

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

CELENA MARTINEZ, Appellant,

vs.

DENVER INTERNATIONAL AIRPORT,

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

The hearing in this appeal was held on May 22, 2017 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Leonard A. Martinez, Esq. Assistant City Attorney Shelby Felton represented the Agency in the appeal, and Angela Padalecki served as the Agency's advisory witness. The Agency called Angela Padalecki Patrick Heck, and Harrison Earl. Appellant testified on her own behalf.

I. STATEMENT OF THE APPEAL

Appellant Celena Martinez appealed her Jan. 24, 2017 temporary reduction in pay (TRIP) of 10.95% for 13 pay periods, and asserted claims based on discrimination, retaliation, denial of a grievance, placement on a performance improvement plan (PIP), and violation of the whistleblower ordinance. All claims but the disciplinary reduction in pay and whistleblower violation were dismissed by order issued Feb. 28, 2017 based on Appellant's failure to allege a prima facie case on those issues. The parties stipulated to all the Agency's exhibits, 1 – 17, and withdrew her exhibits, which are duplicates of Agency exhibits.

II. FINDINGS OF FACT

Appellant was employed by the City and County of Denver in 2002, and has been a Contract Administrator for the Department of Aviation, Revenue Management-Properties Division since 2012. Her duties include managing insurance and surety compliance for airline contracts.

On Aug. 22, 2016, Appellant was given a written reprimand by Director of Airline Affairs Angela Padalecki, who supervised Appellant from Feb. 3 to Dec. 5, 2016. The reprimand was based on several instances of tardiness, inaccurate recording of work time, failure to obey orders, and disrespectful treatment of her supervisor and other employees, as described in the nine-page reprimand. [Exh. 3.] Five months later, the current disciplinary reduction in pay was imposed by Appellant's new supervisor, Harrison Earl, based on incidents occurring from September to December, 2016. [Exh. 8.] Padalecki was Appellant's supervisor during most of this time, but Earl took over as her supervisor on Dec. 5th. The allegations and evidence regarding these incidents are as follows:

1. Request to attend extended lunch

At 11:30 am on Sept. 16, 2016, Appellant asked Padalecki via email if she could attend a three-hour lunch meeting with colleagues to thank the videographer of an internal City Spirit video, which event would begin at 1 pm. Padalecki was in a meeting at the time, but responded at noon. Padalecki gave Appellant permission to go, but told her to work her full day or use personal leave. [Exh. 6-10.] Appellant replied that others had been allowed to use work time, and complained she was being ostracized and insulted by management. Appellant then confronted Padalecki angrily in her office. [Appellant, 4:55 pm; Exhs. 6-9 to 6-17.] Earl, who sits in the cubicle closest to Padalecki's office, was concerned when he heard Appellant's raised voice over his headphones expressing her unhappiness, "sustained over several minutes." Earl asked Padalecki if she was all right. When she said yes, Earl walked Appellant out of Padalecki's office. [Earl, 3:42 pm.] Later, Appellant emailed Padalecki with her understanding of what they had discussed, included several exaggerations. Padalecki responded, correcting the overstatements "to confirm you understand the expectations that were set". [Exhs. 6-14, 6-15.] Earl testified that he also overheard Appellant's sustained, raised voice in a conversation with Padalecki on Nov. 8, 2016. [Earl, 3:45 pm.] After hearing the same behavior, Senior Vice President Mukesh Patel emailed Padalecki that Senior Vice President of Concessions Neil Maxfield had also heard Appellant's "badgering and unprofessional behavior towards you", and was concerned. He informed Padalecki that he could no longer allow such conduct "in the workplace for others to see." [Exh. 13.]

At her contemplation of discipline meeting, Appellant said Padalecki told her in early September "that [Padalecki] was thankful we did something to represent our team. She seemed to be congratulating me and appreciative. I had mentioned at that time that we had planned to take a lunch for the person making the video." [Exh. 7.] On that basis, Appellant believed the meeting should have been considered a teambuilding event. [Appellant, 4:19 pm; Exh. 8-8.]

Appellant also expressed that, as a salaried employee, she should not be required to keep track of her hours. She based that on a statement by the Payroll Department that salaried employees are paid the same amount, regardless of the hours they work. [Exhs. 6-26; 7.] Appellant's former supervisor, Susan Moore, entered Appellant's time in Kronos until her Oct. 2015 return from FMLA. Moore then informed Appellant she would need to enter her own time. Appellant thereafter started using Kronos to record her work hours. [Appellant, 4:20 pm.] Appellant believed her work was "project based, not time based", unlike hourly employees. She repeatedly asked her supervisor to identify the business reason for the core work hours of 8 am to 4:30 pm. [Appellant, 4:28, 4:42 pm; Exh. 7.] She recalled that the reasons given were "because we can" and that it helps build a team. Earl testified that core hours help the Properties Division maintain the same hours as those of their customer airlines. [Earl, 3:40 pm.] Appellant disagrees, testifying that "[t]here's never been any business need offered [for the core hours] in my opinion." [Appellant, 5:02 pm; Exh. 6-26.]

Padalecki testified that her denial of work hours for the Sept. 16th lunch was based in part on the fact that Appellant had already been out of the office earlier that week, and her manager requires her to account for her team's work time. [Padalecki, 10:24 am.] Executive Vice President Patrick Heck confirmed that Padalecki had the authority to control Appellant's work time and to require her to accurately report her hours. [Heck, 1:10, 1:30 pm.] After the discipline was imposed, Padalecki learned that other supervisors had permitted their staff to

attend the event as work time, but that those employees had given their supervisors several days' notice of the event. [Padalecki, 11:22 pm.] "If I'd have known this, we could have worked it out." [Padalecki, 11:30 am.]

2. Oct. 14, 2016 tardiness

In Nov. 2015, three months before Padalecki assumed supervision of Appellant, Patel established an expectation that team members would arrive by 9 am. [Padalecki, 9:05 am.] Appellant's written reprimand in Aug. 2016 was based on Appellant's attendance issues, as well as her obstinate and disrespectful behavior. Exh. 3.]

On Oct. 14, 2016, Appellant reported to work 15 minutes after 9 am. On her arrival, Padalecki asked her why she was late. Appellant replied, "[g]ive me a business reason why you need me to arrive by 9 am." After Padalecki referred to the written reprimand on punctuality and unprofessional conduct, Appellant denied any performance issues and laughed. She added, "[m]y perceived performance issues are entirely subjective. You have no idea why I'm laughing while you are talking – it could be that I'm laughing at something my daughter said, or the mountains behind you." The Agency alleges that Appellant's email sent after this exchange inaccurately portrayed the substance of their meeting. [Exhs. 6-18, 8-3 to 8-4.] In response to Appellant's request for "a professional window of 15-20" minutes to arrive to work as given to other employees, Padalecki noted that other staff who need to arrive late notify her in advance, and Appellant had not done that on this day. [Padalecki, 11:40 am; Exh. 6-18.]

3. October Kronos time reporting

On Oct. 14 and 28, 2016, Appellant was several hours late reporting her work hours for the pay period; failed to account for about five hours of work or leave; failed to correct inaccurately reported hours for a month, despite three reminders; and worked additional hours without permission. [Exh. 8-4 to 8-5.] Appellant admitted that she only accounted for 5.5 hours on Oct. 11, 2016. [Appellant, 4:57 pm; Exh. 6-26.] Appellant did not directly challenge most of the other Kronos issues, but argued that she was being asked to prematurely record her time at 10 am, before the end of the last day of the pay period. [Exhs. 6-19, 7.] Padalecki later told her that she needed her Kronos approved in advance so that she could obtain approval from two levels of management before the end of the pay period. [Exh. 7.] Appellant admitted the late arrivals and early departures listed in their email exchanges, but argued that there was no business reason for her to work the core hours. [Exh. 7, 6-19 to 6-24.]

4. November conversation with Patel

On Nov. 18, 2016, Patel asked Appellant what time she had arrived at work that morning, intending her permit her to leave early if she had worked sufficient hours. Appellant asked him, "with a smirk and an attitude to boot", if Patel had permission to talk to her. [Exh. 14.] When he responded that he did not need permission to talk to her, she asked him if she should get permission to talk to him. Patel did permit Appellant to leave early, but reported Appellant's negative attitude to her supervisor. [Exhs. 8-5, 14.] Ten days before that, Patel had witnessed Appellant's "badgering and unprofessional behavior" towards Padalecki, and offered to arrange a conversation with Human Resources if Padalecki ever feels threatened by Appellant. [Exh. 13.]

5. December 15 incidents

On Dec. 15, 2016, Appellant requested \$3,000, the cost of participation in the Latino Leadership Institute (LLI) 2017 Fellows program at the University of Denver. Appellant had advised Padalecki and Patel in October that she had applied for the program. Padalecki responded, "That's right up your alley". Appellant, 4:22 pm.] Mark Nagel, the Agency's Vice President of Airport Operations, furnished a letter of recommendation in support of her application. [Exh. 17-8.] On Dec. 14th at 1:41 pm, Appellant sent a copy of her acceptance letter to Padalecki, and requested her approval of funding "today at the latest." At 3:36 pm, Padalecki congratulated Appellant on her acceptance, and stated she was in meetings but could talk to her about the cost on the following day. Appellant responded at 4:12 pm. "As the information has been requested today, and an invoice already sent, I will relay the delayed response from DEN leadership to the executive team." At 4:15 pm, Padalecki acknowledged Appellant's "urgent need to know whether we will be paying for this program", and said she and Earl had decided not to grant her request. She offered to meet later with Appellant about available funding and development opportunities. Padalecki's division training budget for her five employees totaled \$2,500. [Exh. 8-10.] At hearing, Padalecki said the situation "escalated so quickly" that she had no opportunity to consider alternatives to denial, as she would have if not pressed to make an immediate decision. [Padalecki, 11:48 am.] A half hour later, Appellant forwarded the LLI information and Padalecki's response to Chief Commercial Officer Patrick Heck, stating that "I am unfortunately not supported by my current management" in this request. [Exh. 17.]

That afternoon, Patel had given all employees a candy bar as a token of appreciation for their work. Appellant later handed back her candy bar to Patel, "very aggressively" telling him she would not accept it because Patel had turned down her request for \$3,000 in tuition funding for LLI, and accused him of "sabotaging her career". Patel told her he would never try to sabotage her, and that he wanted her to be successful. In response, "Appellant laughed out loud and made sarcastic remarks". When Patel said the training budget had to be spread among all team members, Appellant suggested that money could be moved around in the budget. Patel repeated that the request was refused. Appellant said the refusal was political, and that she would escalate the matter. [Exh. 16.] Padalecki testified that it is her policy not to approve any individual training request of over \$1,000, given her small training budget.

At about 5:45 pm, Appellant made loud, derogatory, and sarcastic remarks about Padalecki and the management team within the hearing of Padalecki and two key business partners. [Padalecki, 10:32 am.] At 6 pm, Appellant blocked Padalecki's office doorway and accused her of sabotaging her career and work relationships, specifically regarding her denial of funding for the LLI. Appellant heatedly continued for 20 minutes, repeating her charge and stating that she "had facts" showing that Padalecki had "a history of discriminating and intentionally ruining people." Padalecki felt threatened by Appellant's angry barrage of insults, and felt unable to leave because Appellant stood in her office doorway blocking her exit. When Appellant left, Padalecki immediately emailed her managers, Mukesh Patel and Patrick Heck. She described the incident, reported her alarm at the heightened level of hostility now being displayed by Appellant, and requested their help in addressing the behavior. [Exh. 16-1.]

Chief Commercial Officer Patrick Heck consulted with the Office of Human Resources, which drafted a pre-disciplinary letter based on these incidents. Heck and Appellant's

supervisor Harrison Earl attended the pre-disciplinary meeting, and Appellant and her representative participated by phone. Earl recommended termination because he found Appellant had been given clear expectations and prior discipline, yet continued her noncompliant and unprofessional conduct. After considering Appellant's lengthy response and work history, Heck considered all options, but ultimately decided dismissal was inappropriate. Based on the failure of the very specific and recent reprimand on the same conduct, Heck determined that a 13 pay period reduction in pay of 10.95% was of sufficient seriousness to address the pattern of misconduct, and motivate recognition and a change in behavior, with the goal of "[continuing] to strive for a successful outcome and have you be a productive employee". [Exh. 8-12.]

III. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and that the TRIP was within the range of discipline that can be imposed under the circumstances. In re Carter, CSB 87-09, 2 (7/1/2010.) Appellant has the burden of proof on her whistleblower claim.

A. VIOLATION OF DISCIPLINARY RULES

The Agency based its findings of nine rule violations on the above allegations, all of which can be discussed within the following two categories:

1. Work hours

Appellant does not contest that she was absent at the times alleged, did not report her work hours as ordered by her supervisor, and did not accurately report her Oct. 11th work hours. Her argument on the absences is that she is not subject to core hours because she is a salaried employee. Appellant's reliance on a payroll practice governing exempt employees to justify her absences during her work schedule is unsupported by the Career Service Rules, which set a standard 40-hour work week, and empower agency appointing authorities to establish daily work schedules. CSR § 9-71.

Appellant also claimed, but did not prove, that three other employees were granted more flexibility. Earl testified that he was expected in by 9 am, and that the expectation of leadership is that all employees work an eight-hour day so they can work as a team with the airlines they service. [Earl, 3:38 pm.] Padalecki confirmed that all others on the team arrive by 9 am. [Padalecki, 10:10 am.] Human Resources' Deputy Director Rory McLuster likewise informed Appellant that adoption of a work schedule is the policy and practice throughout the city for exempt employees. [Exh. 15-1.] Appellant's disagreement with her work schedule is not relevant to the claimed rule violations. Those are proven by her unauthorized absences from work and deviations from her scheduled shift, facts that are not in dispute.

Appellant's absences proved violations of CSR § 16-29 M and N, as well as failure to comply with her supervisor's order to arrive by 9 am under § 16-29 F. [Exhs. 3-2, 6-19.] Her failure to timely approve her own time card as accurate was also a failure to comply with her supervisor's order. [Exhs. 6-20, 12.] Appellant's response is that her supervisor did not explain the reason for this requirement, and that she did not want to risk reporting her time inaccurately if she did not end up working the Friday hours reported in advance. It is nevertheless true that her supervisor ordered her to approve her Friday hours in advance, and

that she did not do so. Heck testified that Padalecki's order was in keeping with their procedure, since "[t]here's a process if you don't work [your predicted] hours [on the last Friday of the pay period.]" [Heck, 1:30 pm.] In addition, Appellant was required to work from 8:30 to 4 pm, with a half hour lunch, and so the practice of requiring her to "predict" her work hours every other Friday presents no risk as described by Appellant. The Agency therefore proved Appellant failed to comply with her supervisor's order.

Finally as to this issue, the Agency claims Appellant was dishonest in that she falsified her work hours. The Agency presented no proof that Appellant knowingly misrepresented her work hours, as required to prove a violation of CSR § 16-29 D. As we have held in the past, an error in information supplied to a supervisor is insufficient to prove misrepresentation, absent an intent to deceive. *In re Compos et. al.*, CSA 56-08, 14, (12/15/08), citing *In re Mounjim*, CSA 87-07 (7/10/08). Therefore, the Agency failed to establish a violation of § 16-29 D.

2. Unprofessional conduct

The Agency listed several incidents during which it asserts Appellant's conduct was inappropriate, including the Sept. 16th lunch leave request, and her hostile encounters with her supervisor and manager. It found that her behavior violated §§ 16-29 A (neglect or carelessness), H (intimidation of a witness), I (failure to maintain satisfactory relationships), Executive Order 112 (violence in the workplace), and T (conduct prejudicial).

Appellant admits that she was "very upset" on Sept. 16th over denial of paid time for the extended lunch. Their email exchange shows that Appellant complained in strong terms that her time was scrutinized unfairly and she was being harassed. While it is not unprofessional to object to working conditions or treatment, it must be done in a manner that comports with the Career Service Rules. On Sept. 16th, Earl became alarmed by Appellant's long, angry confrontation with her supervisor, and escorted Appellant out of her office. "I hadn't heard anyone on the team react to Angela like that." [Earl, 3:45 pm.] Padalecki described Appellant's behavior as disrespectful, snarky, and accusatory. [Padalecki, 9:36 am.] Padalecki continued to coach Appellant thereafter, efforts which yielded no improvement, either for Padalecki or Appellant's subsequent supervisor, Earl. [Earl, 3:50 pm.]

Appellant's conduct during a meeting with her supervisor on Oct. 14, 2016 also challenged their working relationship. Appellant began by demanding "a business reason" for the well-known requirement to be on time for work. In response to her supervisor's reminder to be respectful, Appellant laughed, then denied she was laughing at Padalecki. Her statement that Padalecki didn't know why she was laughing, and that she "could have been laughing at the mountains or something her daughter said", was so clearly implausible that Padalecki reasonably concluded her subordinate intended to embarrass her by mocking her comments.

Finally, on Dec. 15th, Appellant loudly made insulting comments about Padalecki in front of two business partners, then confronted Padalecki in her office and inflicted twenty minutes of sarcasm and accusations at her for denying her request for \$3,000 in training funds, a request beyond the capacity of the entire training budget. Appellant raised her voice to a yell, told Padalecki she was a bad manager and a disappointment to her, and threatened to take "her facts" - that Padalecki had "a history of discriminating and intentionally ruining people" - to upper management. "She accused me of not coaching her ... then contradicted herself and said I've been coaching her all year but I don't know what I'm doing, [adding that] she doesn't need or want coaching." When Padalecki told her to stop,

Appellant interrupted her and said, "It's fine, no one is even here." After Appellant left, Padalecki was so shaken that she immediately memorialized the "outlandish and aggressive" incident, and sought the advice of her managers. "I do not want to continue to work in an environment where I am subject to someone yelling at me, attacking my character, accusing me of discrimination and sabotage, and threatening me." [Exh. 16-1.] Ten days before, Appellant had been transferred from Padalecki's supervision to Earl's, in another Agency effort to control her behavior. Documentation of Appellant's confrontational style began in Dec. 2015, with the history and conduct noted in the written reprimand. [Exh. 3.] The current behavior fits the same pattern, and clearly shows that Appellant failed to maintain a satisfactory work relationship with her supervisor. Appellant's verbal abuse also constituted violence within the meaning of Executive Order 112 3.0 (b). On the other hand, the Agency presented no evidence in support of its allegation of witness intimidation or retaliation under § 16-29 H. The Agency argues that Appellant "clearly intended to intimidate" Padalecki for giving her a written reprimand. [Agency's Closing Argument. p.14.] The evidence shows instead that Appellant was angry about the denial of training, not the reprimand.

Heck found that Appellant's disparagement of her supervisor in the presence of airline business partners, was conduct unbecoming a city employee, and carelessness in maintaining that business relationship. It requires no speculation to conclude that the natural consequence of Appellant's loud, derogatory statements about her supervisor, in Padalecki's presence, could well be a negative effect on the business partners' opinion of Padalecki and her ability to control her subordinates, as well as their view of Appellant's professionalism. Such an open and disloyal attack on the competence of her supervisor and head of the Properties Division in front of their customers is the type of conduct prohibited by this rule. The Agency established a violation of § 16-29 T.3, conduct unbecoming a city employee.

Next, the Agency claims that Appellant had a duty to work with business partners, and therefore her criticism of her supervisor in their presence was carelessness. There was no evidence that Appellant carelessly performed any duty directly owed to her business partners. The connection between Appellant's criticism of Padalecki and Appellant's duties to her partners is too attenuated to prove careless performance of duties under this rule.

B. DEGREE OF PENALTY

Appellant denies any wrongdoing, and argues that the reduction in pay was overly harsh for the charged misconduct. She does not challenge the facts, but claims they did not amount to rule violations for the reasons stated above. I have found the Agency proved most of the rule violations asserted in the disciplinary letter based on her conduct during several confrontations over the course of four months, conduct very similar in nature to the many instances described in the reprimand issued less than a month before the first event in this discipline.

Appellant has been provided numerous opportunities to improve prior to this discipline. Minimal behavior expectations were set for her at a meeting on Dec. 3, 2015, where she was instructed to treat everyone respectfully, maintain a positive attitude, begin her day at 9 am, and work a minimum of 80 hours a pay period, among other standards. [Exh. 3-2.] Her last two supervisors noted her disrespectful treatment toward them in their 2015 and 2016 performance reviews. [Exhs. 4, 5.] Appellant received regular coaching as part of the Agency's efforts to help her identify the pattern of unprofessional conduct and change her habitual responses. Most significantly, Appellant's current supervisor Harrison Earl testified that Appellant's "pattern of unprofessional communication" and attendance issues continues to this day. [Earl, 3:51 pm.]

There is no more convincing evidence that the penalty was not overly harsh, given the type and persistence of these behaviors. I find that the reduction in pay was well within the range that a reasonable administrator could impose in order to meet the goals of discipline under the rules.

C. CLAIM UNDER WHISTLEBLOWER PROTECTION ORDINANCE

A claim under the whistleblower ordinance is raised by allegations that a supervisor imposed or threatened an adverse employment action on account of an employee's disclosure of information about official misconduct, i.e., a violation of law or other authority, a waste of city resources, or an abuse of official authority. In re Wehmhoefer, CSA 02-08, 4 (2/14/08); D.R.M.C. § 2-106 et. seq.

Here, Appellant filed a complaint on July 27, 2015, about conditions in the nursing mothers' room, under a different supervisor. Appellant did not allege that she was denied an opportunity to pump at work. Instead, she claimed that the Agency retaliated against her as a result of her EEOC charge of discrimination. That alleges a claim of retaliation for taking a protected action, rather than retaliation for reporting official misconduct. Appellant's complaint related solely to the particular conditions experienced by her in late 2014 and early 2015, in using the nursing room. [Appeal, Atch. 1.] These conditions are not alleged to have amounted to a violation of law, waste of resources, or abuse of authority. Workplace or personnel matters do not rise to the level of the kind of public policy complaints protected by the ordinance. See In re Harrison, CSA 55-07, 89-07 and 90-07, p. 66 (6/17/10), citing Methvin v. Batholomew, 971 P.2d 151 (Alaska 1998); Pickering v. Bd. of Educ., 391 US 563 (1968). Appellant failed to prove that her complaint was a report of official misconduct, and therefore Appellant failed to meet her burden to prove that she made a report of official misconduct, an essential element of a whistleblower claim.

IV. Order

Based on the foregoing findings of fact and conclusions of law, the following orders are entered:

1. The Agency's disciplinary action imposed on Jan. 24, 2017 is AFFIRMED.
2. Appellant's whistleblower claim is DISMISSED as unproven.

Dated this 19th day of July, 2017.



Valerie McNaughton
Career Service Hearing Officer