HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 18-07

DECISION

IN THE MATTER OF THE APPEAL OF:

DARRYL RICHMOND,
Appellant,

vs.

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

The hearing in this appeal was held on June 25, 2007 before Hearing Officer Valerie McNaughton. Appellant Darryl Richmond was present and represented by George C. Price, Esq. The Agency was represented by Assistant City Attorney Joseph A. DiGregorio. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

Appellant Darryl Richmond was suspended for three days on March 29, 2007 by the City and County of Denver Department of Aviation. Appellant filed a timely appeal of the action on April 11, 2007 pursuant to the jurisdiction provided in Career Service Rules (CSR) § 19-10 A. 2.

The parties stipulated to the admissibility of Exhibits 1 - 5, 9, E, G and I. Exhibits 6 - 8 were admitted over Appellant's objection. Appellant withdrew Exhibits A – D, F and H.

II. ISSUES

The following issues are raised in this appeal:

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the CSR, and, if so,

2. Was a three-day suspension justified under CSR Rule 16?

III. FINDINGS OF FACT

Appellant Darryl Richmond is a Contract Compliance Technician with Maintenance Contracts for the Denver Department of Aviation. On March 29, 2007, Appellant was suspended for three days based on his actions during a January 31st meeting with his supervisor, April Henderson, and unauthorized modifications of his work schedule on four days on December 21-22, 2006, and January 10, 2007.

On January 31st, Ms. Henderson asked Appellant to come into her office, which is located within the shared office space used by the Contract Maintenance Unit. Ms. Henderson handed Appellant a reprimand dated January 30th for modifying his work schedule on four days during the airport's December and January snow emergencies: Dec. 21st, Dec. 22nd, Jan. 4th, and Jan. 10th. After Appellant read the reprimand, he told Ms. Henderson that the letter was not right or fair, and added, "[t]he only time you people want to talk to me is for a write-up." Ms. Henderson stated that the reprimand was issued because he had deviated from his work schedule, and therefore failed to follow work rules. Appellant replied, "This is bullshit; you don't know what you're doing." Ms. Henderson stood up, told Appellant the meeting was over, and opened the door for him.

Ms. Henderson followed Appellant out of her office and into the general office, where she made copies of the reprimand and time slips for the days covered by the reprimand. Appellant called his ex-wife on his cell phone while still in the general office area. Natasha Richmond works in the payroll department at Denver International Airport (DIA). Appellant told her that he was being disciplined for work hours during the snow emergencies, and asked her to look up his time records, stating he thought it was unfair. Technician Irene Tenenbaum, who was working in the general office at the time, testified that Appellant's voice was loud and he sounded upset. She did not notice he was on the phone, since she was concentrating on her work and did not look at Appellant. Ms. Henderson overheard this conversation, and told Appellant that they could go back into her office if he wanted to discuss it further. Appellant replied, "What's done is done. I don't want to argue about it. I'm going to leave." Technicians Stan Williams and Lorrie Cook were also in the office during the entire incident, and Francesco Alonzo arrived at the door while Appellant was on his cell phone.

After completing his call, Appellant left the office with Mr. Williams. The two walked to the loading dock, where Appellant told him about the reprimand. Appellant returned to the office a few minutes later. He told Ms. Henderson that Jan. 4th, one of the days for which he was being reprimanded, was his day off, and so he could have left whenever he wanted. Ms. Henderson testified that she replied, "Darryl, I'm done talking to you. I don't want to talk about this. You had the chance, I asked you to come back and talk about this." Appellant continued to talk as Ms. Henderson returned to her office. Ms. Henderson testified that she did not listen, and went about her work in the hope that Appellant would leave. Shortly thereafter, Appellant left the office. Ms. Tenenbaum asked her if she was okay, and Ms. Henderson said she was.

The evidence about Appellant's demeanor during this incident was conflicting. When asked on direct examination whether Appellant was hollering during their private meeting, Ms. Henderson replied, "[h]is voice was loud." In contrast, both Ms. Tennenbaum and Mr. Williams testified they did not hear loud voices through the door, and Ms. Tenenbaum said she would have heard them if either Appellant or Ms. Henderson had been speaking loudly.

All witnesses agreed that Appellant was loud when he was in the general office. Ms. Henderson testified that Appellant was using a loud voice while on his cell phone. Ms. Henderson quoted Appellant as stating, "[t]his isn't right, it isn't fair these people are treating me this way," but that she could not hear the rest of what he said. Mr. Williams said Appellant was loud while on the phone, but he was not yelling or acting in an intimidating manner. In her statement made the day after the incident, Ms. Tenenbaum did not recall what Appellant said, but only her impression that Appellant spoke loudly in a harsh and disrespectful tone. [Exh. 7.]

The day after the incident, Ms. Henderson decided that she should not have to deal with this kind of behavior. She submitted a statement about the incident to her manager, Director of Aviation Maintenance Steve Draper. In that statement, Ms. Henderson related that Appellant said he had a son at home, and his wife needed to work. Appellant added that he has FMLA, and would get his doctor to excuse all the lost work time. [Exh. 6.] Ms. Henderson also testified that Appellant made that statement. In contrast, Appellant testified that Ms. Henderson initiated the FMLA topic when she said he was not on FMLA because of his son. The disciplinary letter quoted Ms. Henderson's statement, and concluded that "the agency is concerned with the possible misuse of FMLA leave. According to Human Resources, your FMLA file is for a serious health condition for you not a family member". [Exh. 2-3.]

That same day, Appellant was placed on investigative leave, and Human Resources employee Suzanne Iverson obtained a statement from Ms. Tenenbaum. [Exh. 7]. On Feb. 14, 2007, Ms. Henderson sent Appellant a notice that discipline was being contemplated based on the Jan. 31st incident and the modification of his work schedule on the four dates in December and January. Attached to the letter were the revised written reprimand, Appellant's Performance Enhancement Program (PEP), and excerpts from the Agency's employee manual. [Exh. 1.] The pre-disciplinary meeting was held on Feb. 27th.

After the meeting but while Appellant was still on investigative leave, Ms. Henderson sent Mr. Draper and Human Resources Director Jim Thomas a memo, entitled "Statement regarding Darryl Richmond" dated March 5, 2007. Therein, Ms. Henderson said Appellant intimidated her during the pre-disciplinary meeting by turning his body toward her, raising his voice and referring to her as "her" and "she". Mr. Draper relied on this information in rendering discipline, but the statement was not included in the disciplinary letter. [Exh. 2.] Ms. Henderson also related in this statement that on March 1st, she overheard Natasha Richmond tell another employee, "You know they are messing with people's livelihoods. They better watch their backs."

Ms. Henderson concluded that Appellant was using his wife to retaliate against her, and she became afraid for her safety both at work and at home. [Exh. 8.]

Appellant testified that the Agency never interviewed him about this incident. The investigator also took no statements from Mr. Williams, Ms. Cook or Mr. Alonzo, the other employees present during the incident. Appellant stated he was angry after being given the reprimand because no one had told him before that there was a problem with his hours for the four days in question. He testified he would have explained that on Dec. 21st, he left the house 45 minutes early, but was an hour late because of a severe snowstorm affecting traffic on Pena Boulevard, the road to the airport. He called Maintenance Control to tell them he would be late, and worked an hour later that day. On Dec. 22nd, he obtained Ms. Henderson's permission to arrive and leave an hour early. On Jan. 4th, he was called in to cover a snow emergency on his day off, and arrived at 6:00 p.m. The emergency was called off at midnight. Appellant waited until the next shift arrived at 3:00 a.m., and then punched out after informing Maintenance Control that he was leaving. The next day, Ms. Henderson signed his payroll slip reflecting those hours. [Exh. I.] On Jan. 10th, Ms. Henderson approved Appellant's request for four hours of holiday pay which had been granted by the Mayor, and she signed a leave slip covering that leave. [Testimony of Appellant.] The Agency did not dispute this testimony and evidence.

The Agency had an audit performed on Appellant's work hours during the snow emergencies. As a result, the Agency did not include in the disciplinary letter its allegation of schedule modification as to Jan. 4th, which was one of the dates charged in both the Feb. 7th reprimand and the predisciplinary letter. The March 29th letter of discipline imposed a suspension of three ten-hour days on the basis of the Jan. 31st incident and the three remaining days. [Exh. 2]. The parties agree that Appellant was also placed on a 6-month Performance Improvement Plan (PIP) and mandatory training as a result of this discipline. [Exh. 9.]

In making the decision to suspend Appellant, Mr. Draper considered the statements made by Ms. Henderson and Ms. Tenenbaum, Appellant's PEP, and the employee manual. Mr. Draper considered as past disciplinary history an October 2006 letter of instruction, as well as the January written reprimand, as it was revised in February 2007. [Exh. 5.] Mr. Draper concluded that Appellant had intimidated, threatened and abused Ms. Henderson by his conduct. He also concluded that Appellant had attempted to engage other employees in the dispute. He imposed the suspension of three ten-hour workdays as the next step under the progressive discipline system.

IV. ANALYSIS

1. Discipline under the Career Service Rules

In an appeal of a disciplinary action, the Agency has the burden to prove by a preponderance of the evidence that the action was taken in conformity with Rule 16 of

the Career Service Rules, and that the degree of discipline was reasonably related to the seriousness of the offense, taking into consideration the employee's past record. CSR § 16-20.

A. CSR § 16-60 A. Neglect of duty

To sustain a violation under § 16-60 A, an agency needs to prove 1) the employee had an important work duty; 2) he failed to perform that duty; 3) performance of the duty was not prevented by any external cause; and 4) failure to perform the duty resulted in significant potential or actual harm. In re Martinez, CSA 30-06, 4 (10/3/06).

The Agency asserts through the testimony of Mr. Draper that Appellant violated this rule by his failure to comply with the policies requiring employees to display teamwork, accountability, and respect.[1]

Discipline for "neglect of duty" requires proof that an employee disregarded a specific assigned work duty. CSR § 16-60 A.; In re Leal-McIntyre, CSA 167-03, 15 (1/27/05) (fingerprinting); In re Davis, CSA 46-06, 6 (6/8/07) (administering pain medication); In re Hill, CSA 14-07 (6/8/07) (snow removal).

The behavior at issue occurred as a part of a disciplinary discussion between supervisor and employee. The city's dispute resolution rule provides "a process to resolve workplace issues at the lowest possible level (the level which they occur)." The Open Door Policy "encourages employees to informally and directly discuss work-related issues with their direct supervisors." CSR § 18-20. If performance standards were deemed to apply in that situation, an employee would be required to demonstrate cooperation, teamwork, and collaboration during those discussions, which may inhibit an honest communication of the employee's concerns. See Siedle v. Dept. of Interior, 35 M.S.P.R. 241 (1987) ("the nature of the employment relationship [during the processing of a grievance] may be adversarial at times.")

By definition, the citywide duties outlined in Appellant's PEP are not work duties specifically assigned to Appellant, but are qualities required of all city employees. Appellant's remarks and behavior were a communication of his disagreement with the reprimand in an attempt to resolve that issue. Moreover, his statements during that personnel discussion did not relate to an important work duty. Thus, the Agency failed to prove Appellant neglected his duties under this rule.

B. CSR § 16-60 B. Carelessness in the performance of duties

An employee is careless in the performance of a duty in violation of this rule when he fails to exercise ordinary care in the performance of a job duty. Ordinary care

[1] These are three of the four qualities making up the acronym STAR (Service, Teamwork, Accountability and Respect), and are part of the citywide duties listed in Appellant's PEP. The agency personnel manual also mentions respect, and prohibits "threatening, offensive, vulgar, loud or abusive language." Exh. 4-2.]

is that degree of care an ordinarily prudent person would exercise under similar circumstances. In re Mitchell, CSA 05-05, 7 (6/27/05), *citing* Black's Law Dictionary 193 (6th ed. 1979.)

Mr. Draper testified that he determined Appellant was careless because 1) he did not perform duties he was capable of performing, and 2) he did not follow the rules and regulations of the Agency.

The first argument fails because the evidence did not show that a specific work duty had been performed carelessly. As to the second contention, the evidence did not prove that Agency policies could be read to impose a specific work duty on Appellant. The Agency thus failed to establish that Appellant was careless in the performance of his work within the meaning of this rule.

C. CSR § 16-60 J. Failure to comply with supervisor's orders

A violation of this rule is established if an employee is given a reasonable order, and fails to comply with that order. See In re Vigil, CSA 110-05, 5 (3/3/06). Since Ms. Henderson admitted that she did not order Appellant to do anything, this allegation has not been proven.

D. CSR § 16-60 K. Failure to meet qualitative standards of performance

The Agency alleges that Appellant's behavior violated his STARS PEP performance standards in the areas of service, teamwork, accountability, respect, and emergency preparedness.

Section II of Appellant's PEP establishes that Appellant's job includes performance of the "citywide duties" of service, teamwork, accountability and respect. Service to customers, including supervisors, requires meeting customer needs, collaboration, and maintenance of constructive relationships. Teamwork is cooperation with others to achieve team goals. Accountability requires contribution to the integrity of the organization. An employee demonstrates respect for self and others by fostering "an environment where creativity, innovation, interpersonal relations and teamwork are valued and appreciated." Appellant's PEP shows that all four of the citywide standards are measured by observation, various forms of feedback, and supervisory inquiry. Emergency preparedness includes participating in emergency snow removal operations, and is measured by observation, feedback, and documentation. [Exh. 3.]

Performance issues may be the subject of discipline for "[f]ailing to meet established standards of performance including either qualitative or quantitative standards." CSR §§16-60 K, 13-20 B. Discipline under Rule 16 requires "inappropriate behavior or performance." CSR § 16-20. The principles governing the progressive discipline process are "due process, personal accountability, reasonableness and sound business practice." Rule 16, Purpose statement. Performance issues that rise to the level of inappropriate behavior or performance may subject an employee to discipline.

In contrast, the career service pay for performance system is designed to enforce measurable job expectations through evaluations and improvement plans for the purpose of correcting inadequate work and rewarding good performance. Rule 13.

The Agency did not submit evidence that Appellant failed to meet any of these performance standards by the objective measures set forth in the PEP. There was no testimony that Appellant received customer, contractor or peer feedback or other measures that demonstrated Appellant had failed to meet any of the above performance standards. Appellant testified, and the Agency did not contest, that he has been rated as successful in achieving his citywide duties. The only PEPR submitted into evidence indicates that Appellant performed his citywide goals at a successful or exceptional level. [Exh. 3.] Both Appellant and Ms. Henderson testified that their working relationship continues to be good, and that they work in close proximity to one another.

Finally as to this issue, the STARS PEP requires that Appellant perform snow removal duties. Mr. Draper admitted that the disciplinary letter referred solely to Appellant's change in work schedule during the December and January snow emergencies. Since Appellant was previously reprimanded for those actions [Exh. 5], he may not be subject to this additional discipline on the same basis. The evidence is therefore insufficient to meet the Agency's burden to prove Appellant violated CSR § 16-60 K. by failing to meet any of the cited performance standards.

E. CSR § 16-60 L. Failure to observe agency regulations

The Agency asserts that Appellant violated its policies relating to interpersonal relations and special operations. Mr. Draper testified that Appellant used threatening, loud and abusive language during the Jan. 31st meeting with his supervisor, in violation of the Agency policy requiring employees to treat others with respect. [Exh. 4-2.]

A threat is a communicated intent to inflict harm on another. Black's Law Dictionary 1030 (abridged 6th ed. 1992). The only statement in evidence that could be considered threatening was the comment of Appellant's ex-wife made to another employee and overheard by Ms. Henderson. [Exh. 8.] The Agency produced no evidence that Appellant caused this statement to be made, or intended to convey a threat through his ex-wife. Since discipline cannot be based on the improper conduct of others, the Agency failed to prove Appellant threatened Ms. Henderson.

Abuse has been defined as "to wrong in speech, reproach coarsely, disparage, revile, and malign." Black's Law Dictionary 5 (abridged 6th ed. 1992). Appellant's remarks that the reprimand was "bullshit" and that Ms. Henderson did not know what she was doing clearly expressed anger and criticism of his supervisor's actions. The remarks were made in the context of a private disciplinary discussion, and were not repeated. The evidence as to nature of Appellant's conduct was conflicting at hearing, and the Agency as the employer was in a unique position to obtain the statements and testimony of the three additional eyewitnesses who might have shed light on that factual issue. The Agency's failure to present their testimony supports a conclusion that the

testimony would not have been favorable to the Agency. See Bonser v. Shainholtz, 983 P.2d 162 (1999); U.S. v. Mahone, 537 F.2d 922, 926 (7th Cir. 1976.) Moreover, the passage of two months without progress in the investigation, and the agency's failure to interview Appellant during his lengthy investigative leave, renders the Agency's evidence of abusive language less persuasive.

Appellant made several loud comments while on his cell phone in the general office in front of other employees, expressing his objections to the reprimand. Ms. Tenenbaum decided not to call anyone about Appellant's conduct because she believed based on her knowledge of him that he did not pose a safety threat. Mr. Williams reacted by leaving the office in order to allow Appellant to discuss what appeared to be a private matter. Ms. Henderson reacted by continuing to copy the reprimand documents, and by ignoring Appellant when he returned a few minutes later to discuss the matter with her. Ms. Henderson did not report the incident until the next day after deciding that she shouldn't have to deal with it. None of the employees felt concern for their safety during the incident. Under these circumstances, I conclude that Appellant's conduct in the general office did not violate the policy against threatening, loud or abusive language. For these same reasons, I also conclude that Appellant was not attempting to engage the employees present in this dispute.

The second policy at issue governs emergency operations. Mr. Draper admitted that the February 7, 2007 reprimand already disciplined Appellant for the same conduct. [Exh. 5.] As Appellant cannot be disciplined a second time on this basis, this charge also fails. Therefore, the Agency failed to establish that Appellant violated Agency policies by a preponderance of the evidence.

F. CSR § 16-60 M. Intimidating or abusing employees

"Intimidation" is conduct intended to place another in fear of bodily harm, regardless of the subjective reaction of the victim. Black's Law Dictionary 569 (abridged 6th ed. 1992). The intent of Appellant's remarks was to express his disagreement with the reprimand. Ms. Henderson testified that she reacted by concluding their private meeting, and later offering to resume it. Appellant at first declined and left the general office. When Appellant returned, Ms. Henderson informed him she would not listen, and ignored him. This evidence does not indicate that Ms. Henderson feared bodily harm. Moreover, a reasonable person in this situation would not have been placed in fear of bodily harm as a result of Appellant's actions or statements. For the reasons stated in Section E above, I also conclude that the Agency did not prove Appellant abused any employee in violation of this policy.

Mr. Draper testified that he relied upon Ms. Henderson's second statement in imposing the discipline. Therein, Ms. Henderson concluded that Appellant intended to harm her based on an overheard statement made by Appellant's ex-wife. There was no evidence connecting Appellant to that statement, and therefore it could not be used to support a conclusion that Appellant intended to intimidate or abuse Ms. Henderson. The statement added that Appellant was being intimidating toward her at the

predisciplinary meeting by turning his body toward her, staring at her and referring to her in the third person. Since this was not included in either disciplinary letter, and Mr. Draper did not corroborate the incident, I find that Appellant was denied notice and the opportunity to confront that allegation as required by CSR § 16-40.

Based on these findings, I conclude the Agency failed to prove that Appellant violated the above rule.

G. CSR § 16-60 O. Failure to maintain satisfactory working relationships

Both Appellant and Ms. Henderson testified that they have a good working relationship, and work in close proximity to one another. A single unpleasant encounter does not establish an unsatisfactory working relationship in violation of this rule. See In re Garcia, CSA 175-04, 3 (7/12/05); In re Day, CSA 12-03, 8 (10/9/03). The Agency submitted no evidence that established a violation of this rule.

H. CSR § 16-60 S. Unauthorized absences

This rule prohibits "unauthorized absence from work; or abuse of sick leave or other types of leave, or violation of any rules relating to any forms of leave defined by Rule 11 LEAVE." Mr. Draper testified that this allegation was based on the December and January absences, as well as a concern "with [Appellant's] possible misuse of FMLA leave." [Exh. 2-3.] The record is clear that Appellant received a written reprimand for these absences on Feb. 7, 2007. [Exh. 5.] Therefore, a second disciplinary action for the same conduct is not permitted by Rule 16.

I. CSR § 16-60 Z. Conduct prejudicial to good order and effectiveness

The Agency did not submit specific evidence or argument in support of this charge, which requires proof of conduct that negatively impacts "the good order and effectiveness" or reputation of an agency, or that it compromises the integrity of the City. The Agency has not proven that Appellant's statements impacted the City's effectiveness, reputation or integrity in any respect. I therefore find that the Agency has not established a violation of this section.

Since I have found that the Agency failed to establish a violation of any of the rules alleged in the disciplinary letter, it is not necessary to address the appropriateness of the penalty.

ORDER

The Agency's suspension dated March 29, 2007 is hereby REVERSED.

Dated this 7th day of August, 2007.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL:
Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY PERSONAL DELIVERY:
Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, First Floor
Denver CO 80202

BY FAX:
(720) 913-5995

Fax transmissions of more than ten pages will not be accepted.

I hereby certify that I have forwarded a copy of this DECISION as indicated below:

Mr. Darrell Richmond, 13041 East 47th Ave., Denver, CO 80239 (U.S. mail)
Mr. George C. Price, 900 Logan Street, Denver, CO 80203 (U.S. mail)
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