

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 18-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

DONALDO TAYLOR, Appellant,

Agency: Denver Sheriff's Department, Department of Public Safety, and the City and County of Denver, a municipal corporation.

Hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on May 5, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, Donald Taylor, appeared and was represented by Robert Goodwin, Esq. The Agency was represented by Assistant City Attorney Mindi L. Wright. Major Gary Anderson was the Agency's advisory witness at hearing. The record closed in this matter on July 17, 2003.

Within these Findings and Order, the Hearing Officer refers to Donald Taylor as "Appellant"; to Tanya Mason as "TM"; the Denver Sheriff's Department as the "Agency"; Deputy Sheriff(s) as "Officer(s)"; Officers with a rank higher than Deputy Sheriff as "ranking Officer(s)"; Agency employees who are not Officers or ranking Officers as "civilian" employees; the Agency's Director, Fred J. Oliva, as the "Director" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set for the below, the Agency's 10-day suspension of Appellant is **AFFIRMED**.

ISSUES FOR HEARING

Whether the act upon which discipline was based occurred. If so, whether such act is cause to discipline Appellant and whether the degree of discipline is reasonably related to the severity of the offense for which discipline was imposed.

BURDEN OF PROOF

The burden of proof is upon the Agency to show, by a preponderance of the evidence, that the act occurred; there is cause to discipline Appellant and the degree of discipline is reasonably related to the severity of the offense for which discipline was imposed.

PRELIMINARY MATTERS

Following the submission of post-hearing briefs / written closing arguments, the Agency filed its Motion to Strike evidence and facts not presented at hearing from Appellants Closing Argument and Appellant's Brief in Support of His Appeal. Appellant filed a Reply to Motion to Strike. The Agency filed a Reply to Appellant's Reply to Motion to Strike and Appellant filed a Response/Rejoinder/Replication to the Agency's Reply. Having considered the parties' post-hearing motion, replies and responses, the undersigned Hearing Officer grants the Agency's Motion to Strike evidence and facts not presented at hearing because such testimony and documents were not subject to cross-examination at hearing. Therefore, the Hearing Officer will not consider any evidence submitted post-hearing. However, the Hearing Officer will consider the arguments (presented in written closing arguments of the parties) regarding evidence presented at hearing.

The parties stipulated to the acceptance into evidence of Appellant's Exhibits A, F, G, J, K and L. Appellant's Exhibit Q was accepted into evidence, as a business document, over the Agency's objection. The parties stipulated to the acceptance into evidence of the Agency's Exhibits 1 through 18 and Exhibit 23 except for the CD dated September 23, 2002. The Agency's Exhibit 20 was accepted into evidence over Appellant's objection that it was cumulative.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Appellant is an Officer, in career status, assigned to the Denver County Jail Classifications section (Classifications). TM is a civilian secretary in the Jail's Operations section (Operations). From January 2001 through August 6, 2002, Appellant's job duties included taking classification reports to Operations.

2. TM first met Appellant when she started working in Operations in January 2001. She saw Appellant at least once every workday, when he delivered classification reports, and they had a good working relationship. TM

and Appellant quickly became workplace friends. Sometimes TM visited Appellant in his office. Occasionally, they had conversations after work hours. Officer Jesse Marin (Marin) was witness to one after-work conversation between TM and Appellant in the parking lot. It was Marin's impression that TM was flirting with Appellant.

3. Appellant began asking TM to go out with him for drinks or dinner. TM is married and did not accept Appellant's invitations. Appellant, who is also married, then started to invite TM to his office at the jail. The manner of these invitations was offensive to TM and she advised Appellant that his invitations were inappropriate. Appellant apologized to TM for his inappropriate invitations.

4. The Agency's Departmental Order 2420.1A regarding Sexual Harassment was reissued to Appellant on February 15, 2001 as the result of an incident between Appellant and TM in which TM confronted Appellant about inappropriate behavior and told Appellant to leave her alone.

5. The Agency has a "zero tolerance" policy regarding acts of sexual harassment. On August 14, 1991, Appellant attended training regarding sexual harassment in the workplace. He attended Sexual Harassment Recognition and Prevention Training on February 18-20, 1999 and, on April 22, 1999, received a packet of information on sexual harassment.

6. TM was generally a very friendly and talkative co-worker. On August 6, 2002, TM's shift in Operations began at 7:30 a.m. At approximately 8:30 a.m., Appellant went to Operations (for the third time that day) to deliver classification documents. Appellant thought he and TM were the only people in the Operations office. He stopped at the counter near TM's desk and began a conversation with TM. During the conversation TM noticed that Appellant was staring at her hands. Appellant then reached down to TM's keyboard, took her hand and pulled it toward his mouth. At first TM thought Appellant was going to kiss her hand but then he started to lick between her fingers. TM groaned aloud, indicating her disgust, and immediately pulled her hand back. Without saying anything, Appellant walked out of the Operations office and TM heard him chuckling in the hall. TM went immediately to the restroom and scrubbed her hands.

7. On the morning of August 6, 2003, one of TM's co-workers in Operations heard what she described as a shrieking sound from TM. However, TM's desk was not in the co-worker's line of sight from her desk. Therefore, the co-worker did not see the incident.

8. On August 6, 2003, Sergeant Wayne Yokum (Yokum) was assigned to "float" between Operations and the Chief's office. On the morning of August 6, 2003, Yokum observed that TM was "acting herself" until Appellant

came into the Operations office. After Appellant left, TM was withdrawn, quiet and didn't want to talk to anyone which was out of character for TM.

9. TM was uncertain what to do regarding the incident. However, she was sure that she wanted to have no further contact with Appellant. With the intention of avoiding any future contact between herself and Appellant, TM reported the incident to the Agency's Internal Investigations Unit as an *informal* complaint against Appellant. At that time TM believed that, if the complaint was informal, perhaps Appellant could be transferred away from her.

10. At that time, the Agency had no standard procedure for handling an informal complaint.

11. A meeting regarding the informal complaint was held on August 6, 2003. In attendance at the meeting were Appellant, Division Chief Robert Maher (Maher), Major Gary Anderson (Anderson), Captain Michael Horner (Horner) and Sergeant Elias Diggins (Diggins). Appellant was not initially forthcoming about the incident but eventually he admitted to kissing TM's hand. Appellant agreed that it would never happen again. Additionally, Maher advised Appellant that he should have no contact with TM or the Operations section and that he considered the matter resolved.

12. Imposition of the "no contact" order on Appellant was neither a form of discipline nor a form of "company punishment". Rather, it was an order that resolved Maher's and TM's immediate concerns.

13. TM felt that imposition of the no-contact order was appropriate. However, on the evening of August 6, 2003, after speaking with her family, TM decided to file a formal complaint. Her formal complaint was filed on August 8, 2003.

14. The Agency's procedure for handling a formal complaint begins with taking a written statement or complaint. In this case, the written statement was in question-and-answer form. Next, a neutral investigator is assigned to investigate the allegations. The investigator interviews witness and, in this case, the alleged victim and the alleged perpetrator of sexual harassment.

15. Diggins was assigned to investigate TM's formal complaint, in part, because he was "up to speed" on the incident in that he sat in on the meeting held the day of the incident. Appellant believes Diggins may not have been a neutral investigator because Diggins and Appellant had at least one prior disagreement at work. Nonetheless, Diggins was neutral and unbiased in his investigation of Appellant's actions in that he held no grudge against Appellant and recognized his duty to investigate with a neutral perspective.

16. As a result of his investigation, Diggins concluded that Appellant licked between TM's fingers and that such conduct was uninvited and unwanted.

17. Sexual harassment is defined as "any unwelcome sexual advances, requests for sexual favors, or other verbal or physical contact of a sexual nature when...such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment." Examples of Sexual Harassment include physical contact such as patting, pinching, or constant brushing against another's body, unwelcome repeated requests for dates, employees joking or engaging in behavior that could be observed as offensive by a third party.

18. The act of licking between TM's fingers is an act of sexual harassment. It is an unwelcome physical act that is sexual in nature and was offensive to TM. Appellant's August 6, 2002 act (licking between TM's fingers) could be offensive to third parties, interfered with TM's work performance and created an offensive environment.

19. On October 24, 2002, Maher issued a Memorandum (Memo) to All Denver County Jail Department Staff. The Memo affirmed the Agency's zero tolerance stance toward any form of sexual harassment and stated, "From this point forward it is also the policy of the Denver Sheriff Department that we do not take or recognize 'informal complaints'."

20. Appellant's first pre-disciplinary meeting was scheduled for November 21, 2002. However the first and second scheduled pre-disciplinary meetings were rescheduled, at the request of Appellant's attorney, to allow the Agency to provide additional information to Appellant's attorney.

21. Appellant's pre-disciplinary meeting was held on January 29, 2003. Diggins moderated the pre-disciplinary meeting. That is, Diggins ran the tape-recorder. Appellant, his attorney and the Director attended. Appellant presented character witnesses on his behalf. Diggins turned the tape-recorder on and off 5 or 6 times during the "breaks" from the meeting.

22. In determining whether discipline should be imposed and, if so, what level of discipline, the Director considered the fact that Appellant regularly received "exceeds expectations" ratings for his work and had no history of disciplinary action with the Agency. The Director considered Appellant's extraordinary duties in translating materials such as handbooks, rules for visitors, information for the car pound, regarding money orders and bond procedures into the Spanish language. The Director also considered the seriousness of the offense and that the Agency has "zero tolerance" for sexual harassment. The Director did not consider the February 2001 incident between Appellant and TM that resulted in the reissuance of the Agency's Departmental Order 2420.1A

regarding Sexual Harassment. The Director did not consider the no-contact order to be disciplinary action.

DISCUSSION

1. Authority of the Hearing Officer: The City Charter and Career Service Rules require the Hearing Officer to determine the facts, by *de novo* hearing, in “[a]ny action of an appointing authority resulting in dismissal, suspension, involuntary demotion...which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules.” (City Charter C5.25 (4) and CSR 19-10.) A *de novo* hearing is one in which the Hearing Officer makes independent findings of fact, credibility assessments and resolves factual disputes. (See *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. App.1975).)

2. Sexual harassment: It is the Agency’s burden to show, by a preponderance of the evidence, that Appellant committed an act of sexual harassment, in this case, licking between TM’s fingers. Appellant admitted to kissing Appellant’s hand. (See Findings of Fact, paragraph 11 and Appellant’s testimony at hearing.) However, the weight of the evidence (including the testimony of Appellant’s coworkers) supports a finding that Appellant licked between TM’s fingers and that such act was unwelcome, offensive to TM and her co-workers and Appellant’s actions interfered with TM’s work performance. (See Findings of Fact, paragraphs 6, 7, 8 and 16.)

Sexual harassment is defined as “any unwelcome...physical contact of a sexual nature when...such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive environment.” Examples of Sexual Harassment include physical contact such as patting, pinching, or constant brushing against another’s body, unwelcome repeated requests for dates, employees joking or engaging in behavior that could be observed as offensive by a third party. (Denver Sheriff Department Order No. 2420.1A.) Therefore, the undersigned Hearing Officer concludes that the single act of kissing a co-workers hand, if unwelcome and offensive to the recipient or third parties can constitute sexual harassment. In this case, Appellant licked between TM’s fingers and it was unwelcome, offensive to TM and her co-workers and Appellant’s actions interfered with TM’s work performance. Therefore, the Hearing Officer concludes that the Agency has met its burden to show that Appellant committed the act of licking between TM’s fingers and such act constitutes sexual harassment.

3. Cause for discipline: Career Service Rules provide, in pertinent part: “The purpose of discipline is to correct inappropriate behavior or performance.” (See CSR 16-10.) Appellant argues that the August 6, 2003 no-contact order was a disciplinary action designed to correct inappropriate

behavior. However, he misunderstands the purpose of a no-contact order. A no-contact order is just that: It is an order (not discipline) designed to keep the parties apart pending any further resolution, if necessary. The order, in and of itself, cannot correct inappropriate behavior. The order simply removes the opportunity for inappropriate behavior. Initially TM only wanted to insure that she would have no further contact with Appellant. On August 6, 2002, Division Chief Maher wanted only to resolve TM's informal complaint and request for no-contact. Therefore, the Hearing Officer concludes that the no-contact order resolved Maher's and TM's immediate concerns and, although Appellant could have been disciplined for violation of the no-contact order, the no-contact order itself was not a form of discipline.

After the August 6, 2002 work day, and consultation with family members, TM decided that Appellant's actions should be formally reported. Such formal complaint resulted in an internal investigation. The investigation determined that Appellant's actions on August 6, 2002 were uninvited and unwanted. The Director then determined that Appellant's actions met the Agency's definition of sexual harassment, that such actions were inappropriate and that such inappropriate behavior must be corrected. That is, the Director determined that there was cause for discipline in this case. Having concluded that the act of licking between TM's fingers was sexual harassment, the undersigned Hearing Officer further concludes that the Agency has met its burden to show, by a preponderance of the evidence, that there is cause for discipline.

4. Level of discipline: "The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record." (See CSR 16-10.) In this case, the Director considered Appellant's excellent record. The Director also considered the Agency's "zero tolerance" of sexual harassment, that sexual harassment is grounds for dismissal and concluded that Appellant's actions constitute a very serious offense. Considering the seriousness of the offense in this case and weighing it against Appellant's excellent work history, the Hearing Officer concludes that the level of discipline imposed in this matter is reasonably related to the seriousness of the offense. That is, due to his excellent work history, Appellant was not dismissed or demoted. Nonetheless, even a single act of sexual harassment is a serious matter worthy of a significant suspension in order to correct such inappropriate behavior. A 10 day suspension is significant and yet reasonable in this case due to the seriousness of the offense and the Agency's zero-tolerance policy.

CONCLUSIONS OF LAW

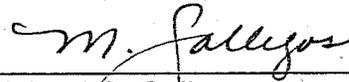
1. The Hearing Officer has jurisdiction to make and issue Findings, conclusions and Order in this matter.

2. The Agency has met its burden to show that the act occurred, there is cause for discipline and that the level of discipline imposed is reasonably related to the severity of the offense.

ORDER

Therefore, for the reasons stated above, the undersigned Hearing Officer **AFFIRMS** the Agency's 10-day suspension of Appellant.

Dated this 19th day of September 2003



Michael S. Gallegos
Hearing Officer for the
Career Service Board.