

**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**SANDRA L. ROYBAL**, Appellant,

vs.

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

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**I. INTRODUCTION**

The Appellant, Sondra Roybal, appeals her dismissal from the Department of Aviation, Denver International Airport ("Agency" or "DIA") on October 14, 2011, for alleged violations of specified Career Service Rules (CSR), and Agency regulations. A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on February 7 and February 9, 2012. The Agency was represented by Robert Nesor, Assistant City Attorney, while the Appellant was represented by Michael O'Malley, Esq. Agency exhibits 1-11 and 13 were admitted by stipulation, as were Appellants' exhibits A-D. The following witnesses testified for the Agency: Adam Greer; Treena O'Neil; David Newquist; Lynn Rubner; and Robert Kastelitz. The Appellant testified on her own behalf, and presented the following witnesses: Jordan Mertes; John Hutton; and Les Berry.

**II. ISSUES**

The following issues were presented for appeal:

A. whether the Appellant violated any of the following Career Service Rules (CSR): 16-60 §§ A., B., C.1., E., F., J., K., L., M., O., Y., and Z.;<sup>1</sup>

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<sup>1</sup> At the close of the evidence, the Agency withdrew its claims under CSR 16-60 B., J., and K.; therefore, only the remaining claims are addressed in this Decision.

- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss the Appellant conformed to the purposes of discipline under CSR 16-20.

### III. FINDINGS

Ms. Roybal was hired by the Agency in 2008. On May 22, 2011, the Agency promoted her to the position of Telecommunication Administrator. Pursuant to Career Service Rules, Roybal's promotion was subject to probation for six months. CSR 5-52 A. Roybal's duties included negotiating contracts for DIA's telecommunications needs with outside vendors, adhering to the highest level of ethical behavior, and modeling appropriate ethical behavior for subordinates.

On October 10, 2011, the Agency notified Roybal that she did not pass probation, and returned her to her previous position. An employee may not appeal her return from promotional probation, except on the grounds of alleged discrimination or violation of the Whistleblower Protection ordinance. Roybal did not assert either of these claims.

On May 31, 2011, when Roybal pulled her agency-issued Apple iPhone 4G out of its clip-on holster, the phone "flew out of my hand," [Roybal testimony], and landed on the floor, breaking the glass facing on the phone. Roybal instructed Adam Greer<sup>2</sup> to set a meeting with AT&T, the Agency's phone service provider, regarding her phone and two other Agency iPhone 4Gs, the glass facings of which also broke during use by other employees in her department. The AT&T contract did not include glass-break coverage for iPhones, [Exhibit 10-14; Greer testimony], but Roybal told Greer to insist that AT&T replace the three phones by talking about how much the Agency pays for them every month as a bargaining tool, and to "play dumb" about how the phones were broken. [Exhibit 10-14; Greer testimony]. Greer drafted an email to AT&T account manager Nancy Gray concerning the three broken phones. [Exhibit Y-000133; Roybal cross-exam]. Greer stated "we have had three iPhone 4Gs' glass break in the past two weeks and none of these devices are very old" and "the users did not do more damage than what would of occurred with a older iPhone." He also represented that all three phones "had screen protectors and cases," [Exhibit 5-2] although it was not true. Roybal reviewed and approved the email before Greer sent it.

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<sup>2</sup> Although Greer worked for an independent organization, his assignment was to support DIA wireless users, and he later reported directly to Roybal. At the time of this incident, Greer had worked with Roybal only three days.

A teleconference, which included Roybal, Greer, Gray, and Apple Phone Sales Director Katherine Mendonca, took place on July 11, 2011. Roybal asked Mendonca to replace the three phones because they were overly fragile in normal use and therefore defective. [Greer testimony]. Mendonca declined to replace the phones at no cost, because the Agency's warranty contract excluded replacement for any reason, save manufacturing defects. [Greer cross-exam]. Roybal remained silent when Greer then told Gray "I'd hate for such a small incident to ruin our relationship." [Exhibit 5-2; Greer testimony]. Gray's colleague then offered, in the spirit of customer goodwill, to replace the three phones at no cost, even though the Agency's contract did not cover physical damage. The value of the three iPhone 4Gs was \$1,097.00. [Exhibit TTT].

Greer was bothered by his participation in pressuring Gray to provide free replacement phones and noticed a distance developed between them after the July 11 meeting. [Greer testimony]. On August 24, 2011, during a conversation between Greer, his new supervisor Treena O'Neil, and Gray, Greer apologized for the way he and Roybal handled the July 11 meeting. He told Gray he believed it was unethical, unprofessional and inappropriate. [Greer testimony; Exhibit 2-5]. O'Neil then investigated the incident.

The Agency served Roybal with a letter in contemplation of discipline on September 22, 2011, and convened a pre-disciplinary meeting on September 30. Roybal attended with her representative. On October 14, 2011, the Agency dismissed Roybal. This appeal followed, timely, on October 21, 2011.

#### **IV. ANALYSIS**

##### **A. Jurisdiction/Burden/Standard of Proof**

Jurisdiction is proper under CSR 19-10 A.1.A. - the direct appeal of a dismissal. The Agency retains the burden of persuasion, throughout the case, to prove Roybal violated one or more cited sections of the Career Service Rules, and to prove its choice of dismissal complied with the purposes of discipline under CSR 16-20. The standard of proof for each violation is a preponderance of the evidence.

##### **B. Career Service Rule Violations**

###### **1. CSR 16-60 A. Neglect of duty.**

In order to sustain a violation under CSR 16-60 A., the Agency must establish Roybal neglected to perform a job duty known to her. See In re

Campos et al, CSA 56-08 through 59-08, 2 (CSB 6/18/09). The Agency claimed Roybal breached her duty to adhere to the highest ethical standards in her dealings with Gray and Greer. [Agency closing statement; Exhibit 9; City of Denver Ethics Handbook, p.4, 2008 edition; Denver Revised Municipal Code (DRMC) Article IV, sec. 2-51].

With respect to Gray, Roybal argued Greer acted independently in drafting an email to Gray, and in stating how much DIA's business was worth to Gray's company. Even if it were true that Greer acted independently, Roybal acknowledged reviewing Greer's email to Gray before he sent it. Further, she failed to intervene during the July 11 teleconference, when Greer inferred DIA would take its cell phone business elsewhere if AT&T didn't replace the three broken iPhones. Thus, Roybal violated her duty to adhere to the highest ethical standards in her dealings with Gray, when she approved Greer's email demand to Gray, in violation of the Agency's contract with AT&T, and approved Greer's thinly-veiled threat during their teleconference. This is particularly true since Roybal was knowledgeable about such contracts, and her own cell phone use agreement limited the replacement of her iPhone 4G to manufacturing defects. [See Exhibit 10-14; Greer testimony; Roybal cross-exam]. The Agency thus established Roybal neglected her duty of ethical behavior toward Gray in violation of CSR 16-60 A.

Roybal also failed her duty to adhere to the highest ethical standards in her dealings with Greer. Since Roybal claimed Greer acted independently when he inferred to Gray, in the July 11 teleconference, that DIA might take its business elsewhere, this violation depends upon the relative credibility of Greer and Roybal. In that regard, Greer had nothing to gain in his *mea culpa* to Gray and to his supervisor O'Neil. Such an admission of his own part in the deception, at peril to his own career, would normally be a strong disincentive to make such an admission, whereas Roybal had an obvious self-interest in blaming Greer for the deception toward AT&T. Greer admitted Roybal did not provide the language he used in his email to Gray, nor did Roybal direct him to use the words "I'd hate for such a small incident to ruin our relationship" during the teleconference. However, both are consistent with Greer's desire to please his new client, Roybal, and to comply with her insistence on free phone replacements outside of their contract. It would be nonsensical for Greer to risk his own job merely to inculcate Roybal, unless Greer had some self-destructive loathing toward Roybal, and there was no evidence of such animosity. These factors prove Greer's recollection of the incident to be more credible than Roybal's version.

Consequently, when Roybal instructed and approved Greer's deception of AT&T, she failed her duty to adhere to the highest ethical standards in her dealings not only with Gray, but also with Greer, in violation of CSR 16-60 A.

**2. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to... Lying to superiors... with respect to official duties, including work duties, disciplinary actions...**

The Agency claimed Roybal was dishonest in conveying, whether herself, or through Greer, the manner in which the three phones were broken, in an attempt to acquire three replacement phones wrongfully. [See Agency closing statement]. Roybal denied any dishonesty, claiming instead she properly insisted on the replacement of the iPhone 4Gs as a manufacturing defect because they were broken in the normal course of use, including her own phone which "flew out of my hand." Several factors indicate Roybal was dishonest about the manner in which the iPhones broke.

1. Greer testified one of the three phones broke when the employee ran over it with his bicycle. [Greer testimony]. At hearing Roybal countered she was unaware of that incident, but "assumed" the other two phones were broken during normal use. Roybal's "assumption" was contrary to her representation to AT&T that all three phones were broken during normal use. 2. Roybal also claimed that, since users drop their phones all the time, such incidents are "normal wear and tear," and therefore indicate a defective design. Roybal's argument falls outside any commonly-understood notion of "normal wear and tear."<sup>3</sup> 3. Circumstances called for acknowledgement that the equipment was not subject to free replacement.<sup>4</sup>

In short, Roybal engaged in deception, whether overtly or through silence, concerning the manner in which equipment was broken. The result was Roybal deceptively acquired equipment to which she knew neither she, nor the Agency, was entitled, in violation of CSR 16-60 E.

Roybal's insistence that the vendor frequently replaces other broken phones in the name of good customer service, contract provisions notwithstanding, was unconvincing. She failed to provide the circumstances under which such other phones are replaced. Roybal also stated there was no dishonesty where Greer maintains a large stock of phones and she could have obtained a replacement merely by asking him, or she could have obtained a free replacement by accepting her division manager's offer to take his iPhone 4G, since he was going to replace his cell phone. Roybal's claims miss the point. The manner in which she obtained replacements was dishonest, regardless of other, legitimate options.

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<sup>3</sup> Even leaving aside the obvious lack of normal wear and tear, with respect to running over a phone with a bicycle, Roybal's definitions of "normal wear and tear" and "defective" would render liable the manufacturers of any fragile device, and require them to replace dropped devices such as cameras, glasses, and laptop computers.

<sup>4</sup> Those circumstances included Roybal's knowledge about the vendor contract (no replacement except for manufacturing defect), her position of influence over Greer and Gray, and her silence as to the manner in which the three phones were broken.

**3. CSR 16-60 F. Using official position or authority for personal profit or advantage, including kickbacks.**

The evidence was uncontroverted that Roybal always carried two phones with her, one for personal use and the iPhone 4G only for Agency business. Consequently, even if she obtained a new iPhone by deception, she gained no personal profit or advantage, since the only advantage was to carry out work duties. Since no personal profit or advantage could inure from her procurement of the free phones, this violation is unproven.

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

The Agency claimed Roybal violated the following written policy.

**DIA Technologies division-Wireless Communication device Support  
Procedure states in relevant part:**

**...B. DIA supplied Smartphone - A smart phone will be allowed connectivity to the DIA network through Microsoft Active Sync, but will not be supported or managed by the RF and Wireless Group. A smart phone includes... iPhone....**

**3. Any costs for devices and accessories associated with a DIA supplied smart phone will be the responsibility of the agency/department the device is assigned to.**

It was not apparent from the Agency's evidence that this procedure was susceptible to disciplinary action. Even if Roybal unethically, or otherwise wrongfully obtained three free cell phones in violation of other Agency and Career Service Rules, the responsibility of the Agency and her department to pay for the phones did not change with her actions, the Agency did not argue how this procedure applied, and I decline to extend the effect of this Agency informational policy into the realm of punitive action.

**5. CSR 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of this public, for any reason.**

Violations under this rule require a level of wrong to an employee, or to a member of the public, which significantly surpasses wrongs to employees described under CSR 16-60 O. [*In re Harrison*, CSA 55-07, 52 (6/17/10); *In re D'Ambrosio*, 98-09, 7-8 (5/7/10); *In re Owens*, CSA 69-08, 6-7 (2/6/09); *In re Lykken*, CSA 26-10, 6 (7/7/10)]. Roybal's improper insistence, that Greer attempt to obtain free iPhone replacements, and Roybal's chiding AT&T to replace those

phones, in contravention of the explicit terms of the Agency's contract, went beyond the avid pursuit of meritorious benefit for the Agency, as alleged by Roybal. Greer's testimony established that AT&T's relationship with Roybal's department grew frosty after the Roybal-induced pressure to procure free equipment to which the Agency was not entitled. Nonetheless, the degree of mean-spiritedness required to find Roybal abused Greer or Gray, by "defiling," "insulting," "using bad language about," or "reviling" them, was not present here; nor did Roybal's actions intimidate them by making them fearful, frightened, or compelling them by threat, as contemplated under this rule. [See Webster's Unabridged Dictionary 1979]. Consequently, this rule remains unproven.

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

For reasons stated above, Greer's testimony was more persuasive than that of Roybal. Consequently, the Agency established, by a preponderance of the evidence, that Roybal failed to maintain a satisfactory working relationship with Greer, where Greer was reasonably distraught by Roybal's wrongful insistence on acquiring free equipment replacements such that he felt compelled to self-report his actions at peril to his own career. Similarly, Roybal failed to maintain a satisfactory working relationship with a vendor, Gray, where she demanded free replacement of vendor-provided equipment, despite contrary contract terms.

The effect of Roybal's actions on Greer cannot be overstated. Even if Roybal believed she was acting in the best interests of the Agency by securing free iPhone replacements, she used Greer to shield herself from disciplinary repercussions, and potentially placed Greer's job at risk as a result of her own impropriety.

**7. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.**

a. Fiscal Accountability Rule 10.1 states, in relevant part:

**Fiscal Misconduct is ... manipulating or falsifying data or documentation so as to misrepresent or inaccurately report city transactions or city business with a monetary impact.**

As determined previously, Roybal misrepresented the basis upon which her department obtained three free iPhones. The effect of the misrepresentation had a monetary impact, since, in order to rectify the wrongdoing and return the City and the vendor to their *status quo ante*, the City was compelled to reimburse the vendor the value of the iPhones. Because Roybal claimed the

free replacements improperly, she obligated the City to reimburse the vendor for an improper gain. Roybal's misrepresentation, with a resulting cost to the City, contravened the City's Fiscal Accountability Rule 10.1, in violation of CSR 16-60 Y.

**b. ... City and County of Denver Technology Services wireless Communication device Support Policy states in relevant part:**

**TS Wireless Device Support Group will not provide support, maintenance, repair, parts, or accessories for a City supplied non-Blackberry Smart phone.**

As stated above, in the discussion under CSR 16-60 L., it is not apparent this policy is susceptible to interpretation as a disciplinary matter, but merely states a contractual agreement between the Agency and the vendor. As above, the Agency did not establish how this policy may be interpreted as disciplinary, and I find no reason to expand the scope of such contract provision here.

**c. City and County of Denver – 2008 Ethics Handbook states in relevant part:**

**Page 4-A. conflict of interest occurs when you take "direct official action" on a matter before the City in which you, your immediate family member, a business associate or an outside employer have a "substantial financial, contractual, or employment interest."**

Under this provision, the Agency was obligated to prove Roybal (1) took a "direct official action," (2) concerning a matter before the City, (3) in which Roybal, a member of her immediate family, a business associate, or an outside employer, (4) had a "substantial financial, contractual, or employment interest." The Agency did not directly associate Roybal's actions with the elements of this conflict of interest provision, and the evidence did not lend itself to finding such links, particularly as regards (3) and (4).

It is apparent the evidence did not identify a member of Roybal's family, business associate or outside employer. That leaves the question whether Roybal herself had a "substantial financial, contractual or employment interest" in obtaining replacement iPhones. Her financial interest was minimal, or non-existent, as she could have obtained a free Blackberry device to replace her iPhone, and the uncontroverted testimony established Roybal did not like her iPhone, used it only on an experimental basis, and would not seek to use another iPhone. While Roybal signed an agreement in which she opted out of replacement coverage, it is unclear she had more than a *de minimus* contractual interest, since the iPhone, while assigned for her use, remained

Agency property. Finally, it was evident Roybal's employment interest in the use of her iPhone was insubstantial. The Agency failed to prove a violation under this provision of the City's ethics rules.

**d. Denver Revised Municipal Code – Article IV –Sec. 2.51. – Legislative intent states in relevant part:**

**It is the intent of the city that its officers, officials, and employees adhere to high levels of ethical conduct so that the public will have confidence that persons in positions of public responsibility are acting for the benefit of the public. Officers, officials and employees should comply with both the letter and spirit of this ethics code and strive to avoid situations which create impropriety or the appearance of impropriety.**

The broad, aspirational outlines of legislative intent embodied in this provision, including "intent," and "should comply," fail to provide sufficiently specific guidance to employees as to what conduct is proscribed. This provision is, therefore, unenforceable as a Career Service Rule violation.

**e. Denver Revised Municipal Code –Article IV –Sec. 2.60 –Gifts for officers, officials and employees states, in relevant part:**

**Except when acceptance is permitted by paragraph (b) below, it shall be a violation of this code of ethics for any officers, officials, or employees, any member of their immediate families to solicit or to accept any of the following items if (1) the officer, official, or 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, business, or regulatory relationship with the donor.**

- (1) Any money, property, service, or thing of value that is given to a person without adequate and lawful compensation;**
- (2) Any honoraria or payment for participation in an event;**
- (3) Any loan of goods, equipment or other items that is not available to the general public on the same terms and conditions...**

This ethics violation is at the heart of the Agency's case. Taking each element of the provision separately: Roybal was a City employee; she solicited and accepted free iPhones; she was in a position to take direct official action by approving or rejecting the service contract with AT&T; the City had, and continues to have, a contractual relationship with AT&T; Roybal accepted a thing of value – three iPhones - without adequate compensation. These elements establish a prima facie violation.

Roybal's response, that the broken iPhone 4Gs were defective, was already disposed of, above, as missing the mark. Her claim that Greer acted independently defies the evidence: Roybal approved his email and remained silent during the July 11 meeting while Greer implicitly threatened Gray with termination of DIA's contractual relationship if Gray failed to replace three iPhones at no cost. Roybal, therefore, failed to rebut any element of the Agency's prima facie case. Consequently, this violation is established.

**8. 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.**

A violation of this rule requires the Agency to prove actual harm, either to the Agency's mission or to the City's reputation or integrity. *In re Misty Jones*, CSB 88-09A (9/29/10). While the Agency established that Roybal's actions damaged its relationship with AT&T, the Agency did not present evidence of the Agency's mission or how it was damaged by Roybal's actions. Even assuming the Agency's mission is to provide a world-class airport, Roybal's actions would not seem to have damaged such mission. This violation remains unproven.

**V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. 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, in imposing discipline. CSR § 16-20.

**A. Severity of the proven violations.**

At first blush, Roybal's acquisition of three free iPhone replacements do not appear to constitute a serious violation. However, a damaged relationship between a City Agency and a vendor is a serious matter, even though the Agency's reimbursement seems to have mitigated the injury. More significantly, however, Roybal jeopardized Greer's career by her vicarious badgering of a vendor into capitulating to a wrongful claim. Greer was an at-will employee for his company and responsible for serving Roybal's needs. In that capacity, Roybal's insistence that a subordinate<sup>5</sup> engage in an ethically and contractually wrongful act was severe wrongdoing, where that insistence potentially placed the subordinate's job in jeopardy.

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<sup>5</sup> I do not intend "subordinate" in terms of reporting structure, but in terms of his obligation to serve Roybal as the client/Agency representative.

B. Roybal's past record.

Roybal's past performance was always exemplary. She received commendations for her devotion to the Agency and to clients. The Agency may, appropriately, have decided that Roybal's lack of disciplinary history, and her past exemplary performance could mitigate the severity of its discipline in the present case; however, all three factors, taken together, did not require the Agency to assess a lesser discipline.

C. Penalty most likely to achieve compliance.

Roybal continued to deny she engaged in any wrongdoing throughout the hearing, and suggested similar conduct in other instances was rewarded, where she pushed vendors to achieve the best financial result for the Agency. Roybal's failure to acknowledge wrongdoing, and her failure to acknowledge the profound effect of her actions on a subordinate, do not indicate she would be likely to reform. Consequently, the Agency's election to dismiss Roybal was neither clearly excessive nor based upon considerations unsupported by a preponderance of the evidence. In re Jones, CSA 88-09 (5/11/10) (affirmed on other grounds, CSB 88-09 (9/29/10)).

**VI. ORDER**

The Agency's dismissal of Roybal from employment on October 14, 2011, is AFFIRMED. To the extent Roybal claimed the Agency wrongfully returned her from probation, that claim is rendered moot by this Decision.<sup>6</sup>

DONE March 13, 2012.

  
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Bruce A. Plotkin  
Career Service Board Hearing Officer

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<sup>6</sup> Even if Roybal's return-from-probation claim were not moot, it would be dismissed for lack of evidence of discrimination and Whistleblower violations, the only bases to appeal such claim. CSR § 5-63.