

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

Appeal No. 44-05

DECISION

IN THE MATTER OF THE APPEAL OF:

KEVIN A. TRUJILLO,
Appellant,

vs.

DEPARTMENT OF PARKS AND RECREATION,
Agency, and the City and County of Denver, a municipal corporation.

I. PROCEDURAL INTRODUCTION

The Appellant, Kevin A. Trujillo, appeals a 15 day suspension, imposed on April 15, 2005, by his employer, the Department of Parks and Recreation, for violations of the Career Service Rules (CSR) and for a violation of Executive Order No.112. These violations are alleged to have occurred on February 25, 2005. The Appellant filed his appeal on April 28, 2005. A hearing concerning this appeal was held on October 26, 2005, before Bruce A. Plotkin, Hearings Officer. The Appellant was present and represented by John R. Palermo, Esq., while the Agency was represented by Assistant City Attorney Robert A. Wolf. Mr. Alvin Howard served as advisory witness to the Agency.

Agency Exhibits 1-9 and 19-21 were admitted without objection. Agency Exhibits 10-18 were withdrawn prior to hearing. Appellant's Exhibits A, B, C, and M were admitted without objection. The Agency objected to Appellant's Exhibits D-H, tendered prior to hearing, and those exhibits were never entered into the record. Therefore, Appellant's Exhibits D-H are not considered in this Decision.

The Agency presented the following witnesses at hearing: Mr. Leonard Renfro, Ms. Theresa Michael, Mr. David Hallman, Ms. Karin Howshar, Mr. Michael Barney, and Mr. Steve Gutierrez. The Appellant testified on his own behalf and also presented witnesses Ms. Carol Gutierrez, Ms. Denise Santisteven, Ms. Rhonda Cazares, Mr. Martin Saucedo, and Mr. David Rodriguez.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated Career Service Rules (CSR)16-50 A. 8), 18), 20), CSR 16-51 A. 3), 11), or Executive Order No. 112, Violence in the Workplace;
- B. whether the Agency engaged in unlawful discrimination against the Appellant;
- C. whether the Agency engaged in unlawful retaliation against the Appellant;
- D. if the Appellant violated one or more of the above-referenced CSRs, or Executive Order, whether the Agency was justified in assessing a 15-day suspension against the Appellant.

III. FINDINGS OF FACT

The Stapleton/Globeville Recreation Center (the Center) is maintained by Denver Parks and Recreation (the Agency). The Appellant was Recreation Supervisor at the Center. In addition to supervising staff, the Appellant was the assistant-coach of a basketball team comprised of 13 and 14 year-old girls. The league is administered by Karin Howsher, who also serves as the Recreation Coordinator for the Montclair Recreation Center.

On February 25, 2005, the Montclair Recreational Center hosted the Appellant's team in a game against the St. Charles Recreation Center. By all accounts there was bad blood between these teams from a prior game. Parents were arguing and threatening each other during the game so that Referee Leonard Renfro warned parents to calm down or leave, and one parent was later ejected. The Appellant acknowledged the game was well-refereed until the final two minutes. [Exhibit C]. With about two minutes left in the game, the Appellant disagreed with Renfro's calls. According to the Appellant, "I then stepped onto the floor, and I got into Mr. Renfro's personal space¹, and I told him he was horrible." [Appellant testimony]. The Appellant was loud, admitted he lost his composure with Referee Renfro, and admitted Renfro ejected him from the game under the rules. After being instructed to leave the gymnasium, the Appellant continued to argue with Renfro. [Appellant testimony]. As the Appellant left, he also argued with a parent from the St. Charles team. *Id.* Parents on both sides, who already had been arguing loudly back and forth, became enraged. The Stapleton/Globeville players also began to voice their disagreement with Referee Renfro. Since security became problematic, the game was called before time expired.

A pre-disciplinary meeting was convened on April 4, 2005 by the Appellant's supervisor, Michael Barney. The Appellant attended *pro se*, and provided written and verbal statements. Following that meeting, Barney issued the Agency's notice of discipline to the Appellant on April 15, 2005, and hand-delivered the same on April 19,

¹ While the witnesses differed as to how close the Appellant came to Renfro, most accounts placed him from "chest to chest" [Michael testimony] to within a foot [Renfro, Howsher testimony].

2005. The Appellant perfected his appeal on April, 28, 2005.

IV. ANALYSIS

A. CSR 16-50 A. 8) Threatening, fighting with, intimidating, or abusing employees or officers of the City and County of Denver for any reason....

The Agency alleged the Appellant violated this rule by his conduct in approaching, and manner of addressing, Renfro during the last two minutes of the game. [Agency closing]. Renfro is employed by the Boulder School District. There was no evidence he was a City of Denver employee or official. No employee or officer of Denver was alleged, by the Agency, to have been threatened, intimidated, or abused by the Appellant. Therefore, even though the Appellant's conduct would surely have constituted a violation against an employee or officer of Denver², the Agency failed to establish this fundamental element of the charge against the Appellant.

B. CSR 16-50 A. 18) Conduct which violates an Executive Order: Executive Order No. 112 Violence in the Workplace.

Unlike CSR 16-50 A. 8), above, Executive Order No. 112 (No. 112) does not require a Denver employee or official to be the target of the proscribed conduct, nor is an intent to harm required in order to establish a violation. See, e.g. In re Freeman, CSA 40-05, 75-04, 5 (3/3/05). Pertinent portions of No. 112 state:

To ensure and affirm a safe, violence-free workplace, the following will not be tolerated.

A. Intimidating, threatening or hostile behaviors,

The first issue to resolve is whether the allegedly proscribed conduct occurred in the workplace. Testimony established the Appellant was a recreation supervisor at the Stapleton/Globeville Recreation Center. The basketball game during which the Appellant allegedly violated this rule, took place at the Montclair Recreational Center. Since the Appellants duties included coaching the girls 14-and-under basketball team, then anywhere the Appellant coached his team, or otherwise performed his job duties, comprised the workplace. See [Exhibit 9] @ ¶¶6,15.

Next, as stated above, the Appellant's conduct toward Renfro was threatening and abusive. Here, unlike CSR 16-50 A. 8), above, it is irrelevant that Renfro is not a Denver employee.

The Appellant's two defenses to the Agency's allegations are unpersuasive. The first, that Renfro's calls were incorrect, and therefore deserved a harsh response, is irrelevant. The

² The Appellant admitted he had already lost his composure with Renfro [Exhibit C-2], admitted the fans were becoming uncontrolled, and admitted he approached Renfro almost chest to chest, still agitated over Renfro's calls. Under these circumstances, the Appellant's behavior would have been threatening and abusive against a Denver employee or officer.

Appellant was aware of, and failed to heed, the correct protocol for disputing Renfro's calls. [Appellant, Michael, Hallman testimony]. The Appellant's second claim, that Renfro, at 6'3" and 325 pounds did not believe the Appellant could prevail in a hand-to-hand fight with the him [Renfro testimony], is also irrelevant. The Hearings Officer agrees with Renfro that he could not know if the Appellant had immediate access to a weapon, or intended an assault when, enraged, he approached and came face-to-face with Renfro. *Id.* Renfro should not have to determine whether an irate coach intends physical harm.

The Appellant's witnesses, the Stapleton/Globeville head coach and several parents of Stapleton/Globeville players, testified they did not observe any aggression by the Appellant when he approached Renfro, [Steve Gutierrez testimony, Carol Gutierrez testimony],³ and that his tone was normal. [Santisteven testimony]. Under the circumstances described above, and particularly in light of the Appellant's prior admission that he lost his composure with Renfro and approached very close to him, the Appellant's witnesses lack credibility. For reasons stated above, the Agency has proven the Appellant's conduct in aggressively approaching and confronting Renfro was a violation of No. 112 by a preponderance of the evidence, and therefore constitutes a violation of CSR 16-50 A. 18).

C. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

The Agency identified specific conduct, above and below, as cause for discipline. The Hearings Officer therefore declines to apply this rule.

D. CSR 16-51 A. 4)⁴ Failure to Maintain satisfactory working relationships with co-workers, other City and County employees or the public.

The Agency alleged the Appellant violated this rule by his conduct toward Renfro. [Agency closing]. As stated previously, Renfro was not a City and County employee. The Hearings Officer finds that Renfro, in the context of his employment as referee, was not a member of the public, either. The Agency did not present any evidence that anyone else present was offended by the Appellant's conduct. Certainly, in some general sense, the Appellant's conduct was inappropriate and offensive, but without evidence that his conduct failed to maintain a satisfactory working relationship with some person defined by the rule, the Agency cannot establish the Appellant's violation of this rule by a preponderance of the evidence.

E. CSR 16-51A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

For reasons stated above at CSR 16-50 A. 20), the Hearings Officer declines to apply this violation.

³ Both these witnesses testified the Appellant did not lose his composure with Renfro.

⁴ Agency's Exhibit 2-2 cites the rule as 16-51 A. 3), rather than 4). The Hearings Officer assumes 4) was intended, as 3) concerns abuse of leave, a subject not at issue in this case.

F. Whether the Agency engaged in unlawful discrimination against the Appellant.

The Appellant claims race discrimination by disparate treatment. He stated "the suspension appealed was imposed discriminatorily by [Agency head] Mr. Alvin Howard, a black person, against the Appellant, a Hispanic person." [Appellant Pre-hearing Statement, filed May 24, 2005, p.4]. The Appellant claimed a Black coach, Hallman, was assessed a lesser penalty for more egregious conduct. *Id.* The Appellant also claimed the Agency's discipline of him was a mere pretext for its discriminatory intent. *Id.*

An Appellant may show the Agency's discipline was a pretext for unlawful discrimination based on disparate treatment by providing evidence that he was treated differently than other similarly-situated, non-protected employees, who violated work rules of comparable seriousness. An employee is similarly situated to the Appellant if the employee deals with the same supervisor and is subject to the same standards governing performance evaluation and discipline. Kendrick v. Penske Transp. Servs., 220 F.3d 1220 (10th Cir. 2000). The Hearings Officer should also compare the relevant employment circumstances, such as work history and company policies, applicable to the Appellant and the intended comparable employees in determining whether they are similarly situated. *Id.*

Hallman, like the Appellant, is a recreational center supervisor who coaches girls' basketball. Both report directly to Michael Barney, and are subject to the same performance standards and work rules. An important component of the comparison is whether the conduct for which the two were disciplined was similar.

The Appellant stated Hallman received only a written reprimand for conduct which was "worse than Appellant's conduct for which he was suspended." [Appellant Amended Pre-hearing statement, p.7]. Hallman testified he received a reprimand in January 2005. During a basketball game in which he coached a girl's 14-and-under team, he disputed the number of timeouts remaining for his team. He became angry, and began to say "that's bullsh..." without finishing the word, for which he was assessed a technical foul. He was not ejected from the game, did not continue a tirade, and remained on the bench after the foul. [Hallman testimony]. Hallman's testimony was not impeached by the Appellant. By comparison, the Appellant admitted, as Hallman, that he lost his composure, but in addition, came off the bench, came, aggressively, face to face with the referee, was ejected for his continued tirade, refused to leave the building after being ejected, and continued to have words against the officiating even as he was leaving. Comparing these circumstances, Barney could reasonably conclude the Appellant's conduct was sufficiently more egregious than that of Hallman, so as to merit a more significant penalty.

In addition, the Appellant's discrimination claim was against the Agency head, Alvin Howard, whereas the discipline was assessed by Barney, and merely approved by Howard. [Barney testimony]. The Agency may be found to violate anti-discrimination law if the Agency head merely acted as a rubber stamp, or "cat's paw," for a subordinate employee's prejudice, even if the Agency head lacked discriminatory intent. Kendrick v. Penske Transp. Servs., 220 F.3d 1220 (10th Cir. 2000). Here, however, the inverse situation underlay the complaint. The

Appellant did not allege Barney engaged in any discriminatory conduct, and no conspiracy was alleged between Howard and Barney, thus Kendrick does not apply. Without presenting some evidence of a link connecting Barney's discipline with Howard's discriminatory intent, the Appellant's discrimination claim fails.

G. Whether the Agency engaged in unlawful retaliation against the Appellant.

The Appellant claimed race-based discriminatory retaliation by the Agency. To establish a prima facie case of retaliation based upon race, the Appellant must show (1) he engaged in protected opposition to discrimination; (2) he suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. Hysten v. Burlington Northern & Santa Fe Ry., 296 F.3d 1177, 1183 (10th Cir. 2002) (add'l citations omitted).

The Appellant failed to establish, at any time prior to or during hearing, the first element of his retaliation claim, *i.e.*, he did not claim he engaged in a protected opposition to discrimination, such as filing a discrimination complaint, Hysten, Kendrick, *supra*. The Appellant's retaliation claim thus fails.

V. LEVEL OF DISCIPLINE

The test to determine the propriety of discipline is whether the degree of discipline chosen by the Agency was reasonably related to the seriousness of the offense, In re Champion, CSA 71-02, 18 (7/31/02), while taking into consideration the employee's past record. CSR 16-10. Discipline is reasonably related to the seriousness of the offense if it falls within the range of reasonable alternatives available to a reasonable, prudent agency administrator. Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo. App. 1986). In determining whether the discipline is within the range of reasonable alternatives, the discipline may be found excessive where it is substantially based on considerations that are not supported by a preponderance of the evidence. In re Gustern, CSA 128-02, 20 (12/23/02).

The Agency established, by a preponderance of the evidence, the Appellant's violation of CSR 16-50 A. 18), including, at a minimum, that he lost his composure and, enraged, came face to face with Renfro. The Appellant had an obligation to set the highest standards of conduct for the girls in his charge. The Appellant acknowledged his obligation to comply with the following code of conduct.

I will do my best to provide a safe playing situation for my players.
I will lead by example in demonstrating fair play and sportsmanship to all my players.
I will use those coaching techniques appropriate for all of the skills that I teach.
I will remember that I am a youth sports coach, and that the game is for children and not adults.

[Coach's Code of Ethics, Exhibit 7]. Both by his own admission, and by his poor example on February 25, 2005, the Appellant violated the trust placed in him pursuant to those promises for the following reasons. (1) providing a safe playing situation: while the parties tiptoed

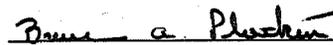
around the issue of whether the coach is in any way responsible for the conduct of parents in attendance at games, it is apparent to the Hearings Officer that the Appellant's conduct, at a minimum, exacerbated an already, and inexcusably, volatile atmosphere. It is completely irrelevant that Renfro may have assessed a foul incorrectly, or missed a call. (2) demonstrating fair play and sportsmanship: the Appellant demonstrated poorly in losing his composure, then, even worse, in coming chest-to-chest with Renfro while still enraged. (3) appropriate coaching techniques: the Appellant testified at hearing that he intentionally chose to leave the coach's box, and approach Renfro, knowing he would be ejected, in order to motivate his team. Such a technique cannot be appropriate in a 14-and-under recreational girls' league. Finally, (4) remembering the game is for children: this was the most important code of all, and was the most blatantly disregarded by the Appellant, by acquiescing in Stapleton parents' poor conduct, by becoming enraged, by approaching Renfro chest-to-chest, by refusing to leave (ironically, the Appellant testified he is a stickler for the rules), by approving one of his own players throwing her shoulder into an opposing player as "a hard foul, but which in basketball is legal," [Appellant testimony], while vehemently protesting when, not surprisingly, an opposing player then elbowed one of his players in the stomach." The Appellant stated he accepted responsibility: "Ms. Howshar did nothing to defuse or resolve the situation, however I can also take personal responsibility in that as well; "I take full responsibility of my inappropriate behavior..." [Exhibit C-2], however it is clear from the Appellant's other statements, that his acceptance of responsibility was well-tempered by blaming player parents for arguing, by blaming the referees because Stapleton "was getting the short end of the stick", *id*, and by blaming the league for even scheduling the game. [Entire first paragraph of Exhibit C-1, and Appellant testimony]. Thus, the Appellant's acceptance of responsibility was sufficiently hedged so that it was unclear he recognized the need to change.

From the discussion immediately above, the Hearings Officer finds the Agency's choice of a fifteen day suspension was well-within the range of reasonable alternatives available to it. In sum: the Appellant violated his trust to set a proper example for children in his charge; he hedged admission of responsibility; he did not clearly recognize the need to change his conduct; the Agency considered the Appellant's statements at his pre-hearing conference, his prior lack of discipline, and also considered a range of possible penalties, from verbal warning to termination. [Barney testimony, Exhibit 2-3]. The Agency therefore complied fully with the requirements and purposes of CSR 16-10.

VI. ORDER

The Agency's suspension of the Appellant for 15 days without pay, beginning May 6, 2005, is **AFFIRMED**.

DONE this 14th day of November, 2005.



Bruce A. Plotkin
Hearings Officer
Career Service Board