

3/28/08

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 81-07

DECISION

IN THE MATTER OF THE APPEAL OF:

JACK BURGHARDT, Appellant,

vs.

CLERK AND RECORDER,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on February 8, 2008 before Hearing Officer Valerie McNaughton. Appellant was present and represented himself. The Agency was represented by Assistant City Attorney Robert D. Nespor. Having considered the evidence and arguments of the parties, the following findings of fact and conclusions of law are entered herein.

I. INTRODUCTION

Appellant Jack Burghardt is an Administrative Support Assistant III (ASA III) with the Denver Clerk and Recorder's Office. On Nov. 21, 2007, Appellant was suspended for four days. This is Appellant's appeal of that suspension. Admitted into evidence by stipulation during the hearing were Agency's Exhibits 2 and 3, and Appellant's Exhibits A - C. The Agency withdrew its Exhibit 1, since it was identical to Exhibit A. No other exhibits were offered by either party.

II. ISSUES

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and
2. Was a four-day suspension within the range of discipline that could be imposed by a reasonable administrator?

III. FINDINGS OF FACT

Appellant Jack Burghardt was suspended for four days based on an incident that occurred on Nov. 1, 2007 in the break room of the Denver Clerk and Recorder's Office. The disciplinary letter found that Appellant asked his co-worker Tina Gallegos how much it cost her people to cross the border, and concluded that the comment was

a derogatory slur which violated the Career Service Rules prohibiting intimidation and harassment based on national origin, and failure to maintain satisfactory work relationships. [Exh. 2.]

On Nov. 1, 2007, Ernestina Bernadette (Tina) Gallegos and her friend and co-worker Consuelo Dominguez were eating lunch and talking in the small employee break room. Appellant was sitting at a nearby table with Mirav Morenis, who works with Appellant in the Marriage License section of the Clerk's Office. Ms. Morenis left the room. Appellant turned to Ms. Gallegos and Ms. Dominguez and said, "How much did it cost for your people to get across the border these days?" Ms. Dominguez was shocked, and replied, "Jack, I'm from California, so I couldn't answer that question for you." Ms. Gallegos was hoping she had not heard him right, and so asked, "Excuse me, Jack, what did you say?" Appellant said, "Oh, come on, Tina, how much is it costing for your people to get across the border these days, because you know that's how you got here." Ms. Gallegos replied, "How much did it cost for that jerk sandwich you're eating?" Both Ms. Gallegos and Ms. Dominguez got up and threw their unfinished sandwiches in the trash. As they were leaving the break room, Appellant told them he had seen a movie about people crossing the border. [Testimony of Gallegos and Dominguez.]

Appellant testified that he had just seen the movie Fast Food Nation¹, and asked Ms. Morenis if she had seen it. Ms. Morenis said she had not. Appellant described it to her as a comedy about people going across the border. Ms. Morenis then remembered she was late for a pre-paid massage appointment, and she left the lunch room in a hurry. [Testimony of Ms. Morenis.] Appellant was still thinking about the movie, and said aloud to himself, "I wonder how much it costs to cross a border with a guide?" Ms. Dominguez said to him, "What are you talking about? I'm from San Francisco." He replied, "I'm talking about the movie Fast Food Nation", and described it briefly. He noticed that Ms. Gallegos looked upset, and told him she had had a bad experience from someone across the border. Ms. Gallegos then left the room. [Testimony of Appellant; Exh. B.]

Ms. Dominguez testified that Appellant's comment was her first experience of being the target of a remark she considered racist. She was shocked that it occurred in a government building, having just begun her employment with the Agency in mid-October 2007. Ms. Dominguez testified she considered Appellant's remark as a sign of his ignorance, and she lost all respect for him as a result of it.

Throughout the rest of the day, Ms. Gallegos was extremely upset about Appellant's comment, which caused her to feel humiliated. The topic of undocumented Mexican workers is a sensitive one for her, as her father arrived in the

¹ Fast Food Nation, Director Richard Linklater, Participant Productions 2006. The movie centers around a meatpacking plant that employs undocumented workers from Mexico and produces tainted beef in unsafe and unsanitary working conditions. In one of the opening scenes, a group of Mexican people paid a trucker to take them across the border. They are later hired by the meatpacking plant, and their story forms one of the main plot lines of the movie. [Exh. C.]

United States by crossing the Mexican border. She told her supervisor what Appellant had said, and asked him not to allow Appellant to be around her that afternoon. Later that afternoon, a co-worker noticed Ms. Gallegos crying, and brought her into the office of the Clerk and Recorder, Stephanie O'Malley. Ms. Gallegos told Ms. O'Malley what had happened. Immediately thereafter, Ms. O'Malley interviewed the other four employees who had been in the break room. On Nov. 8, 2007, Deputy Clerk and Recorder Helen Gonzales served Appellant with a notice that disciplinary action was being contemplated. [Exh. A.]

A few days after the incident, Ms. Gallegos saw Appellant in the hallway. Appellant apologized to her for making her upset, stating, "Tina, I'm sorry." Ms. Gallegos replied that she never meant to get him in trouble, but wanted him to know that what he said was wrong. She believes he is a good person who "needs to have some kind of sensitivity as to what might come out of his mouth to offend somebody." Ms. Gallegos believes that their relationship has been negatively affected by what he said that day.

Both before and after incident in the lunch room, Ms. Gallegos has treated Appellant with her characteristic friendliness and respect. She continues to greet Appellant, assist him with projects, and engage in light teasing, which is not always fully understood by Appellant. She testified that she will say, "Good morning, Jack", "Good afternoon, Jack", "How are you, Jack?", "Where's my snacks, Jack?" Ms. Gallegos has asked Appellant when he is going to get married, since he works in the Marriage License division, and tells him he may marry her someday. Appellant interpreted the latter comment as showing she desired a romantic relationship with him. Appellant related that some employees were spreading or believing rumors about his romantic interest in other co-workers. [Exh. B-2.]

At the pre-disciplinary meeting held pursuant to CSR § 16-40, Appellant submitted a written statement. It said he was telling Ms. Morenis about the movie Fast Food Nation when Ms. Morenis left abruptly to go to her scheduled massage. Appellant was thinking out loud in the break room when he said, "I wonder how much it costs to cross a border with a guide?" Either Ms. Gallegos or Ms. Dominguez asked what he was talking about, and he told them about the movie. The other woman responded, "Talk to the hand." Appellant was not sure whether she was joking or upset with him. [Exh. B.]

After being briefed by Ms. Gonzales about Appellant's statements at the pre-disciplinary meeting, Clerk and Recorder O'Malley determined that on Nov. 1, 2007, Appellant asked Ms. Gallegos and Ms. Dominquez how much it costs people to cross the border. [Exh. 2.] Ms. O'Malley testified that her office policy requires all employees to treat each other with respect. She found that Appellant's comment contained "disturbing racial overtones" that indicated he had not received the message that the rules against harassment and office policy requiring respectful treatment would be enforced. She concluded that a four-day suspension was appropriate given the nature of the misconduct, the importance of the policy being enforced, and

Appellant's recent three-day suspension for violating office policy against use of unauthorized software. [Exh. 2-3.]

Appellant was born in Poland and lived there until the age of 17, then moved to the United States where he has been living for the past 13 years. He has worked for the Agency since August 2006. He is aware of the city's policies against discrimination and harassment as a result of the new employee classes on those policies he took when he first began with the Agency. Appellant believes the policies do not adequately define the kind of comment that is prohibited as discriminatory or harassing in nature. He stated that in Europe no one would get offended by anything you said. Appellant testified that he did not intend to be demeaning in asking the question, which came to his mind in thinking about the movie Fast Food Nation. As a result of this discipline, Appellant states he now understands that a question such as the one he asked can be offensive.

In Appellant's letter to Ms. O'Malley, he relates that another co-worker believes he is racist based only on his Polish/German and Catholic heritage, and that this employee has been spreading rumors about him. Appellant further states that his deeply rooted moral values include a belief that all people are equal, and that we should be allowed to freely express ourselves unless told it makes another person uncomfortable.

The question was not offensive in nature and was never meant to be. The problem that exist is the fact that what may be offensive to one person is often quiet all right with another person. I had never been given chance to correct my behavior if was ever seen as unappropriated. . . . No one had ever informed me what is the definition of racist and racist comments as seen by the City and County of Denver. . . . I am at a disadvantage from other employees of this agency that I did not grow in this country and I have learning curve ahead of me.

[Exh. B-3.]

IV. ANALYSIS

1. Discipline under the Career Service Rules

In an appeal of a disciplinary action, the Agency has the burden to prove 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 O. Failure to maintain satisfactory work relationships

The cases decided under this rule make it clear that some element of fault or wrongdoing is necessary to establish a violation. See e.g. In re Delmonico, CSA 53-06, 5 (10/26/06) (assault of a co-worker); In re Diaz, CSA 13-06, 6 (5/31/06) (refusal to speak to her supervisor); In re Mestas, 37-05, 7 (8/4/05) (hostile confrontation with a security guard); In re Smith, CSA 17-05 (7/07/05) (comment impugning the morals of a sensitive co-worker); In re Roberts, CSA 179-04, 5 (6/29/05) (persistent requests to a co-worker to make a false report); In re Lucero, 162-04, 11 (4/15/05), In re Moreno, CSA 138-04, 8 (5/25/05), In re Katros, CSA 129-04, 10 (3/16/05), In re Leal-McIntyre, CSA 77-03, 4 (1/27/05), (continued angry criticism of supervisor or co-worker). The gravamen of the offense is conduct an employee knows, or should know in the exercise of good judgment, is harmful to the trust and goodwill needed between employees to accomplish the agency's mission. Cf. In re Lucero, 162-04, 11 (4/15/05). Thus, the rule requires proof of three elements: 1) wrongful conduct toward a co-worker, 2) committed with intent or knowledge of its wrongfulness, 3) causing harm to a co-worker relationship. The last element, harm, may be proven directly by proof of an inability to work together after the incident(s), or indirectly by evidence such as the nature of the relationship and the co-worker's reaction to the conduct. In re Strasser, CSA 44-07, 2 (CSB 2/29/08).

The Agency contends that Appellant violated this rule by asking two Hispanic co-workers a question with "disturbing racial overtones", resulting in distress to both employees. Appellant does not dispute that Ms. Gallegos became very upset, Ms. Dominguez lost respect for him, and that the relationships continue to be adversely affected by Appellant's words. Therefore, the third element of harm to the relationship is established.

The next issue is whether Appellant's question was the kind of act for which discipline should be imposed under this rule. The disciplinary rules for career service employees are "governed by the principles of due process, personal accountability, reasonableness and sound business practice." C.S.R. Rule 16, Purpose statement. Therefore, discipline is proper if it would promote those principles. When the conduct at issue consists of speech, careful analysis is required. A remark may be considered inappropriate in the workplace based on a number of factors: its content, context, usage, setting, audience, and style of delivery. Cf. Ash v. Tyson Foods, Inc., 126 S.Ct. 1195 (2006).

Since the asserted misconduct here is asking co-workers a question with racial overtones, cases decided under Title VII's prohibition of racial harassment are instructive. The Supreme Court has imposed "[a]n objective standard of reasonableness" in analyzing hostile work environment cases because it "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." Burlington Northern & Santa Fe Railway Company v. White, 165 L. Ed. 2d 345, 360 (2006). See also Harris v. Forklift Systems, 510 U.S. 17 (1993); In re Katros, CSA 129-04 (3/16/05). While this Career

Service rule does not require the severe or pervasive atmosphere of discriminatory ridicule or insult needed to prove a harassment case, the same discipline should be brought to bear in analyzing whether speech is wrongful under this rule.

Whether a statement is wrongful should be determined by considering all circumstances surrounding it. If a reasonable person who heard the remark would consider it wrongful in the workplace setting, this element is satisfied. The evidence here is that Appellant's question was repeated to at least four other people in the office, and all considered it concerning enough that they either referred the matter higher up or investigated it to determine if discipline was appropriate. I find that the Agency proved the remark was wrongful in the context of the workplace.

The sole remaining issue on this rule is whether Appellant can be deemed to be at fault in making the statements. While fault can be attributed in most cases by the commission of the wrongful conduct, this Appellant has argued that he was unaware of the cultural context in which his question would be deemed derogatory on the basis of national origin, and that the principles governing discipline under the Career Service Rules require that an employee have notice of the type of conduct for which he can be disciplined.

Appellant denies that he addressed the question to Ms. Gallegos and Ms. Dominguez, or that he added that he knew they had come to the country by crossing the border. However, I find that the clear and consistent testimony of both witnesses was more credible than Appellant's vaguer memory of the event. In addition, the remarks caused a strong reaction in Ms. Gallegos that impressed the exact words on her memory.

Analysis of the intent behind a remark so laden with cultural overtones specific to this country is difficult. The Agency argues there is no question that Appellant's statement was harassing. Stripped of its national context, the question asks for a point of information about a public issue that Appellant presumed the two would know based on their appearance and last names. They took understandable offense at his presumption that they were illegally in this country.

Appellant contends that he asked the question out of curiosity after seeing a movie, and did not know asking two Hispanic women a question which presumed they crossed the Mexican border illegally may be insulting to them. This argument is supported by the testimony of all four eyewitnesses that he mentioned the movie about persons crossing the border during this conversation.

Appellant also claims his upbringing in Europe did not prepare him for the fact that the two women would be offended by the question. He stated he is at a disadvantage because he did not grow up in this country, and "I have learning curve ahead of me." Appellant demonstrated an imperfect knowledge of social messages and teasing during his cross-examination of Ms. Gallegos and in his pre-disciplinary statement. He had no prior knowledge of the reason for Ms. Gallegos' special

sensitivity on this subject. He apologized when he learned his question had caused Ms. Gallegos to be hurt, and "took note of it made sure that don't make any comments that can upset any one." [Exh. B-3.] The evidence shows that their prior relationship was one of friendship, and that there is no indication Appellant bore any hostility toward either woman or Hispanics in general. The Agency failed to rebut this evidence by any showing that Appellant intended to harm his co-workers, or had reason to know the remarks were derogatory. Therefore, I find that the Agency failed to establish that Appellant intended his remark to be derogatory, or that fault should otherwise be attributable to Appellant in making the comments.

In contrast to this case, an admittedly insulting remark was determined to violate this rule. In re Smith, CSA 17-05 (7/07/05) (male co-worker told female co-worker, "If you keep your knee pads on, [the supervisor] might keep you in the staff position.") Here, the Agency did not demonstrate Appellant failed to maintain satisfactory working relationships by a preponderance of the evidence.

B. CSR § 16-60 R. Discrimination or harassment of any employee
CSR § 15-102 Harassment based on national origin

In order to establish that a single comment constitutes harassment in violation of this rule and the Code of Conduct, the Agency bears the burden of persuasion that the statement was intentionally derogatory based on his co-workers' national origin.

Based on my finding above that the Agency did not establish Appellant intended his question to be derogatory on the basis of national origin, I conclude that the Agency also failed to prove Appellant violated the disciplinary rule and the Code of Conduct prohibiting harassment based on a protected status.

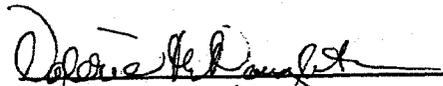
C. CSR § 16-60 Y. Conduct which violates Rules, Charter, Municipal Code

Since the Agency failed to establish that Appellant violated any provision of the rules, Charter or municipal code, the Agency also did not prove a violation of this rule.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that the four-day suspension dated November 21, 2007 is REVERSED.

Done this 28th day of March, 2008.


Valerie McNaughton
Career Service Hearing Officer