

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ISAAC RUBIO, Appellant,

vs.

DIVISION OF ANIMAL CONTROL, DEPARTMENT OF ENVIRONMENTAL HEALTH,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on June 5, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Cheryl Hutchison, a representative from the American Federation of State, County and Municipal Employees (AFSCME). The Agency was represented by Assistant City Attorney Robert Nesper, and Division Operations Director Frank Boldoe served as advisory witness. 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

On April 3, 2009, Appellant Isaac Rubio was terminated from his position as Animal Control Officer for the Division of Animal Control in the Denver Department of Environmental Health (Agency). Appellant filed this direct appeal challenging his termination on April 8, 2009. Agency Exhibits 1 – 10, 12, 14, 16 and 17, and Appellant's Exhibit A, were admitted by stipulation. Exhibits 11, 13 and 15 were admitted during the hearing.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and

2) Did the Agency establish that termination was within the range of penalties that could be imposed upon Appellant by a reasonable administrator for the violations proven under the rules?

III. FINDINGS OF FACT

Appellant Isaac Rubio was employed as an Animal Control Officer with the city for 22 years at the time of his termination. On April 3, 2009, Appellant was dismissed for violation of Career Service and departmental rules regarding treatment of a dog newly admitted to the city animal shelter on Feb. 26, 2009. [Exh. 2.]

Division protocol requires that dogs should be vaccinated upon impoundment with DA2PPv, an injectable vaccine for the highly infectious Parvovirus, and given the intranasal spray Bordatella for kennel cough, a relatively mild canine illness. [Exh. 5.] The staff veterinarian has instructed employees that the intranasal vaccine may be postponed if the dog is aggressive. [Testimony of Larry Nelson, DVM.] At the time of this incident, employees had received only on-the-job training on how to administer vaccinations and handle aggressive dogs. [Testimony of Director of Operations Frank Boldoe; Appellant.]

On Feb. 26, 2009, Animal Control Officer David Romero was on duty with a partner in a Division van, and saw a tan and white Chihuahua running loose. They chased the dog for twenty minutes before catching it. The dog was secured with a nylon leash, also known as a pound rope, and driven to the animal shelter. The dog reacted aggressively when Mr. Romero tried to vaccinate it in the shelter's garage. Appellant came in and offered to help Mr. Romero by performing the vaccinations while Mr. Romero held the leash.

The evidence of what happened next is disputed. One eye witness, Animal Control Attendant Holly Guy, stated that she walked into the garage and saw that Appellant and Mr. Romero had the dog "on a lead that was hung over the canine hitch", a kind of hook attached to the wall. "They had the dog hanging off the ground to where it was not touching the ground at all. They were giving the dog its vaccinations while it was hanging. When they released the dog it did not get up but lay on the floor for a few minutes." [Exh. 14.] Ms. Guy reported this conduct to Dr. Nelson, who informed his supervisor, Mr. Boldoe. Mr. Boldoe in turn reported the incident to his supervisor, Division Director Doug Kelley. Mr. Kelley instructed Mr. Boldoe to investigate the matter.

That afternoon, Mr. Boldoe requested and received statements from Ms. Guy, Dr. Nelson, and Veterinary Technician Christine Lederhos. [Exhs. 10, 12, 14.] Ms. Lederhos stated she was in the garage helping with vaccinations and "witnessed [Mr. Romero and Appellant] make a Chihuahua pass out." Mr. Romero "tied the dog to the canine hitch . . . and pulled the dog tight while [Appellant] vaccinated the dog. The dog then became unconscious for approximately 1 – 2 minutes until [Appellant] tried rubbing the rear side of the dog to make it come to." [Exh. 12.]

The next day, Appellant gave his own written statement to Mr. Boldoe about the incident. He said the dog was growling and aggressive, and that Mr. Romero put the

leash on the wall hook "to stand dog up." Appellant tried to grab the dog's hind quarter. The dog "started thrashing & spinning to avoid any contact." Appellant finally grabbed the dog, vaccinated it in the rear quarter under the skin, and sprayed the intranasal vaccine in or near its nose. The Chihuahua, "spent tired", lay down on the floor. Appellant tapped its chest and it started growling. A few minutes later, Officer Romero took the dog into the kennel. [Exh. 8.]

Mr. Romero gave his own statement that same day:

The chi kept trying to bite so I put the end of the rope on latch on wall and pulled the dog up so it couldn't bite us while [Appellant] gave it a shot. The dog was fighting and made it hard for [Appellant] to grab its leg to give it the shot. The dog started twisting around and my pound rope tightened up and the dog lost its breath so I released the rope immediately so the dog could catch its breath. As soon as it caught its breath and I made sure the dog was ok I then walked it and put it in a cage. I realize now that the best thing to do with a mean dog is to cage it and not try to give it a shot.

[Exh. 9.]

Mr. Boldoe also took a written statement from the other Animal Control Officer present in the garage, Stephan Romero. Therein, Mr. Romero said he did not see the incident. That statement was not used as a part of this disciplinary action, and was not submitted into evidence in this appeal. [Testimony of Mr. Boldoe.]

On March 11, 2009, Appellant was served with a notice that discipline was being contemplated because "you and/or Officer Romero" tied the dog's leash to a hitch and pulled it so tight that the dog lost consciousness. The notice asserted that the conduct may violate Career Service Rules governing performance standards and conduct prejudicial to the department, as well as regulations prohibiting unbecoming conduct and inhumane handling of animals. [Exh. 3.]

At the pre-disciplinary meeting, Appellant stated that the dog was struggling, jumping and pulling back while standing on its hind legs, which were never off the ground, and that Mr. Romero put the dog on the anchor. [Exh. 2-3.] The deciding official, Mr. Kelley, found the following as facts:

Due to the dog being fearful, aggressive, and trying to bite you, you and Officer Romero tied the end of leash the dog was on to a canine hitch located on the west end of the garage and pulled the leash so tight that the dog was hanging off the hitch with none of its feet touching the ground causing the dog to lose consciousness, most likely as a result of lack of air from choking. At that time the dog was given its vaccinations.

After giving the dog its vaccinations, the tension on the leash was released to allow the dog to lie on the floor. The dog lay on the floor unconscious as you attempted to massage the dog to wake it up. After some time, the dog regained consciousness. Minutes later, the dog was led into the main kennel and put into cage 39.

[Exh. 2-2.]

Based on the Appellant's statements at the pre-disciplinary meeting, Mr. Kelley ordered Mr. Boldoe to seek additional information from Ms. Guy, Ms. Lederhos, and Dr. Nelson. Their written answers were not submitted until after the termination letter was issued, and were therefore not considered in support of the disciplinary action taken. [Exhs. 11, 13, 15.]

Based on his factual findings, Mr. Kelley concluded that Appellant failed to meet his performance standard to protect animals, and thus violated CSR § 16-60 K. He also determined that Appellant violated two Agency policies: § 2.03, Unbecoming Conduct, and § 16.01, Humane Handling, in violation of § 16-60 L. [Exh.7.] Mr. Kelley found that the conduct may have violated city or state laws prohibiting animal cruelty, as proscribed by § 16-60 Y. He found that it caused embarrassment to the Agency when it was required to consult with management, the Career Service Authority and the City Attorney's Office in reviewing this incident, and thus violated § 16-60 Z. Finally, Mr. Kelley concluded that termination was appropriate because he had the authority to impose termination, and the violation warranted the penalty of termination.

At hearing, Ms. Guy testified that she was entering the garage on Feb. 26th, and noticed Appellant and Mr. Romero with the Chihuahua ten feet away. Appellant was kneeling on the floor with a needle in his hand next to the Chihuahua, who was resisting. A canine hitch or hook was embedded in the back wall about 2 ½ feet from the floor. Mr. Romero held the leash, which was looped over the hitch. He pulled the dog off its feet by tightening the leash, and the dog twisted back and forth. Appellant grabbed the dog's back hind quarter and administered the injection while the dog was struggling and hanging in the air. Ms. Guy testified that Appellant laughed while spraying the Chihuahua in the face with the intranasal vaccine. While giving the shot, Appellant focused on the back hind quarter of the dog. From Ms. Guy's observation, Appellant would not have known how tightly the leash was being held. After the injection, the Chihuahua struggled for air, then its movements slowed down. Mr. Romero loosened the leash and the dog lay down on the floor.

Three other employees were in the garage, closer to the scene, but no one said anything about it. Ms. Guy made no comment at the time to stop the behavior, since she had only been there five months at the time, and had been warned early on by another employee "not to go up against an animal control officer, because I would lose."

As soon as the dog was revived and taken to its cage, Ms. Guy went to Dr. Nelson's office and asked him if it was okay to hang a dog to give it its shots. Dr.

Nelson told her it was not, and asked her what had happened. Ms. Guy told him that Appellant and Mr. Romero lifted a dog off the floor with a leash hung from the canine hitch, causing the dog to collapse when it was released. [Exhs. 10, 14.]

At the time of the incident, Dr. Nelson had been employed by the Division for less than a year, and works part time. He immediately sought out Ms. Lederhos, a long-time shelter employee, and asked her whether he should report his conversation with Ms. Guy to anyone. She advised him to inform his supervisor, Mr. Boldoe, and he did so that afternoon. [Testimony of Dr. Nelson.] Mr. Boldoe obtained witness statements at Mr. Kelley's request. [Testimony of Mr. Kelley; Exhs. 8 – 10, 12, 14.] Ms. Guy testified that she thinks she informed Mr. Boldoe that Appellant had been laughing at the time, but admits she did not mention it in her statement. [Exh. 14.]

Ms. Lederhos testified that she has been a veterinary technician for eight years. She was in the garage helping Officer Stephan Romero with vaccines about three feet away from the Chihuahua, and had a side view of the incident. She looked over three or four times, and observed that the dog was spinning on the leash and trying to bite Appellant and Mr. Romero. She did not see whether the dog was ever suspended completely off the ground. Appellant and Mr. Romero were struggling with the Chihuahua, but appeared to have the situation under control. When she looked over again, the dog had passed out, and evacuated its bladder and bowels in the process. Appellant patted the dog, and it regained consciousness. When Ms. Lederhos visited its cage later that day, the dog was fearful but otherwise fine. Ms. Lederhos added that she had seen other frightened or aggressive dogs pass out after choking on shelter leashes. She stated she did not believe what she had seen was abuse, but she advised Dr. Nelson to report it to his supervisor because Ms. Guy felt strongly enough about it to talk to the veterinarian. [Testimony of Ms. Lederhos.]

At hearing, Appellant testified that he entered the garage to help out, having parked his van in the lot to await his turn to unload his animals. Appellant obtained a few vaccine doses from the refrigerator, and offered to help Mr. Romero with immunization shots for an unhappy, "thrashing and carrying on" Chihuahua. Mr. Romero hooked the leash on the wall hitch because "the dog was not going to cooperate." Appellant tried to hold the animal's hind quarter so he could inject the vaccine under the skin, where it would be less painful than if it hit a muscle. Mr. Romero pulled the leash tight to get the dog to stand on its back legs. "Dave was handling the part with the teeth - the front end - the head." Appellant was concentrating on administering the vaccine, and he did not notice how Mr. Romero was holding the leash. Appellant did notice that the dog's back feet were never off the ground. Appellant finally succeeded in grabbing the dog's hind quarters, and injected the vaccine. After Appellant sprayed the intranasal vaccine, Mr. Romero realized the dog was not moving, and loosened the rope to allow it to lie on the floor. Appellant and Mr. Romero both touched the dog to make sure it was okay. The dog growled, and was led into a cage by Mr. Romero.

Appellant testified that he was trained in the method of injecting vaccines fifteen to twenty years ago. Two months before this incident, he was shown how to give the new intranasal vaccine. During his 22 years at the shelter, Appellant has vaccinated thousands of dogs, sometimes as many as fifty a night. Appellant received no specific training in how to handle aggressive dogs. He has used a leash and canine hitch post on many occasions as a method of controlling fearful or aggressive animals. [Testimony of Appellant.]

Mr. Romero testified that he worked for the Division of Animal Control for thirty years as an Animal Control Officer, and is now unemployed. He stated that the Chihuahua tried to bite him when he began to administer the vaccine, and Appellant offered to help. Mr. Romero held the leash, and Appellant tried to hold the fearful dog still for the injection. Mr. Romero testified that small dogs such as Chihuahuas are quick and hard to handle. He pulled the leash over the hitch to control the dog's movements, as he had been trained to do, and as he has done hundreds of times in the past without criticism. The dog was pulled onto its hind legs by the tightened leash, but was never completely off the floor. Mr. Romero observed that the dog was struggling to breathe, and so he immediately slackened the leash so the dog could catch its breath. Mr. Romero stated that he had control of the leash at all times. He said Appellant would not have known how tightly he was holding it, since Appellant was concentrating on the animal's hind quarters to give the shot. While the dog was lying on the floor, Mr. Romero touched it to make sure it was breathing, and then led it to a cage. [Testimony of Mr. Romero.]

IV. ANALYSIS

Appeals from employment actions must be decided based on a de novo determination of the facts. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975). The Agency bears the burden to prove by a preponderance of the evidence that the imposition of discipline is appropriate under the Career Service Rules, and that the level imposed is within the range that could be issued by a reasonable administrator.

1. 16-60 K: Failure to meet established standards of performance

The Agency first asserts that the incident violated the above Career Service Rule requiring all employees to meet qualitative or quantitative performance standards. In order to prove such a violation, the Agency must prove 1) a prior-established standard, 2) clear communication of that standard to the employee, and 3) that the employee failed to meet that standard. In re Mounjim, CSA 87-07, 8 (7/10/08); Pabst v. Industrial Claim Appeals Office, 833 P.2d 64, 64-65 (Colo. App. 1992). Performance standards may be found in an evaluation, job description, or in agency policies and procedures. In re Dessureau, CSA 59-07, 7 (1/16/08).

Mr. Kelley testified that the Agency relied on Appellant's obligation to protect animals in determining that Appellant violated this rule. The evidence includes a vaccination protocol dated Dec. 31, 2008. [Exh. 5.] That protocol requires that

aggressive dogs must be given the DA2PPv vaccination, but does not specify the method of restraint for administering that vaccination. In any event, Mr. Kelley testified that he did not rely on the protocol in making the disciplinary decision.

The Agency also submitted an excerpt of its employee conduct policy, and cited Appellant for unbecoming conduct and inhumane handling of animals. [Exhs. 2, 7.] “Unbecoming conduct” is defined in the policy as “[a]ny breach of peace, neglect of duty, or any conduct . . . which tends to undermine the good order, efficiency, or discipline or which reflects discredit upon the department or any employee thereof”. [Exh. 7-1.]

This departmental rule is similar to CSR § 16-60 Z. The latter prohibits “conduct prejudicial to the good order and effectiveness” of an agency, or “conduct that brings disrepute on or compromises the integrity of the City.” Simply put, both rules prohibit conduct adversely affecting either the Agency’s operation or reputation. By analogy to the Career Service Rule, proof of the first part of the departmental rule requires evidence that the conduct hindered the agency’s ability to perform its mission. See In re Compos, CSA 56-08, 15 (12/15/08), *citing In re Catalina*, CSA 35-08, 8 (8/22/08). The second part of the departmental rule prohibits conduct reflecting discredit on the Agency, a concept similar to that targeted in the second clause of 16-60 Z, “conduct that brings disrepute on . . . the City.” Thus, this part of the rule requires proof that the department’s reputation was actually harmed by Appellant’s actions. In re Catalina, CSA 35-08, 8 (8/22/08).

Here, all eyewitnesses confirmed that Appellant vaccinated the dog while another employee held it fast with a leash. There is no question that it was the leash that caused the dog to lose consciousness. However, the Agency failed to prove that Appellant controlled the leash, or even knew how tightly it was being held. Only Ms. Guy testified that Appellant laughed as he was using the nasal spray, and she did not mention that observation in her contemporaneous statements to Dr. Nelson or Mr. Boldoe. [Exhs. 10, 14.] The other eyewitnesses did not hear Appellant laugh, or hear any talking during the incident. [Testimony of Mr. Romero, Ms. Lederhos; Exhs. 9, 12.] Since laughing while causing a dog to be suspended from a rope would have supported Ms. Guy’s allegation of animal cruelty, her failure to mention it at the time renders this testimony less convincing. I find that Appellant’s actions did not cause injury to the Chihuahua, or otherwise adversely affect Agency operation or mission to protect animals.

The second part of the departmental rule requires proof that Appellant actually caused damage to the Agency’s reputation. Mr. Kelley admitted the incident received no outside publicity, but said the Agency was embarrassed by the need to report the incident to the city’s human resource and legal advisers. A subjective feeling of embarrassment, unaccompanied by any evidence of actual harm to the department’s reputation, does not sustain a finding that this rule has been violated. See In re Strasser, CSA 44-07, 2 (CSB 2/29/08). (“To find otherwise would render CSR 16-60 Z. simply a catch-all provision, offering employees no guidance as to the standards by

which their conduct will be measured, while allowing agencies to impose discipline based solely on subjective views of potential harm.”)

Finally as to this asserted violation, the Agency claims that Appellant failed to handle the animal in a humane manner in that he subjected it “to physical force other than as may be required in subduing” the dog, in violation of departmental rule 16.01. [Exh. 7-2.] The Agency presented no proof that it gave any training in proper handling of aggressive animals, or otherwise developed established qualitative or quantitative standard on handling aggressive or resistive animals. Mr. Romero and Appellant both testified they had used leashes and canine hitches to control animals many times in the past, and had never been instructed that it was improper. Dr. Nelson testified that gloves, towels, and muzzles could also be used, but others testified that these tools were either not readily available or were inappropriate for a small, aggressive animal.

Moreover, even if this rule created a performance standard, the evidence established only that Appellant administered the vaccines while another held the leash. All eyewitnesses, including Ms. Guy, stated that the dog was twisting and fearful, and Appellant was trying to vaccinate the animal. On that evidence, Appellant cannot be determined to have violated a performance standard of humane handling of animals.

2. CSR § 16-60 L: Failure to observe regulations or rules

Mr. Kelley based his determination that Appellant violated this rule on his conclusion that Appellant violated departmental rule 2.03, Unbecoming conduct, and rule 16.1, Humane handling. Based on the findings above, I conclude that the Agency did not establish a violation of either rule. Thus, the Agency failed to prove Appellant violated § 16-60 L.

3. CSR § 16-60 Y: Violation of rules, charter, or municipal code

The Agency contends that Appellant could be charged with a violation of city or state laws proscribing cruelty to animals based on his conduct. The Agency has not cited any law that prohibits the only actions taken by Appellant, which were holding and vaccinating a struggling dog. The Colorado criminal offense defines cruelty to animals as “knowingly, recklessly or with criminal negligence . . . mistreats or neglects any animal”. C.R.S. § 18-9-202. Commission of such a crime requires proof of an act taken with a culpable mental state. C.R.S. § 18-1-502; People v. Wilhelm, 676 P.2d 702 (Colo. 1984). Here, the Agency proved neither an act of cruelty taken by Appellant, nor the intent to cause the specific result proscribed by the statute. C.R.S. § 18-1-501(5). Therefore, the Agency did not establish a violation of this rule.

4. CSR § 16-60 Z: Conduct prejudicial to good order of Agency

The Agency supported its finding that Appellant violated this rule by Mr. Kelley’s testimony that the Agency was embarrassed by having to report this incident to the city human resources and legal advisors. Based on the above findings regarding § 16-60 K,

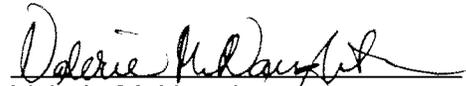
I conclude that that Agency failed to prove Appellant's acts adversely affected either the Agency's operation, mission, or reputation. See In re Catalina, CSA 35-08, 8 (8/22/08).

The Agency failed to prove that Appellant violated any of the rules cited in its letter of dismissal. Therefore, the dismissal must be reversed.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated April 3, 2009 is REVERSED.

DATED this 1st day of July, 2009.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision within fifteen days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery below. CSR § 19-60, 19-62. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be served on the following:

Career Service Board
Office of the Personnel Director
Career Service Authority
201 W. Colfax Avenue, Dept. 412, 1st Floor
Denver, CO 80202

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202