's Street Maintenance Division (Division), testified for Appellant.

II. ISSUES

The issues presented for appeal were whether:

- A. Appellant violated CSRs 16-28 A, D, E, I, L, O, R and T; and
- B. the Agency's decision to dismiss Appellant, if he violated the above-mentioned CSRs, conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS

Background

On February 16, 2000, the City and County of Denver (City) hired Appellant to work at the Agency and he had been a manager in it since June 22, 2015. In August 2018, Ms. Duffy reorganized the duties of the four managers who supervised the operations of the Division of Street Maintenance (Division). Three of them managed street sweeping, street paving, and street patching. Appellant managed citywide operations, including traffic control, hauling of material, median maintenance, and served as liaison with the fleet of equipment. So, he

influenced all of the managers' worksites, the purchasing decisions, and the assignment of trucks to each Division task. Although he held the same position as the other managers, Ms. Duffy gave him more authority and relied on him more than the other managers. Ms. Duffy and Appellant did not communicate effectively to the other managers the reason for Appellant's higher status. He also exercised his status brusquely. Hence, Appellant's status and relationship with Ms. Duffy generated distrust of them and resentment from some Agency employees.

Most of the Division witnesses testified that they would not approach either Appellant or Ms. Duffy with any concerns. They were especially reluctant to bring any concerns about Appellant to her, as she would react defensively and simply defend him. They also suspected they would then be targeted for scrutiny and potential discipline. They understood they were to keep complaints internal and report them to the Division administrative manager. Ms. Duffy described Appellant as a conscientious employee, defended his exercise of authority throughout the Division as proper for business reasons, stated that she never observed him take any untoward action or was unaware of any such action by him.

Mr. Sigala, supervisor under Appellant, solely lauded him as a great supervisor. Mr. Sigala became a supervisor in 2015 and initially supervised street patching. In August 2018, he began to supervise traffic control at jobsites, lowboys-transport for heavy equipment, and the warehouse. He stated that Appellant gave him more responsibility gradually, so he was never overwhelmed, and that he would have felt comfortable approaching Appellant with issues but neither had any issues nor observed Appellant take any untoward action. While Appellant managed Mr. Sigala effectively, his delegation of some duties to Mr. Sigala generated criticism of and distrust of Appellant.

In 2016, OHR assigned Ms. Linzey to the Division. She developed relationships with the Agency employees and some began to confide in her. Some of them disclosed to her alleged problematic behavior by Appellant. They also complained that his close relationship with Ms. Duffy and Ms. Duffy's own behavior left them without an avenue to address their issues. Other employees did not speak up either for fear of jeopardizing their employment or because they were unaffected by Appellant's alleged behavior. Ultimately, Ms. Linzey arranged a meeting between employees who would speak up and the new Agency chief of staff and Mr. Duarte. She had attempted without success to setup this meeting with the former Executives Directors Mr. Cornejo and Mr. Delaney. On April 25 and 26, 2019, thirteen employees voiced complaints only about Appellant and Ms. Duffy, alleging improper supervision, inappropriate comments, disregard of the safety protocols, and financial mismanagement. The chief of staff and Mr. Duarte reported the information to Mr. Cleckly. He decided the Agency needed an outside agency to investigate the allegations, for which the City Attorney's Office hired Employment Matters, LLC. It interviewed 12 Agency supervisors, one manager, and two OSH employees, and compiled their written statements.

Work Demeanor

The complainants alleged generally that Appellant used bullying, rude and intimidating conduct in his supervision of them, even if they were not his direct reports. They also stated that Appellant caused negative relationships between the employees under him, whom he favored, and other Division employees; and between the Division and other agencies. Ms. Duffy testified generally that Appellant's duties included addressing safety issues wherever he encountered them, in a global defense of his admonitions to employees who were not his direct reports.

Mr. Rzeszut, asphalt plant supervisor under Mr. Laumann, described an incident in which Appellant bullied the plant staff. Due to delay, the asphalt loaded onto a truck had cooled, hardened, and needed to be removed. The plant staff began to try to remove it with a backhoe. Appellant drove into the plant at that time, and toward the truck. Concerned for any

potential damage to it, he approached and yelled at Mr. Rzeszut, "What the fuck do you think you are doing?" He then ordered the plant employees to break up and remove the asphalt using jack hammers. The staff used the hammers for a couple of hours with insignificant progress. They then reverted to the backhoe and removed the asphalt efficiently as one lump. Mr. Rzeszut wrote¹ that plant employees refused to work on weekends when Appellant worked. (Ex 48-11).

Mr. Armbrust, traffic control supervisor under Appellant, testified about two incidents. He asked Appellant to approve the replacement of his broken office chair. In response, Appellant belittled him, telling him that he exceeded the weight limit for a chair and denied his request. There is no evidence of any such limit. Mr. Armbrust wrote that in January 2019, after attending a "black belt" training, he suggested that Appellant combine the forms to request traffic control and truck hauling into one form for efficiency. Appellant rejected the suggestion. But, in April 2019, Appellant combined these forms. Mr. Armbrust requested credit for the suggestion, which Appellant denied, claiming the idea as his own. Mr. Armbrust obtained FMLA leave for health reasons which he attributed in part to the stress Appellant inflicted on him. Appellant denied belittling Mr. Armbrust over his weight but did not address the issue of the revised form.

Michael Bowers, operations supervisor at the Wastewater Division, wrote² of an interagency incident. Mr. Bowers supervised the change of the height of manholes in the streets during paving season. In 2017, Appellant drove up to a jobsite and ordered a Wastewater employee, who was replacing a 200-pound manhole ring, to move his parked truck. Over Appellant's objection, the employee finished installing the ring before moving the truck. Upset at the delay, Appellant punitively ordered the Division paver operator to not drive over the manhole. Ordinarily the operator would drive over the manhole to make it flush with the pavement. Instead, the manhole protruded from the pavement, which Appellant then ordered the Wastewater crew to fix, and which took extra time and effort. Appellant did not address this incident. Mr. Bowers would also supervise snow removal in the winter but quit that duty to avoid contact with Appellant. (Ex. 48-37, 38).

Mr. Paige, supervisor under Mr. Laumann, testified to an incident involving Appellant. In May or June 2017, after Mr. Paige was promoted to supervisor, another supervisor was congratulating him. Appellant approached them and stated that Mr. Paige could now cut that crap off his head,³ referring to Mr. Paige's dreadlock hairstyle, his expression of African-American culture. There was no evidence of any rule regarding hairstyle or any effect from Mr. Paige's hairstyle on his duties. Mr. Paige felt demoralized by Appellant's comment. Mr. Paige obtained some FMLA time off and has been on medication for elevated blood pressure, which he attributed to the stress at work. Appellant denied making this comment to Mr. Paige.

Mr. Valdez, supervisor under Mr. Gonzales, testified that Appellant castigated two employees outside of his office who were speaking Spanish. Appellant walked by and ordered them not to speak it "around here," because we are in America now and we speak English. Appellant was not involved in any work duties with the employees. Mr. Valdez spoke to the castigated employee, who reported to Mr. Valdez and who was fearful of Appellant so he would not complain about the incident. Mr. Valdez stated that Division production has improved since Appellant left, including daily production of miles per truck, per hour, and miles swept, and per team, because Division employees feel valued, respected and appreciated. Appellant denied making this comment to the Hispanic employees.

¹ Some evidence is from witnesses' written statements from the investigation.

² Mr. Bowers provided a written statement to the investigator but did not testify.

³ Mr. Paige wrote, "Now you can cut that off your head." (Ex. 48-27) and testified "Now he can cut that crap off his head," which the Hearing Officer finds corroborating.

Mr. Gonzales testified that he, Appellant, Ms. Duffy, and an Envirotech employee were driving back to the City together. The Envirotech employee questioned Mr. Cleckly's credentials to be the Agency Executive Director. Ms. Duffy replied that she shared that doubt, and attributed Mr. Cleckly's appointment to the fact that he and the Denver Mayor, both African-Americans, had families who were slaves together. Mr. Gonzales was stunned by this comment. The Envirotech employee stated she would not even touch it. Appellant participated with Ms. Duffy by laughing at her comment. Appellant denied making any discriminatory comments.

Mr. Gonzales testified that other employees would contact him to complain about Appellant's behavior that they found inappropriate. He did not believe he had any avenue to take any action in response to complaints about Appellant and did not attempt to do so.

But for Mr. Sigala, the other Division employees testified that the environment in the Division has improved and the employees work better after Appellant's dismissal due to their collaborative efforts and reduced stress. Mr. Sigala did not address this aftermath.

The Europe Trip

The Agency conducted an audit of the travel of Appellant and Ms. Duffy, who was the travel liaison for the Division (Ex. 7-1), on City business to Germany and Italy, from May 15 through 23, 2018. She had prepared the required Travel Request for this trip. She stated in it that she and Appellant would travel to Munich, Germany to an industry conference and meet with vendors to discuss and review the vendor technology and equipment. She stated in the "Purpose/Benefit to the City" that Dulevo and Giletta "will be discussing options for full electric sweepers in the future." (Ex. 11-2). However, she did not state that their trip included Italy, or that Hardline would pay for some of the expenses. Appellant initialed this Request, attesting the "funding for this trip is in compliance with the Denver Code of Ethics, which prohibits accepting travel or funding for travel if the traveler is in a position to take direct official action with regard to the donor, and the city has an existing, ongoing, or pending contract, ... with the donor." *Id.*

Appellant did not file the documentation of Hardline's payment for his Europe trip as required by the City Travel Procedures. He again attested that the funding for the trip was compliant with the Code of Ethics (Code) when he requested reimbursement for some of his expenses. (Ex. 26-3). Appellant did not report Dulevo or Hardline's payments, for his conference fee and travel and lodging expenses, in his Annual Employee Gift Report for 2018.

On September 10, 2018, Hardline proposed that the City purchase from it the Dulevo D-Zero electric street sweeper for \$221,060. On October 26, 2018, Andrew Miskell, City Senior Buyer, General Services agency, requested from Appellant a letter describing why it would be a great idea to omit any supplemental bid for the D-Zero sweeper. On November 1, 2018, Appellant complied and sent Mr. Miskell a recommendation that the City purchase this street sweeper, without obtaining any other bids. (Ex. 38-2). He began, "I feel it is in the City and County of Denver's best interest to purchase a Dulevo D-Zero Street Sweeper with out [sic] doing a supplemental bid." He followed with several sentences supporting this opinion. On November 6, 2018, Mr. Miskell initiated a purchase order for the D-Zero sweeper from Hardline for \$221,060 without obtaining any other bids.

Before and since Appellant's travel to Europe, the City has had a contract with Hardline for the purchase of Dulevo equipment, garbage trucks, and for other parts and service. Mr. Schuller testified that Hardline had a five-year contract with the City from 2013, with annual renewals.

On May 30, 2019, the City's internal auditor interviewed Appellant during its audit of his trip to Europe. (Ex. O-4). Appellant claimed to be unable to provide any specific information, documentation, or receipts regarding his trip to Europe. He claimed to not remember the dates

of travel, airline on which he traveled, names of hotels, or names of vendors' representatives with whom he met in Italy. In the summer 2018, Nancy Kuhn, PIO, had interviewed Appellant about the trip to Europe due to press inquiries about it, but he already claimed to not recall these basic details of the trip. (Ex. O-7).

The auditor requested similar information from Hardline, which also did not provide documents. But Mr. Walt Tokunaga, Hardline's owner, did state that Hardline paid for Appellant and Ms. Duffy's airfare and the expense for two nights at the hotel. (Ex. O-4). The auditor confirmed that Hardline employees traveled with Appellant and Ms. Duffy to Europe and that it paid for Appellant's and Ms. Duffy's roundtrip airfare, \$4,182.34, (Ex. 15-17), his hotel for two nights in Germany, and the rental car for the Italy trip. (Ex O-6). Dulevo paid for Appellant's hotel for one night in Italy. (Ex. 25).

Appellant and Ms. Duffy testified that Mr. Cleckly had instructed them to ask the manufacturers to pay for some of the Europe trip expenses as it was too expensive. She stated that Appellant arranged payment by Giletta and Dulevo. However, she testified that she did not know until her testimony at the hearing that Hardline had paid for any expenses. Mr. Cleckly denied instructing either Appellant or Ms. Duffy to request any funding from the manufacturers. He stated making such request would create an appearance of a conflict of interest.

Appellant testified that he did not know whether Hardline paid for any of his expenses for his trip to Europe. He also denied recommending the purchase of the D-Zero street sweeper in his November 1, 2018 memorandum to Mr. Miskell.

The Safety Issues

Janalee Thompson, OSH Professional, addressed safety issues. She began to work at the Division in late May 2018. She wrote (Ex. 48-57, 58) that some Division employees told her they could not get the Division to address their concerns about the "super tandem" trucks, with four varied rear axles. They claimed that the trucks were difficult to steer and unsafe when the fourth axle was lowered, which claim Appellant rejected. She rode in a super tandem and verified its steering issue. Appellant persisted in making the drivers lower the truck axle. Mr. Cleckly, with expertise on the operation of the super tandems, criticized Appellant's directive as improper.

Appellant demanded that Ms. Thompson identify which of three employees had complained about the super tandem trucks and refused to talk to her further when she declined, citing the need for anonymity of complainants. He then reported to her manager that she had acted unprofessionally with him. He testified that he needed to identify the complainant to retrain him. She attended an October or November 2018 meeting, when an employee raised this issue, but Appellant responded it was not the time for it. After the meeting, Appellant told Ms. Thompson that the employee "doesn't even operate a super tandem or a plow, but he will be now" which she considered retaliation for his complaint.

Appellant eventually provided additional training to the operators of the super tandems. He delegated the training and dictated its content to Mr. Sigala. Mr. Sigala described that, on April 5, 2019, he conducted a 15-minute training session, informational but not operational. The drivers reported to Ms. Thompson that the training was perfunctory and did not include any new information. (Ex. 48-58). They found it inadequate since Mr. Sigala did not actually drive a super tandem truck. He conducted the training five or six months after their complaints, after the winter. Ms. Duffy claimed this training was only supplemental, and that it was one hour long.

Finally, Ms. Thompson, would only meet with Appellant with another OSH employee present to protect against his bullying behavior toward her. (Ex. 48-59).

Ms. Linzey testified that both Appellant and Ms. Duffy always reacted negatively to any ideas or recommendations to improve safety. They claimed Ms. Linzey was instigating Division employee complaints and sought to have her removed from the Division. Mr. Duarte testified that in the spring 2018, Acting Director Delaney, Ms. Duffy and Appellant approached him and asked that he remove Ms. Linzey from the Division. Mr. Duarte declined to do so as they lacked specific justification. In the spring 2019, Mr. Cleckly and Chief Operating Officer Richardson also discussed Ms. Duffy's and Appellant's complaints about Ms. Linzey with Mr. Duarte. Mr. Cleckly and Mr. Duarte agreed to remove Ms. Linzey from the Division, not because they thought her actions improper, but to remove her as a factor in the determination of the issues in the Division.

Mr. Krupczak, OSH supervisor at the Division since October 2016, testified that the Division leadership, but especially Appellant and Ms. Duffy, had little engagement with safety. He described encountering Appellant on the job without wearing personal protective equipment, in violation of the safety rules. He confronted Appellant, who responded that the employees knew not to hit him. He described a meeting after the impasse between Ms. Thompson and Appellant over her refusal to disclose the employee(s) who raised the safety issue. He met with Appellant and Ms. Duffy and agreed to their request that OSH not bring them any safety issues unless it had verified that multiple employees, not just a single employee, had raised the issue.

Mr. Krupczak also stated that operators of graders complained Appellant ignored their complaints about two new graders that were equipped with a joystick instead of a steering wheel. They claimed the graders were difficult to steer as the joysticks were too sensitive. Mr. Krupczak stated that a fleet mechanic advised that the manufacturer could adjust the software for the joystick to make it less sensitive. Appellant testified that he could not adjust the software on the graders but did not address why he refused to have the manufacturer do so.

The complainants described that Appellant made drivers drive their trucks in icy and snowy conditions without any material loaded in them and took away their discretion to mitigate the poor driving conditions of the streets. The drivers wanted material in the trucks because it improved their traction in the poor driving conditions. They also wanted discretion to distribute material on icy and snowy streets to make them safer. If they carried no material and then deemed it necessary, they would have to return to the Division offices to get it. However, Appellant ignored the complaints and would order that no material be loaded on the trucks.

Mr. Gonzales testified that about an incident regarding Appellant and his prohibition of material on the trucks. He was to start work after his truck operators had started on that day. Two of his supervisors called him at home to complain that Appellant was ordering them to drive off without material and to not put any material on the streets. He described the weather as very snowy, which made it unsafe for the drivers and the public traffic. He called Ms. Duffy to request that his drivers get material, which annoyed her but she authorized it. Appellant took offense at Mr. Gonzales, and they did not speak to each other for a time thereafter.

Ms. Duffy generally defended Appellant's action as operators might then spread too much material on the streets and violate the EPA and Colorado state environmental regulations. However, she did identify any regulations or their limits on material, or how much material the operators spread, or whether the drivers ever got close to or exceeded any limits. She also generally stated the Division needed to limit the use of material to make its supply last the season. She and Appellant testified that the senior staff met and decided whether to load material on trucks or to spread material on the streets based on the weather forecasts, although nobody else testified or wrote that this was the Division protocol.

Mr. Armbrust testified that Appellant rejected his request for more staff at a worksite that he deemed understaffed and unsafe, stating that "budget trumps safety." So, Mr. Armbrust sent

Appellant an email confirming the number of staff Appellant had determined was adequate for the task, due to the budget considerations. Appellant responded by email stating generally that safety was paramount and that staffing can be supplemented anytime it is justifiable. (Ex. Y). Mr. Ambrust testified that, in the email, Appellant had now modified his earlier dismissive comments to appear supportive of safety considerations.

Mr. Valdez testified that an employee was injured on the job, and later died from the injuries. He raised the issue of safety awareness at a meeting later that day, because neither Appellant or Ms. Duffy had done so. He testified that he observed them as they sat together, reacting to his comments dismissively, treating them as a joke.

Equipment Purchases

Management employees complained that Appellant made equipment purchase decisions for the City without input from the affected employees, resulting in ill-advised purchases. Mr. Bales, the Fleet supervisor, is involved in the purchase of all equipment. He described the process as a collaboration between him and the client to arrive at final recommendations. For the Division, he consulted only with Appellant. Once they made a decision, he would forward the purchase requests to the General Services agency to finalize the purchasing process, and sometimes ultimately to the city council.

After some due diligence, Appellant recommended the purchase of Dulevo street sweepers to replace the Elgin sweepers. Appellant had organized a "sweep off" to test the sweepers of interested vendors. Some employees criticized him for using flour in the contest to favor Dulevo sweepers, which alone function with vacuum systems. Also, Appellant had Mr. Sigala, who does not operate a sweeper or supervise a sweeping crew, acquire the flour for this contest. Mr. Gonzales, manager of street sweeping, wrote that Appellant composed the specifications for the sweepers the City would purchase without consulting him and required that the sweepers have vacuums, which only Dulevo sweepers contained. (Ex. 48-92, 93).

Mr. Gonzales stated that Appellant criticized the Elgin sweepers as unable to drive up the hills on city streets due to their smaller engines. He wrote that Appellant tested an Elgin sweeper on Denver's highest hill, and stated that Elgin rectified this issue, but that Appellant raised other issues with the Elgin sweepers and did not let it resolve them. (Ex. 48-92). The City Attorney's Office then negotiated the full credit for the return of the Elgin sweepers. Ms. Duffy testified the earlier return of the Elgin sweepers was necessary to obtain full reimbursement for their cost.

Mr. Rzeszut, asphalt plant supervisor, complained that Appellant recommended the purchase of silos for the asphalt plant without consulting him. In fact, Mr. Sigala, testified that Appellant had him compose the specifications for this purchase, although Mr. Sigala did not work at the asphalt plant or claim any expertise on asphalt. He also testified that the Mr. Rzeszut composed his own specifications, maybe suggesting that Mr. Rzeszut was thereby involved in the process. Mr. Rzeszut also complained that they purchased the silos without lights, problematic at times since they start operations at 5:00 a.m. Ms. Duffy and Appellant did not justify marginalizing Mr. Rzeszut in this process. Appellant stated they actually collaborated on it.

Mr. Rzeszut testified that Appellant recommended the purchase of a prototype crusher for \$1.3 million without consulting him and that it does not work well. He alleged that Appellant tested other crushers that cost about \$4-5,000,000 while the prototype could not be tested. Appellant testified that he participated in the purchasing process and recommended a crusher, but that it had favorable qualities and was bid lowest at \$1,100,000. Ms. Duffy noted that the plant has to finance its operations from its asphalt sales as it gets no funds from the City general fund. As such, a \$1 million purchase is substantial for the asphalt plant operation.

The evidence showed that equipment that the City uses from different vendors have different characteristics. As such, it may be difficult to compare equipment and to identify which is the "best." The issue here is that Appellant negotiated the purchases to be made with Mr. Bales, drafted the specifications for the equipment to be purchased, and controlled the demonstrations. He thereby had more influence over the timing of and specific purchases for the Division than its other employees, but he also created cynicism and low morale by excluding relevant employees from the process and appearing to favor some vendors.

The evidence did not show that Appellant had any significant influence in the City's purchase of the "Python" one-man street patching machines; or caused the purchase of snow plows too heavy to use on city streets or giant snow plows that are unsuitable for the City. While the evidence showed that Appellant rejected the purchase of a crane, the financial justification supported that decision.

Advertising

August 22, 2018, Hardline sought Appellant's approval of the accuracy of its information, which Appellant provided the prior day (Ex. 33), to be distributed in flyers on its letterhead promoting its distribution of Dulevo sweepers. The first page touted Hardline's Dulevo 6000 street sweeper, with Appellant citing favorable statistics as against the Pelican and Global sweepers. (Ex. 34-2). The second page touted Hardline's D-Zero all electric street sweeper, with Appellant citing favorable statistics against the Johnston c-201 sweeper. (Ex. 34-3). It identified Appellant as "Doug Legg, Streets Manager, City and County of Denver, Colorado."

Appellant advertised for Hardline without obtaining City approval. On November 23, 2018, it posted a video on the social networks Facebook and YouTube in which Appellant appeared, wearing a City uniform shirt. (Ex. 42). Hardline identified him as the City's "Manager of Streets." In the video, he touted the Dulevo D-Zero all-electric street sweeper but specifically endorsed Hardline as its distributor and the service and parts that Hardline provides.

On December 7, 2018, Hardline issued a press release on its letterhead, promoting its distribution of the D-Zero sweeper, and the City's purchase of the first one in the United States. It included favorable quotes from Appellant, which it identified as "City of Denver Streets Manager Doug Legg." (Ex. 44).

Ms. Leadbetter-Bellile had created a video featuring the D-Zero sweeper. (Ex. 29). She had coordinated with Appellant to do so in conjunction with Hardline. However, when she created her video around July 27, 2018, the Hardline photographers did not appear. On August 7, 2018, Appellant featured in the video Hardline created in which he was identified as "Doug Legg, Manager of Street City of Denver" and in which he promoted Hardline. (Ex. 43). He made also available the D-Zero sweeper for this video. However, he did not inform Ms. Leadbetter-Bellile about the creation of or his appearance in Hardline's video. After Hardline posted its video on the social networks, other individuals notified her of its existence.

In early December 2018, Ms. Leadbetter-Bellile then coordinated an interview of Appellant by a social network blogger Sean Mitchell "With All Things EV" to promote the City's D-Zero, at which she was also present. (Ex. 45). During this interview, Appellant did not mention Hardline.

Both Ms. Kuhn and Ms. Leadbetter-Bellile testified that they handle all requests for promotions. They were unaware of Appellant's participation in Hardline's promotions until after the fact, when they learned of it from other sources. They did not know of any employee that had ever done such advertising for a vendor, and they would not have approved it. Mr. Cleckly testified that he would not have approved such advertising.

Appellant testified that he would have needed permission to appear in a promotional video, but that Ms. Kuhn had given him permission from to feature in Hardline's promotional video, and that it included him in its press release without his permission. Ms. Duffy testified that it was not inappropriate for Appellant to promote specific vendors.

Dismissal

On June 26, 2019, Appellant and his representative Ed Bagwell met with Mr. Duarte, Shelby Felton, Senior Assistant City Attorney, Elena VanDecar, OHR Senior Business Partner, and Amy Lowell, OHR Employee Relations Partner for a contemplation of discipline meeting. Appellant stated generally that the Agency relied on facts which were 90% inaccurate, he did not intend his behavior to be perceived negatively, and it had not previously coached him on behavioral issues. On July 1, 2019, after considering the circumstances, the Agency dismissed Appellant. On July 14, 2019, Appellant filed this appeal of his dismissal, which is timely.

IV. ANALYSIS

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction of this direct appeal of a dismissal pursuant to CSR 19-20 A.1.a. The Hearing Officer is required to conduct a *de novo* review, meaning to consider all of the evidence as though no previous action had been taken. CSR 19-55 A; Turner v. Rossmiller, 532 P.2d 751 (Colo.App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of proof, by a preponderance of the evidence, throughout the case to prove that Appellant violated CSR 16-28 A, D, E, I, L, O, R and T, and to prove that its dismissal of him was within a reasonable range of alternatives available to it. CSR 19-55 A.

C. Authority

CSR 16-28 states in relevant part:

- A. Neglect of duty or carelessness in performance of duties and responsibilities.;
- D. Any act of dishonesty, which may include, but is not limited to, lying, or improperly altering or falsifying records, examination answers, or work hours.;
- E. Accepting, soliciting, or making a bribe, or using official position or authority for personal profit or advantage, including kickbacks.;
- I. Failure to maintain satisfactory working relationships with co-workers and other individuals the employee interacts with as part of his or her job.;
- L. Discrimination or harassment as defined in this Rule 16. This includes making derogatory statements based on race, color, religion, national origin, sex, sexual orientation, gender identity and expression, disability, genetic information, military status, age, marital status, political affiliation, or any other status protected under federal, state, and/or local law. This prohibited conduct need not rise to the level of a violation of any relevant local, state or federal law before an employee may be disciplined and the imposition of such discipline does not constitute an admission that the City violated any law. ...;

- O. Failure to use safety devices or failure to observe safety regulations.;
- R. Conduct which violates the Career Service Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, written departmental or agency regulations, policies or rules, or any other applicable legal authority. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.; and
- 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 compromises the integrity of the City; or
 - 3. Be unbecoming of a City employee.

D. Career Service Rule Violations

The Agency argues that Appellant's misconduct was sufficiently problematic and of such length that it had no choice but to dismiss him. Mr. Cleckly noted that Appellant had an incident in 2010 that documented the duration of his issues. Mr. Valdez testified that, in 2010, his employees documented this incident. A truck operator drove into the wrong area on a jobsite and hit a sign. Appellant then threw the sign at the truck twice and jammed it in the truck's grill. He then approached the driver and they exchanged comments. The driver did not complain about Appellant's actions. However, other employees disclosed it, so the Agency documented it. Among some Agency employees, Appellant was infamous for this incident, which also made them wary of him. Appellant testified that he got disciplined for the incident in 2010.⁴

Mr. Cleckly found disconcerting Appellant's racist comments to Mr. Paige, an African-American, on his promotion to supervisor, and to the Hispanic employees to not speak Spanish. He noted the diversity of the Division, about 40% Hispanic employees and many African-American employees, including some witnesses. See *also* Ex. 48-122. He noted Appellant's apparent disregard of the conflict of interest in accepting the payment of expenses from and in promoting one vendor, thus casting doubt on the integrity of the City's purchasing process.

But for appearing in Hardline's video, Appellant argues that he did not commit the actions which the Agency alleged and accuses his critics of lying. He argued that he had verbal permission to participate in Hardline's video. He blames OSIH and OHR staff for instigating Division employees against him, causing them to invent allegations against him. He claims the lack of prior complaints or Agency coaching of him proves his innocence of the allegations.

1. CSR 16-28 A - Neglect: Both parts of this rule require notice of a duty and either the failure to perform it (neglect), or a substandard performance of that duty (carelessness). [In re Gustin](#), CSA 02-17, 2 (8/8/17), citing [In re Abbey](#), CSA 99-09, 6 (8/9/10); [In re Simpleman](#), CSA 31-06, 4-5 (10/20/06). To sustain a violation under this rule, the agency must establish appellant performed a known duty deficiently or not at all. [In re Marez](#), CSA 58-16, 6 (1/26/17), citing [In re Leslie](#), CSA 10-11 (12/5/11).

The Agency proved Appellant violated this rule by a preponderance of the evidence. As a manager and supervisor, he had a duty to treat employees respectfully. However, as described above, his actions included treating employees disrespectfully, marginalizing relevant employees

⁴ This agency action is not considered discipline pursuant to the CRSs.

from the purchasing process for equipment and disregarding employee safety concerns. Appellant also violated this Rule by violating the Code by accepting Hardline's payment of his airfare, lodging, and rental car, and by failing to report the details of this travel as required by the City Travel Procedures.

2. CSR 16-28 D - Dishonesty: A violation of this rule includes any knowing misrepresentation made within the employment context. [In re Marez](#), CSA 58-16, 3 (1/26/17), citing [In re Rodriguez](#), CSA 12-10, 7 (10/22/10). Intent to deceive may be inferred from circumstances. [In re Steckman](#), CSB 30-15, 4 (1/19/17), citing [In re Gale](#), CSB 02-15 (7/21/16). Dishonesty-by-omission established where appellant failed to disclose critical information any reasonable person would know to disclose, and did so intentionally and knowingly for the purpose of attempting to obtain information he was not otherwise entitled to receive. [In re Mancuso](#), CSB 76-17, 6 (9/6/18).

The Agency proved Appellant violated this rule by a preponderance of the evidence. He falsely attested that his May 2018 travel comported with the Code, when he personally obtained Hardline's funding for it, which he also withheld from the Agency and the City internal auditor. He also withheld from the PIO staff his participation in Hardline's promotions, flyers, press release and video, when he knew he needed their prior permission to participate.

The Hearing Officer finds incredible Appellant's claim that Hardline included his comments in its press release without his permission, when he had provided it the information. Hardline also would not jeopardize its relationship with Appellant through this action, since he was influential in the City's decisions to purchase its products and he was promoting it in his official capacity.

3. CSR 16-28 E – Personal Profit: Violation of this rule is established by requesting an advantage by virtue of having an official position, and does not require that an employee actually receive the requested advantage. [In re Cotton](#), CSA 104-09, 8 (10/18/10). Violation of this rule requires proof of a significant link between one's official position or authority and seeking an advantage to which one is not otherwise entitled. [In re Sawyer & Sproul](#), CSA 33-08 & 34-08, 9 (1/27/09). Rule requires proof of actual use of official position for personal gain. [In re Catalina](#), CSA 35-08, 8 (8/22/08).

The Agency proved Appellant's violated this rule by a preponderance of the evidence. Appellant used his official position to obtain funding for his trip to Europe from Hardline, to which he was not entitled, and which the Code prohibited him from accepting.

4. CSR 16-28 I – Unsatisfactory Work Relationships: Conduct violates this rule if it would cause another person standing in the employee's place to believe it would be harmful to others or have a significant impact on their working relationship. [In re Schofield](#), CSA 08-17, 13 (10/9/17). The standard for analyzing a violation under this rule is objective and is not defined by the affected individual's feelings and perception of mistreatment. *Id.* Violation of this rule requires evidence of poor treatment of a particular person or actions in a particular situation, without which it is mere conjecture to assess the behavior and its effect on a reasonable co-worker. *Id.*, at 15.

The Agency proved Appellant violated this rule by a preponderance of the evidence. His actions included yelling and swearing at other City employees, making discriminatory comments against African-American and Hispanic employees, and refusing to provide a chair for an employee based on some alleged weight rule. Appellant also violated this Rule by marginalizing relevant employees in decisions about equipment purchase requests. Appellant also violated this Rule by dismissing employee concerns about safety, at least until forced to address them, and by attempting to eliminate safety oversight from the Division.

Ms. Duffy defended Appellant against this allegation. She claimed to be unaware of any issues with Appellant and noted that nobody had brought issues about him to her attention, but she merely ignored the complaints. Ms. Thompson described some survey results, in which about half of 118 respondents claimed that Appellant was the source of their stress and made their job miserable. (Ex. 48-56, 57). However, Appellant and Ms. Duffy just alleged the employees lied. So, Ms. Duffy just misstated the facts when she claimed ignorance of Appellant's issues.

5. CSR 16-28 L - Discrimination

The Agency proved Appellant violated this rule by a preponderance of the evidence. Appellant's participation with Ms. Duffy, in laughing at her derogatory comment about Mr. Cleckly and the Mayor, and his own derogatory comment to Mr. Paige for his hairstyle, on Mr. Paige's recent promotion to supervisor, showed his discrimination toward African-Americans.

Appellant's admonishment of Hispanic employees for speaking Spanish also evidenced his discrimination toward Hispanics. By then, employment managers knew it is illegal to limit employees' use of language that does not affect their execution of employment duties. See Maldonado v. City of Altus, 433 F.3d 1294, (10th Cir. 2006) (Absent a business necessity, an English only policy may create a hostile work environment based on race and national origin discrimination, prohibited by Title VII, and U.S.C. §§ 1981 and 1983.) Appellant should have known better.

Appellant denies making these comments. However, these witnesses are quite credible. The impact of his actions is apparent from the emotion with which they testified. Ms. Duffy's comments in the first incident make her unqualified defense of Appellant less credible. Appellant's denial is unconvincing as he is not more credible than these witnesses.

Appellant also defended against this misconduct by claiming that he is not "racist," which has its own definition. The Hearing Officer applied employment law to this analysis. CSR 16-22 and its predecessors state that City employees have a right to be free from harassment and discrimination based on race, national origin, color, and other bases; and Maldonado, *supra*, states the relevant federal law. So, Appellant's defense is ineffective.

6. CSR 16-28 O – Failure of Safety: This rule may be violated in three ways: 1) when there is a nexus between an employee's omission and injury to the employee or another; 2) when the employee's omission jeopardizes the safety of the employee or others; or 3) when the employee's omission results in damage or destruction of city property. [In re Simpleman](#), CSA 05-06, 6 (5/16/06), citing [In re Owoeye](#), CSA 11-05, 4 (6/10/05).

The Agency proved Appellant's violated this rule by a preponderance of the evidence. Appellant's jeopardized his own safety by not wearing personal protective equipment, and that of other employees by disregarding employee complaints of having to drive trucks without material in icy and snowy conditions, by having to drive quad tandem trucks with the fourth axle down when not necessary, and by undermining the efforts of Ms. Linzey, Ms. Thompson and Mr. Valdez to improve safety in the Division.

The Hearing Officer finds Mr. Armbrust's testimony credible over Appellant's testimony. Mr. Armbrust stated he asked for more staff at a jobsite for safety reasons, which Appellant denied. Appellant relies on his email of a few day later, in which he states that additional staff is available when needed for safety reasons. Had Mr. Armbrust been able to obtain additional staff, he would have had no need to contact Appellant with his request but, having done so,

Appellant would have approved it. Instead, Appellant overruled Mr. Armbrust's safety concerns and denied the additional staff. So, Appellant did not apply his current position to this incident.

7. CSR 16-28 R – Violation of Authority

The Agency cites as authorities that Appellant violated: (1) Code Sec. 2-60, (2) Code Sec. 2-61, (3) Fiscal Rule 10.8 – Travel, and (4) Fiscal Accountability Rule 10.12 - Employee Gifts, Prizes, and Awards.

Sec. 2-60. Gifts to officers, officials, and employees. states in relevant part:

(a) ... it shall be a violation of this code of ethics for any ... employees ... to solicit or to accept any of the following items if (1) the ... employee is in a position to take direct official action with regard to the donor; and (2) the city has an existing, ongoing, or pending contract, ... with the donor: ...

(6) Travel expenses and lodging;

Sec. 2-61. Conflict of interest while employed. states in relevant part:

(a) ... an ... employee shall not take direct official action on a matter before the city if he ... has any substantial ... financial interest in that matter. ...

Fiscal Accountability Rule 10.8 – Travel states in relevant part, "Travel Requirements and Restrictions 1. All Travelers must comply with this rule and the related Travel Procedure. ..." (Ex. 4-2). The related **Controller's Office Travel Procedure** states in relevant part at Section 5 - Transportation 1. What methods of transportation can be used for travel? A. Commercial Airlines, "...If the ticket is not paid for by the City, the Traveler is required to submit the original receipt, showing proof of payment, amount, date, name of carrier, flight times, and destination with his/her Travel Authorization and Expense Form."

Fiscal Accountability Rule 10.12 – EMPLOYEE GIFTS, PRIZES, AND AWARDS states in relevant part: (9) Employees shall annually report every gift, prize, and award presented and accepted on the Employee Financial Disclosure Statement.

The Agency proved Appellant violated this Rule through the violations of the following authorities by a preponderance of the evidence:

- (1) Code Sec. 2-60 by obtaining Hardline's payment, with which the City had a contract, for his travel and lodging expenses, when he was in a position to and took direct official action by recommending the City's purchase of its D-Zero sweeper without other bids;
- (2) Fiscal Accountability Rule 10.8 as he did not submit the details of his airfare for which Hardline paid with his Travel Authorization and Expense Form; and
- (3) Fiscal Accountability Rule 10.12 as he did not report the Hardline payments for his travel on his subsequent Employee Financial Disclosure Statement.

The evidence shows that Appellant knew that accepting Hardline's payment of his travel expenses violated the Code. He was an experienced traveler, familiar with travel procedures. His Annual Evaluations and Reviews identify business travel to a conference as a goal in the years 2012, 2014, 2015, and 2016. (Ex. P., Pgs. P-3, 11, 14, and 18). Appellant's persistent coverup of Hardline's payment highlights his attempt to conceal his Code violation. He withheld this information from Ms. Duffy, who only learned of it at the hearing. He did not submit it with his Travel Authorization and Expense Form when he sought reimbursement for expenses. He claimed that he only had to list the expenses for which sought reimbursement. He withheld Hardline's payment from his next Annual Employee Gift Report. He withheld it from the auditor, feigning ignorance of all travel details. At hearing, he still claimed to be unsure of its payment.

Appellant also claims immunity from this violation because other City employees took a similar trip in 2017, also funded partly by manufacturers. Yet, accepting payment for expenses from manufacturers is not by itself a Code violation. The evidence did not show an actual Code violation, that those manufacturers had contracts with the City for whom those employees could take official action. The evidence also did not show any violations in the related Travel Authorization and Expense Forms. So, Appellant's immunity defense is inapposite.

The Agency did not prove that Appellant violated Code Sec. 2-61, as he had no financial interest in the City's purchase of the Dulevo D-Zero sweeper from Hardline. An employee has a financial interest in a pending action if the person would receive a personal benefit or detriment from the outcome. See People v. Epps, 406 P.3d 860, 865 (Colo. 2006) (District attorney who will not receive a personal benefit or detriment does not have a financial interest in a case.) Here, Appellant would incur no benefit or detriment if the City purchased the D-Zero.

8. CSR 16-28 T – Conduct Prejudicial: Wrongdoing under this rule now includes conduct which “could foreseeably” cause harm, in addition to actual harm. In re Marez, CSA 58-16, 8 (1/26/17). More than imagination or sheer conjecture is required to establish a violation under this rule. Id. Appellant's open and disloyal attack on the competence of her supervisor in front of their customers is conduct unbecoming a city employee under this rule. In re Martinez, CSA 10-17, 7 (7/19/17).

The Agency proved Appellant violated all three subsections of this Rule by a preponderance of the evidence. His violative actions included yelling and swearing at other City employees, making discriminatory comments against African-American and Hispanic employees, and refusing to provide a chair for an employee based on some alleged weight rule. Appellant also marginalized relevant employees in decisions about equipment purchase requests. He also dismissed employee concerns about safety, at least until forced to address them, and attempted to eliminate safety oversight from the Division. He falsely attested that his May 2018 travel comported with the Code, when he personally obtained Hardline's funding for it, which he also withheld from the Agency and the City internal auditor. He also withheld from the PIO staff his participation in Hardline's promotions, flyers, press release and video, when he knew he needed their prior permission to participate.

V. DEGREE OF DISCIPLINE

The Agency argues that its dismissal of Appellant is appropriate, given his misconduct. It argues that Appellant's violations fundamentally undermined the City's principles of fairness and respect of its employees, and the integrity of its purchasing process.

Appellant argues that his dismissal is inappropriate since he did not commit any CSR violation. In the alternative, he argues that, should the Hearing Officer sustain the Agency's claim of his violations, its dismissal of him therefor is excessive.

CSR 16-41 Purpose of Discipline states:

The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

1. Seriousness of the proven offense

Appellant's misconduct is quite serious. It is fundamentally contrary to the City's values. City employees are expected to treat other employees with fairness and respect, especially those whom they supervise. Managers and supervisors are expected to observe the City rules, in effect to lead by example. Appellant disregarded his basic duty to treat other employees appropriately and to promote their safety. His misconduct created such a toxic environment for many employees that the Division performance suffered, and he distressed some employees. Further, employees are expected to be honest in their relationship with the City and to act in its best interests. However, he lied about his Code violation by accepting payment of expenses from a contracted vendor. He also placed his relationship with a vendor above his relationship with the City, using his official position to promote the vendor and undermining the integrity of the City's purchasing process.

2. Prior Record

Appellant has no prior disciplinary action in his personnel file.

3. Likelihood of Reform

Appellant testified generally that, were he to do it over, he would avoid some of his infractions for which he was dismissed, i.e., fill out his travel forms accurately and decline to give interviews to outside organizations. He also claimed that other bases for his dismissal did not occur or that they were not rule violations. (The Hearing Officer noted above some unproven allegations.) Appellant does not acknowledge his misconduct, which is longstanding. The witnesses noted his issues for lengthy periods, Mr. Gonzales since they became managers about five years earlier, Mr. Rzeszut since 2015, and Mr. Krupczak and Ms. Linzey since 2016. Appellant testified that, but for his Europe trip, all the Agency allegations against him were false. Yet, it was he who gave incredible testimony. He showed that he will not reform but would instead try to undermine anyone who tried to hold him accountable for any violative behavior.

VI. CONCLUSION AND ORDER

The Agency's dismissal of Appellant comports with CSR 16-41, as it was properly fashioned to address inappropriate behavior, and was reasonably related to the seriousness of Appellant's conduct; and the record reflected a sufficient, reasonable, and articulated justification for it, it was within the range of alternatives available to a reasonable and prudent administrator, and it was not clearly excessive. See [In re Economakos](#), CSB 28-13A, 2 (3/24/14), citing [Adkins v. Division of Youth Services, Dept. of Institutions](#), 720 P.2d 626 (Colo.App. 1986); [Colorado Dept. of Human Services v. Maggard](#), 248 P.3d 708 (Colo. 2011).

Accordingly, the Hearing Officer AFFIRMS the Agency's dismissal of Appellant.

DONE February 20, 2020.



Federico Alvarez
Career Service Hearing Officer