

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 69-08

DECISION

IN THE MATTER OF THE APPEAL OF:

HENRY OWENS.

Appellant,

vs.

**DEPARTMENT OF GENERAL SERVICES, FACILITIES PLANNING AND
MANAGEMENT**, and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

Appellant, Henry Owens, appeals his 20-day suspension assessed by his employer, the Facilities Planning and Management Division, [Agency], for alleged violations of the Career Service Rules specified below. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on December 10, 2008. Owens was present and represented by Michael O'Malley, Esq. The Agency was represented by Franklin A. Nachman, Assistant City Attorney. Agency Exhibits 1-27 were admitted, while Owens' Exhibits A was admitted.¹ The Agency presented the following witnesses: Christine Spader; Sareth Bunta; Steve Pacheco; Kenny Gonzales; James Stigall; Mike Brewer; and James Williamson. Owens testified on his own behalf and also presented witness Brian Knight. At the close of the evidence, the parties were permitted to submit written closing arguments by December 24, 2008.

II. ISSUES

The following issues were presented for appeal:

- A. whether Owens violated any of the following Career Service Rules: 16-60 J., L., O., M., or Z.;
- B. if Owens violated any of the aforementioned Career Service Rules, whether the

¹ In the pre-trial conference immediately before hearing, the Agency objected to the admission of Owens' Exhibits A and B and no ruling was made at that time; however, later, Owens testified from Exhibit A without objection. Thus, that exhibit is admitted by inference.

Agency's decision to suspend Owens for 20 days conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

Mr. Owens is a custodian for the Agency. On July 7, 2008, he was transferred to the Castro Building, 1200 Federal Boulevard. The Castro Building houses the Denver Department of Human Services. Parking at the facility serves a large number of disabled DHS customers. There are insufficient designated spaces to serve their needs. Consequently close-in parking for DHS and Agency employees is expressly restricted according to written policies issued by the Agency. The parking policy manual states, in pertinent part:

No employee may park in the spaces reserved for handicapped guests/visitors. The display of a state handicapped placard or handicapped license plate alone does not allow the employee to park in any handicapped parking spaces on the Castro Campus. An employee who parks in a handicapped visitor zone without permission will be issued a citation immediately.

If an employee has an injury or temporary medical condition that does not preclude the employee from his/her job duties, but does require the need for close-in parking, the employee may apply for a temporary close-in parking assignment.

...

An employee's disabled-parking request will be approved by the City and County of Denver, Career Service Authority's ADA Coordinator, based on medical information provided by the employee's physician and as a result of the interactive process.

[Exhibit 20-2 @ ¶7, ¶1; Exhibit 21-2 @ ¶¶2, 4].

In addition to these written policies, new employees are verbally instructed about parking restrictions, including that non-handicap employees may not park in handicap spaces before 7:00 p.m., when after-hour customer programs are finished, unless their vehicles display complying handicap license plates or a handicap hangtag. Before his transfer, Owens was informed in writing about parking restrictions at his new job location. "When you arrive at 4:00 p.m. you can park you[r] vehicle on the top level of the parking structure located at the Human Services Building." However, later in the evening Custodians are allowed to move their cars closer to the building." [Exhibit 2]. Also, at his orientation meeting on his first day at the Castro Building, his supervisors, Steve Pacheco and Michael Brewer, briefed Owens about parking restrictions, where he should park, and when. Owens did not mention a need for handicap or close-in parking at that time. Owens received and read the Agency's parking policies regarding employee parking at the Agency. [Appellant cross-exam].

Three days later, on July 10, 2008 Owens, accompanied by his friend and co-worker, Kenny Gonzales, was running late for work. They parked close to the Castro Building in a space marked "handicap visitor parking only." Gonzales told Owens he could not park there. [Gonzales testimony]. Later that day, Christine Spader, Facilities Security Supervisor at Castro, was directed, by one of her agents, to a vehicle parked improperly in the parking garage. Accompanied by one of her officers, Sareth Bunta, Spader saw Owens' car parked in a "handicap visitor parking only" space at about 3:50 p.m. The license plates displayed were disabled veteran plates, which do not comply with DHS regulations for handicap parking at Castro. Only DMV-issued handicap license plates or a complying handicap hangtag meet the requirements for parking in such spaces, whether by visitors or employees.

Spader and Bunta looked into the car but did not see a complying handicap placard. They did not recognize the car as belonging to a handicapped employee who might have identification. As is her practice, Spader wrote a warning for a first violation, and placed it on Owens' car. [Exhibit 18].

About 45 minutes later, when Owens discovered the warning on his vehicle, he took it to the security desk where Bunta was stationed. He spoke to her in an angry tone, [Bunta testimony], demanding to see her supervisor. Spader approached, and identified herself as Bunta's supervisor. Owens angrily approached her, extended the written warning toward her face and spoke to her in a loud and frustrated, but not threatening, voice. He told Spader he is a disabled veteran and stated he could park in handicap parking. Spader explained disabled veteran plates are not handicap plates, and explained he must park on the roof or visitor areas, but not in handicap, transport or foster care spaces until after 7:00 p.m. Spader then offered to show him her own complying handicap plates. Owens continued to express his irritation. He repeated he had been in the military, was disabled, and departed while stating he would park wherever he wanted. Spader wrote a statement about the incident shortly afterward. [Exhibit 4-1]. Bunta, without being prompted by anyone, also wrote a statement about the incident shortly afterward. [Exhibit 4-2].

Spader reported the incident to Owens' supervisor, James Stigall. Stigall immediately interviewed Spader, Bunta and Owens. He asked Owens to show him where he had parked, repeated Agency parking policies to Owens, and gave him a parking policy manual. Owens did not tell Stigall at that time that he had permission to park there or that he had a complying placard or license plates. Owens had not applied for a temporary close-in parking permit, and did not otherwise have authority to park in the aforementioned restricted space on July 10, 2008. The following day Owens parked in a handicap-restricted space again and was issued a citation.

A pre-disciplinary meeting was held on August 19, 2008 which Owens attended with his union representative. Owens stated he was not confrontational with Spader. On September 2, 2008, the Agency notified Owens he was to be suspended without pay for 20 work days, beginning September 15, 2008. This appeal followed timely on September 15, 2008.

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A. 1. b., as a 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 Standard of Proof and

The Agency retains the burden of persuasion, throughout the case, to prove Owens violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate Owens's employment complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

A violation of the first part of this rule is established by proof that (1) a supervisor communicated a reasonable order to a subordinate, (2) proof the subordinate violated the order (3) under circumstances demonstrating willfulness. In re Mounjim, CSA 87-07, 7 (7/10/08), *affirmed* In re Mounjim, CSB 87-07 A. (1/8/09). The Agency claimed Owens violated this rule by failing to comply with Williamson's directive regarding parking, [Exhibit 2], and his supervisors' directives at his orientation meeting regarding parking restrictions.

a. Communication by a superior of a reasonable order. Both Exhibit 2, and the directives of Owens' supervisors' at his orientation regarding parking restrictions are directives to a subordinate. The need for such parking restrictions was reasonable in light of the client population served by DHS at the Castro Building.

b. Violation of an order. While Owens testified he did not believe he violated the rule because his disabled veteran plates should have allowed him to park in the restricted space described above, he did not dispute the Agency's evidence that disabled veteran plates do not meet its requirements for disabled parking in the visitor parking garage. Owens also claimed he had a valid placard displayed when he parked on July 10, 2008. [Exhibit A]. However Gonzales accompanied Owens to his car when Owens saw the warning citation on July 10, 2008. Gonzales testified, as did Spader and Bunta, that he did not see a placard displayed. [Gonzales testimony]. Gonzales, as a friend to Owens, had no motive to fabricate his observation. If Spader and Bunta had any motive to fabricate their observation, it would be inconsistent for Spader to issue only a warning instead of a full citation, as she had the discretion to do so.

Owens also claimed he did not violate any parking order on July 10, because

Stigall told him he could park in the space he did. Stigall refuted making such an offer as against his practice, against Agency policy, and against his direct instructions. Moreover, Stigall provided specific instructions to Owens where he could park, and those instructions did not include the restricted area where Owens parked. Finally, Owens did not raise this important claim at his pre-disciplinary hearing [Owens cross-exam]. For these reasons, Owens is not more credible than Stigall on this point. Thus the Agency's evidence is more persuasive, by a preponderance, that Owens violated a superior's orders regarding parking restrictions at the Castro Building.

c. Circumstances demonstrating willfulness. Owens disputed that he willfully violated orders regarding parking restrictions, because he was unaware his disabled veteran license plates were non-compliant with Agency parking restrictions. These are the pertinent circumstances regarding willfulness. Owens had ample notice as to parking restrictions; he received Williamson's letter explaining parking restrictions at Castro before Owens' transfer; his supervisors explained those restrictions on his first day at Castro, and he did not state then that he needed parking accommodation; he was provided a handbook which contained parking restriction information for the Castro campus. Even if Owens did not understand his disabled veteran plates were not compliant with DHS requirements, he disregarded his friend's warning. Then, even after Spader advised Owens why his plates did not comply, and explained how to qualify for close-in handicap parking, Owens insisted that he could park wherever he wanted with his disabled veteran license plates. Then, most tellingly, after Stigall showed Owens where he could park, Owens parked again in a handicap-reserved space the very next day. These circumstances demonstrate Owens' resistance to parking orders was willful. Consequently he violated CSR 16-60 J by a preponderance of the evidence.

2. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.²

a. Department rules.

The Agency stated Owens violated this rule by violating its policy regarding department, specifically for failing to behave in a professional manner and for failure to treat others with respect. "Employees are expected to behave in a professional manner at all times, whether during their regular shift or overtime, and treat the public, building tenants, their co-workers and supervisors with respect." [Exhibit 6-1].

Department rules and policies are not intended to police every perceived affront in

² For reasons as described immediately above, Owens failed to observe written departmental rules, Exhibits 20, 21, regarding employee parking restrictions. However, the agency's failure to provide notice of a regulation, policy or rule it intends to use as a basis for discipline bars the agency from assessing discipline for violating that regulation, policy or rule. "When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated." CSR 16-60 L. The Agency did not cite its parking rules as a basis for discipline under this rule. Consequently, even though Owens failed to observe the department's parking rules, no discipline may be assessed under this rule on that basis.

Department rules and policies are not intended to police every perceived affront in the workplace. However, the combination of Owens' loud voice, his challenge that he would park wherever he wanted, and thrusting his warning citation toward Spader, irrespective of intent, was objectively disrespectful toward her in violation of the Agency's department rule. Consequently he violated CSR 16-60 L.

b. Violence in the workplace policy.

The Agency also cited Owens for violating its policy regarding workplace violence. "Employees are required to comply with the provisions of Executive Order No. 112 which prohibits all violence or threats of violence in the workplace, including: intimidating, threatening or hostile behavior..." [Exhibit 6-1]. In essence, then, this is a claim under Executive Order No. 112. A violation under this executive order may occur even if the target does not feel intimidated, threatened, or feel she was the target of hostile behavior, if the actor intended such consequence, or a reasonable person would perceive the behavior as intimidating, threatening or hostile. I agree with the Agency's statement, through counsel, that it's not OK to attempt to intimidate co-employees or members of the public as long as you don't succeed. [Williamson testimony]. Most often, a determination must be made through an examination of the circumstances.

The Agency did not allege Owens made a threat, and did not claim he exhibited hostile behavior. Thus I examine the remaining basis to establish a violation under the Agency's anti-violence policy - intimidating behavior. While Spader expressed at one point that Owens was intimidating, she also stated he was not. [Compare Exhibit 6-3 ("She said you used your height and anger to intimidate her") with Exhibit 4 ("He also seemed to be using his height and anger to intimidate me which did not work.")]. Bunta wrote that Owens screamed at Spader, [Exhibit 4-2], but later explained she meant both were loud, frustrated and upset, but neither screamed. [Bunta testimony].

Williamson testified he found Owens' action in shoving the citation toward Spader violated this rule, but testimony was conflicting as to how Owens offered the citation to Spader, and I cannot conclude the action was done in an intimidating manner. Evidence, as here, which proves only that actor was loud, frustrated, and upset, without more, is insufficiently egregious to violate the Agency's anti-violence policy, executive order 112, and consequently, this rule.

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

Williamson testified Owens violated this rule based upon Spader's statement that she felt threatened by Owens, and based upon their gender difference. [Williamson testimony]. The gender difference between an actor and target is not determinative of a violation under this rule. As for the remaining bases to establish a violation of this rule, I have already found the Agency did not claim Owens issued a threat, or fought with anyone. I also determined the Agency failed to prove Owens intimidated Spader by a

preponderance of the evidence. That leaves the question of abuse. That word is not self-defining. Some common definitions are to violate; to defile; to treat harshly; to use insulting, coarse, or bad language about or to; to revile. [1 WEBSTER'S UNABRIDGED DICTIONARY 1979]. The encounter between Owens and Spader on July 10, 2008 does not seem to meet any of those definitions, except, perhaps, "to treat harshly." That phrase, too, is difficult to apply to the present case. Our cases have found a violation for excessive physical force, e.g., In re Rogers, CSA 57-07, 6 (3/18/08), or for cursing, In re Redacted, CSA 190-03, 6, 8 (2/13/06), but not where a reasonable person in the same situation as the target would not have been in fear of bodily harm. In re Richmond, CSA 18-07, 8 (8/7/07). I cannot conclude, therefore, by a preponderance of the evidence, that Owens' loud, frustrated interaction with Spader placed her in fear of bodily harm or was otherwise abusive in violation of this rule.

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

Under this rule, it is irrelevant whether an appellant's argument is correct. This rule addresses the way an employee behaves toward others, irrespective of the propriety of his argument. Owens' raised voice and persistent argument about his warning citation with a security officer, while insufficient to violate CSR 16-60 M., constitute a violation of CSR 16-60 O. It is all-the-more egregious that Owens was a new and uninformed employee who obstreperously tried to impose his will upon someone in a position to know the parking rules better than he did.

5. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain this violation, the agency must prove the Owens' conduct hindered an agency mission, or negatively affected the structure or means by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06). Williamson testified Owens violated this rule when he continued to park in a restricted space after being told not to, since such actions do not reflect well on the City. Williams did not state what mission, structure, or means to a mission was infringed by Owens's conduct, and it was not otherwise apparent from the record how Owens may have violated this rule. The Agency failed to prove Owens violated this rule by a preponderance of the evidence.

V. DEGREE OF DISCIPLINE

In determining the degree of discipline, appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. [CSR 16-20].

A. Severity of the proven offenses.

The Agency proved Owens willfully failed to comply with lawful parking orders and written rules, was disrespectful toward, and failed to maintain satisfactory relations with, another employee. The Agency failed to prove the most egregious violations, that he exhibited intimidating, threatening or hostile behavior toward Spader, or that he threatened, fought with, intimidated or abused her. Thus the question becomes whether the proven offenses justified a 20-day suspension under the circumstances in this case.

B. Past record.

The Appellant's disciplinary history is extensive. [Exhibits 8-17]. Some include the failure to observe regulations regarding calling in prior to late arrival. [Exhibits 8, 9, 10, 16, 17]. Some of the prior discipline was assessed for refusing to comply with lawful orders. [Exhibits 11 and 13 (watching television on duty after being ordered not to, and continuing to watch television after second order); Exhibit 15 (failure to complete assignment in a high profile area)].

C. Penalty most likely to achieve compliance.

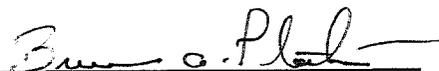
Mr. Owens past record is replete with evidence he refuses direct orders. Here, he persisted, without contrition, upon continuing the same behaviors for which he has been previously disciplined. Under those circumstances, it would have been within the Agency's discretion to dismiss the Appellant for his unrecanting behavior in this case.

A hearing officer must not disturb the agency's determination unless it is clearly excessive or based substantially upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing In re Delmonico*, CSA 53-06, 8 (10/26/06). In light of the Owens' persistent, willful violation of lawful orders, and his disrespectful behavior toward a co-worker in this case, the Agency's decision to suspend him for 20 days was neither excessive nor based upon extraneous considerations.

VI. ORDER

The Agency's suspension of the Appellant for 20 working days, from September 15 to October 13, 2008, is AFFIRMED.

DONE February 6, 2009.



Bruce A. Plotkin
Career Service Hearing Officer